



**NSW Trustee  
& Guardian**  
Justice & Attorney General

Mr. Jonathan Clark  
Principal Council Officer  
Standing Committee on Social Issues  
Parliament House  
Macquarie St  
Sydney NSW 2000  
Fax: (02) 9230 2981

26 October 2009

Dear Mr. Clark

**Re: Substitute Decision Making for People Lacking Capacity**

Please find attached a copy of the NSW Trustee and Guardian (NSWT&G) response to Questions on Notice. Also included is the corrected transcript of evidence from 28 September 2009. The recommended corrections are minor.

I remain available to the committee to provide further information as required and will appear once again on Wed 4 November at 3.15pm.

Yours faithfully

Imelda Dodds  
A/CEO  
NSW Trustee and Guardian

**STANDING COMMITTEE ON SOCIAL ISSUES**  
**Inquiry into Substitute Decision-Making for People Lacking Capacity**

**QUESTIONS ON NOTICE**

**NSW Trustee and Guardian**

**3. With regard to the NSW Trustee and Guardian's Common Fund and the global financial crisis:**

**• How has the value of the fund been affected?**

The NSW TG Common Fund for clients under a Financial Management Order is benchmarked and unitised so the client's funds perform in accordance with the market. The Listed Property and Australian and International Share portfolios have been affected as have all others in market. However the majority of the common fund is in cash and fixed interest investments. Client monies are managed in such a way as to provide for 4-5 years budgeted expenditure to be held in cash and fixed interest so clients with diversified funds can ride out a storm and not redeem Australian/international shares or listed property at a time that is disadvantageous.

The positive of the current situation is that those who are buying into the diversified portfolio can do so at lower prices.

In evidence given to the Inquiry on Monday 28 September you asked me for a more detailed briefing regarding the performance of the Australian listed property portfolio which is one of the eight (8) funds that comprise the common fund. For the financial year 2007-08 the benchmark index (S&P/ASX200 accum index) showed a return of -36.85%. Major The OPC Listed Property Trust which is benchmarked or compared to the relevant index returned -34.96%. While the OPC fund return was negative it was 1.89% better the index. Despite the significant negative return in 2007-08, from inception to 30th June 2008 the OPC fund had returned an average of 5.57%pa compared to the benchmark 5.17%. The fund includes investments in well known companies such as Westfield, Stockland and Mirvac.

For the 2007-08 financial year many comparable property funds showed negative returns well in excess of the OPC fund return, a number losing more than 40%. These included Paladin which returned -42.17%, Colonial First State which returned -43.8% and Equity Trustees SGH which returned -48.22%.

As at 30th June 2008 only 676 OPC clients held investments in the fund and the fund formed only 3.81% of the total funds under management. The OPC cashflow investment strategy whereby we invest four to five years worth of budgeted expenditure in a combination of Cash and Fixed Interest allows us to retain the investment in underperforming sectors (in this instance Listed Property Securities) until they recover while providing funds for our client needs from sectors such as Cash and Fixed Interest which provide stability of capital.

## Financial Planning

I am taking the liberty of providing members with additional information about the process and type of financial planning undertaken at NSWTG.

The financial planning needs of clients under an FMO are far more complex than the vast majority of clients seen in the private sector. Some of the differences are shown in the accompanying table:

Issue	Typical Protected Clients	Typical Private Sector Client
Life expectancy	Up to 70 years	Usually no more than 20-25 years (retirees)
Income needs	Increasing over the lifespan – care costs in particular usually significantly faster than inflation	Decreasing needs as the client ages and becomes less active (eg less overseas travel)
Housing	Required for up to 70 years (life expectancy) so planning involves regular maintenance & upkeep over that period eg replacement of roof, guttering, painting, hot water services every 5-10 years etc	Usually requires minimal work while occupied then Often sold to fund aged care facility bond
Motor vehicles	Often heavily modified people mover costing up to \$100k – to be replaced every 7-10 years	Usually more modest sedan, not heavily used & so not often requiring replacement

Planning for issues such as inflation adjusted regular replacement of expensive specialised motor vehicles every 7-10 years over a 70 year life expectancy is very complex.

As well as using conventional financial planning software, NSWTG uses a sophisticated model specifically developed for NSWTG by a firm of actuaries to better plan client's finances over extended periods of up to 70-80 years including the long term impacts of issues such as inflation and market cycles.

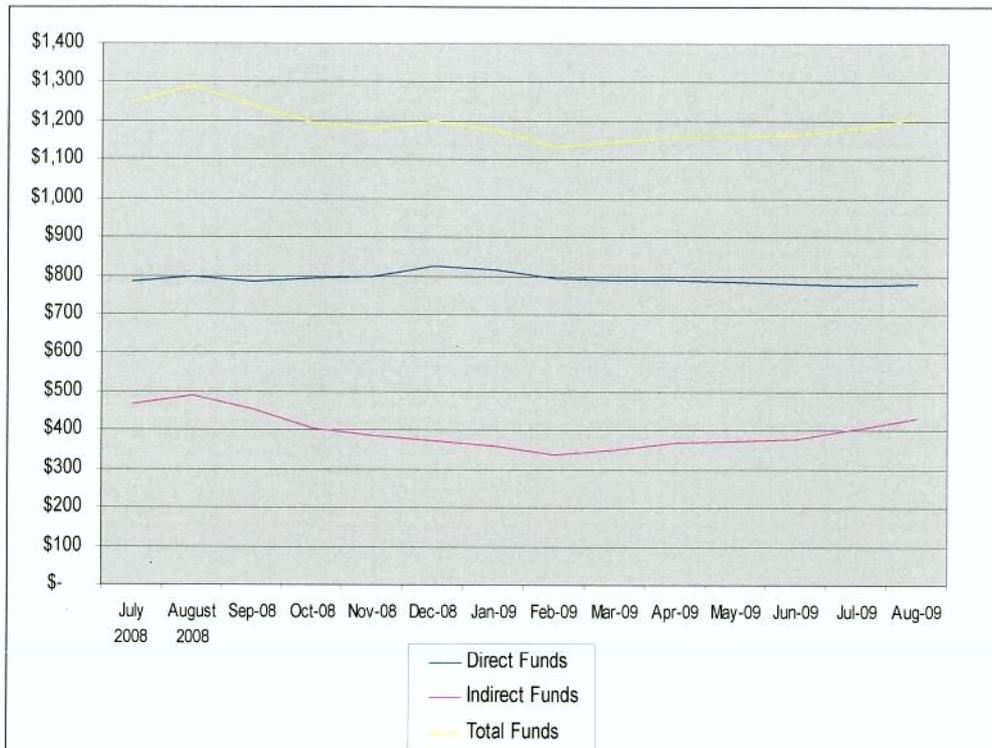
From time to time NSWTG financial planners have assisted external financial planners construct appropriate financial plans for Privately Managed clients. Where a client comes under management with an existing relationship with a financial planner, the relationship is continued and NSWTG financial planners work with the external planner to provide for the client's changing needs.

The NSWTG Financial Planners have a combined experience in excess of 90 years. The role attracts planners who are highly proficient in technical aspects of financial planning but who are not attracted to the heavy sales culture found in most Private Sector financial planning groups.

- **Has the global financial crisis affected the Trustee and Guardian's ability to provide funds for its clients?**

Not significantly. Please see comments above. The majority of funds are in cash and the equities are not redeemed unless there is no alternative e.g. management ends.

For information the following chart shows the movement of the OPC Common Funds for the period Sep 08 to Aug 09:



**4. NSW Legislative Assembly's Public Bodies Review Committee conducted an inquiry into the Public Trustee of NSW in 2006. It's recommendations included:**

- **That the NSW Public Trustee benchmark its service delivery against the achievements of Public Trustees in other jurisdictions.**

There are no national benchmarks for Public Trustees – see note below.

- **That the NSW Public Trustee develop key performance indicators for all key areas of its operations?**

Yes. Extensive KPI's have been developed and are reported on in previous Annual Reports for the PTNSW. In January 2009 the then Public Trustee Peter Whitehead wrote to Treasury advising them of the following:

**Recommendation 4:**

*That the NSW Public Trustee comparatively benchmark case management service delivery operations, including time frames for completion, with Public Trustees in other jurisdictions*

*PT comment:*

*This has been raised with other States who have different requirements for estate administration and therefore different impacts on the time frames for completion. Aspects of Succession law have been harmonised in some States but not yet as to estate administration processes: Wills, Family provision have been the first focus of the reform in NSW. It maybe possible to track in years to come as the laws and requirement become more uniform. PTNSW is one of the only states that publishes this figure currently.*

**Recommendation 5:**

*That the NSW Public Trustee publish this benchmarking information in its Annual Report each year.*

*See above.*

**Recommendation 6:**

*That the NSW Public Trustee develop key performance indicators for all key result areas of its operations*

**Recommendation 7:**

*That the NSW Public Trustee publish these key performance indicators in its Annual Report each year*

*PT Comment:*

*The PT currently reports performance in its annual report with indicators for:*

- 1) product delivery: volumes, values to target, customer access and satisfaction, investment performance;*
- 2) staff: training, turnover, tenure;*
- 3) financial performance to budget; financial trends and ratios.*
- 4) governance and risk management including key legislative compliance.*

*We are further reviewing other measures in our Business Plan to see what other appropriate indicators should be published.*

The 2007-2008 Annual Report of the Public Trustee is available on line and provides full coverage of outcomes. However attached to this document is a table recording performance against KPI's

## **Comfort Money Distribution**

### **7. Can you explain what “comfort” money and how it is distributed to people for whom the NSW Trustee and Guardian is financial manager?**

Comfort Money is a term frequently used in the residential care industry. As a part of the budget process a sum is set aside for the payment of regular allowances. This can be required for a wide variety of things – cigarettes, chemist accounts, outings, hair dresser etc. It depends on the individual's functional ability to receive the money. An agreed amount for comforts goes with the payment for accommodation.

8. A submission to this inquiry from the Coalition for Appropriate Supported Accommodation for People With Disabilities<sup>1</sup> noted potential difficulties with the system whereby the owners of accommodation facilities are responsible for distributing “comfort” money and lump sums for clothing to residents for whom the NSW Trustee and Guardian is financial manager. It was recommended that clear financial accounting in relation to this money be required of these owners and that the owners not be allowed to hold bank books of residents or ask for signed withdrawal slips. Could you comment on this recommendation?

**Licensed Residential Centres (also known as Licensed Boarding Houses)**

This is a very complex area involving intersecting organisations and legislation. NSWTCG has recognised the vulnerable nature of this group over a number of years and have worked with key organisations to better tailor services to meet individual needs. We continue this work through a pilot project and other stakeholders. The following table provides a summary of initiatives and future plans.

	In place	Short term goals	Long term goals
Policies and procedures	<p>Revised Decision Making Policy August 08-staff of NSWTCG is required to have regard to client's own wishes and views</p> <p>New budget tool-this is carried out annually and staff is required to seek client's own views and wishes</p> <p>Disability Advisory Service (DAS) to provide input to assist with decision making e.g. request to purchase aids and equipment has to be supported by this unit</p>	<p>Remove the Managers/ Licensees/ employees of LRC's as key contact</p> <p>When reviewing client's financial affairs, if client does not have own bank account NSWTCG will request service providers to review appropriateness for client to apply for one</p> <p>Clients to be encouraged to conduct own banking and purchase of clothing with assistance of ALL support workers if required as part of skills building exercise or community participation activity</p> <p>Assist those clients who have difficulties with the 100 points identity requirement e.g. applying for a birth certificate on behalf of client</p> <p>Develop Fact Sheet to distribute a fact sheet to inform clients and stakeholders of our role</p>	<p>Review appropriateness of management of this group of clients within the current structure or should they be managed under a designated team</p> <p>Review fees schedule arrangement</p> <p>End “comforts” arrangement</p>

<sup>1</sup> Submission 1, Coalition for Appropriate Supported Accommodation for People With Disabilities, p 1

Data management	Types of accommodation identifying LRC Contact list identifying key contacts Management instructions to alert staff members of issues Communication strategy	NSWTG to distribute Key card/wallet size information card for clients to encourage contact with NSWWTG Update current data to ensure types of accommodation is entered correctly and contact list is current  To instruct staff members through Management Instructions (1) not to rely on the views or advice of LRC managers/licensees/employees as independent (2) a request for funds should come directly from client or a representative nominated by client (3) consultation to take place direct with client or service providers and/or relevant stakeholders (4) wherever possible payments should go directly into client's bank account	
Staff training	Regular staff training session re types of supported accommodation	Develop Tip Sheet to educate and raise awareness among NSWWTG staff members regarding systemic issues for these clients (this will address the request for a lump sum for multiple clients residing in the same LRC) Encourage service providers and stakeholders to make contact with NSWWTG.	Strengthen partnership with stakeholders in other regions  Develop new projects to address on-going issue
Partnership/Projects with external stakeholders  (Through this joint effort we have already seen some positive outcomes e.g. in May this year NSWWTG received a call from a hospital social worker advising that client has been in hospital for many weeks and would not be returning to the LRC. The social worker asked the matter to	2 Senior Disability Advisors are the designated contact for stakeholders involved in LRCs  On-going dialogue with DADHC's Met South Boarding House Reform Team (BHRT)  Attend DADHC's Metro South Co-ordinated Care meeting  Commenced attending BHRT's annual client plan meetings	Most recently staff from our Long Term Residential Team met with a group of residents from an unlicensed boarding house. The "informal" meeting had been arranged by the manager of a local NGO and allowed NSWWTG staff and other service providers to meet with clients in a less formal setting but away from the boarding house. A series of questions were put to the residents to check how much they currently understood about their financial situation. The set questions are listed below and formed the basis for discussion:  1. Do you know that NSWWTG are managing your finances and are you happy with the arrangement? 2. Funds are sent to XXX for the purpose of providing you with cigarettes. Are you given cigarettes? Is there a need to change the current arrangement? 3. Funds are sent to XXX for the purpose of providing you	

be referred to DAS. It turned out the LRC did not notify NSWTG and continued charging this client B&L. NSWTG wrote to this RLC requesting full refund as well as being kept informed of our clients' movements. Refund from LRC received shortly after)

- with clothing. Did you receive the clothes? Is there a need to change the current arrangement?*
4. *You operate your own bank account. Do you access your bank account or does XXX take the money out for you?*
  5. *From time to time you contact the NSWTG requesting additional spending do you want to continue to call us or would you like XXX to call on your behalf?*
  6. *Did you receive your statement and newsletter, and do you remember what it said?*
  7. *Do you require an increase in your comforts money?*
  8. *Is there any additional expenditure you would like us to consider?*

In a report back to DAS, staff noted the following: We have 13 clients at XXX and 6 were at the informal meeting. Some operate their own bank accounts for their regular comforts and additional spending whilst others rely on their comforts money to go to XXX and for the proprietors to purchase and allot their cigarettes on a daily basis.

Of the 6 clients, 4 are paid comforts directly into their own bank accounts. For the most part they are in favour of the current arrangements and don't want to see any changes except for an increase in their comforts.

The remaining 2 have their comforts sent to XXX. One client is happy with the current arrangement and the other advised that she sometimes buys her own cigarettes by the boarding house staff. After discussions with the client it was determined that she would be unable to operate a bank account. Arrangements have been made with the relevant NGO for clothing purchases.

## Financial Management Orders

9. The Attorney General has asked the Committee to consider amending the *NSW Trustee and Guardian Act 2009* to allow the relevant Court or Tribunal to exclude parts of an estate from a financial management order. The Committee notes that section 40 in Chapter 4 of the Act states that “An order may be made under this Chapter for the management of the whole or part of the estate of a person”

- In your view how would excluding parts of an estate differ from making an order for part of an estate?
- It has been argued that considering which parts of an estate to include in an order is more consistent with the presumption of capacity and applying the least restrictive alternative than considering which parts to exclude. Do you agree?

This is a very complex question and one that needs to be approached with care and on case by case basis.

If an order is made appointing a financial manager (private or statutory) excluding part of the estate from management the financial manager can still assist the individual in areas under exclusion – should that be needed. That is the order has been made because the person has been found to lack capacity however the court or tribunal has determined that the manager should only control certain aspects of the estate. A common example would be the entering into contracts by an individual when they did not fully understand the implications. Many people under an FMO might be able to generally manage a pension but are extremely vulnerable to loan, mobile phone and pay television contracts. Under this type of order the Financial Manager can use the authority to extract the individual from such contracts. This is a very common problem for clients under financial management and left unaddressed can lead them into considerable debt.

On the other hand if an order is made for part of the estate only it is implicit that the person is capable of managing the remainder of the estate and the same assistance could not be given in the circumstances described above.

There is a very subtle but important difference. This does not mean that one approach should be used over the other. Rather we would argue that both approaches should be available to any court or tribunal. Clearly the selection of the best approach must be given very careful consideration.

Finally even if at the commencement of an order a person is seen to need total protection over time they may be able to return to managing part of their estate. S 71 of the *NSW Trustee and Guardian Act 2009* allows for the NSW TG to have control over identified parts of the estate. For example – a person may be able to take back control of regular payments of utilities, their basic income but still require oversight of major investments. S 71 in effect allows for a trial with all safeguards still in place. If problems arise and it becomes evident that the person cannot cope with this arrangement their affairs can be quickly protected by revocation of the S71 authority.

10. When considering a financial management order, the Guardianship Tribunal, under section 25 of the *Guardianship Act*, must be satisfied that:

- a) the person is not capable of managing those affairs, and

(b) there is a need for another person to manage those affairs on the person's behalf, and

(c) it is in the person's best interests that the order be made.

Whereas the Court and the Mental Health Review Tribunal are only required to find that the person is not capable of managing their affairs.<sup>2</sup>

- **Is there an inconsistency between these approaches?**

Yes

- **If so, do you know if there is a reason for it?**

We believe this to be historical and the outcome of legislation being drafted at different points in time with differing appreciation of best practice at that juncture. However it should be noted that the Courts apply a similar test based in case law.

- **What would be the best way to resolve this inconsistency?**

The Guardianship Act requirements are the most contemporary and should be used as the basis for a consistent approach across all legislation

## Duration of Orders

12. **It has been argued that the fact guardianship orders can be made for a maximum of 5 years (under s 18 (1A) (b) of the *Guardianship Act*) whereas financial management orders can be made for an indefinite period of time is inconsistent and unjustified and that the indefinite period of financial management orders conflicts with the general principles of the *Guardianship Act*, the *NSW Trustee and Guardianship Act*, and the United Nations Convention on the Rights of Persons with Disabilities, particularly that the least restrictive alternative should be chosen and the autonomy of the person should be respected.<sup>3</sup> What is your view on this issue?**

Philosophically it would be very difficult to argue against this in principle and we would not seek to do so. However it would also be overly simplistic and incorrect to regard the current legislative and practice arrangements as inflexible and plenary in nature.

First when an order is made by the Guardianship Tribunal or Supreme Court it is open to both to make a reviewable or interim order. Both provide an immediate point of review.

Second, parties to an application can at any time request a review of the order appointing a financial manager. Third S71 of the *NSW Trustee and Guardian Act 2009* allows the NSW TG to provide those clients able to take back some control of their affairs to have a "trial run" that can, if successful strengthen any case for revocation. Fourth, clients with a degenerative condition will not be able to functionally regain control of their affairs. However in modest estates, it is possible to make the decisions required under the original order and to set up the persons ongoing affairs in a manner that is safe, transparent and accountable but may not require an ongoing FMO. The most common example is the sale of the family home to facilitate payment of an Aged Care Bond and the placement of remaining monies in either a trust account or other arrangement that can be periodically monitored by family and standards agencies. It

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<sup>2</sup> Submission 25, Blake Dawson Pro Bono Team, p 8

<sup>3</sup> Submission 25, Blake Dawson Pro Bono Team, p 7

should be noted that the 2007/2008 Annual Report of the Guardianship Tribunal reveals that 62% of applications were made for people over the age of 65 and 42% of applications related to a person with a form of dementia.

If we were to move to a legislative scheme of mandated reviews it would be important to recognise that not all orders would require a set review and indeed the process of the same could be unnecessarily burdensome and distressing on parties. For example, requiring a person with advancing dementia and their family to appear before a Tribunal every 2 years may not be in the person's interest. On the other hand a person with an Acquired Brain Injury could well have recovered a significant level of capacity in two years and ought to have the possibility of review. As noted this is possible under existing practice where the Tribunal can set a period for review or rely on application by the client or key stakeholders.

We would recommend that legislation not be so prescriptive that it becomes emotionally and financially costly.

One option could be to require initial orders to be reviewed by the originating Court or Tribunal by a statutory date – as is required for initial guardianship orders. We suggest that such a date could be set at 2 years<sup>4</sup>. Thereinafter it is open to the court or tribunal to determine the frequency of reviews. This would allow them to take into consideration issues of:

- Likelihood of regained capacity
- Complexity of the estate
- Ongoing need; and
- Potential to put in place less restrictive alternatives

Appointed managers could be specifically required to address the questions above when preparing their report to the court or tribunal.

As a matter of best practice it is a goal of the NSW TG to review all long term low contact clients to determine whether less restrictive alternatives can be put into place. This will take time to achieve as there are a significant number of clients in our existing Long Term Residential team

At the present time the NSW TG provides reports to the Guardianship Tribunal for hearings where:

- a) the Tribunal is conducting a review of the Financial Management Order – including orders appointing a Private Manager, or
- b) the Tribunal is conducting a review of the Guardianship Order where a Financial Manager is also appointed.

On average each report takes a level 3/4 Officer 3 hours to prepare. NSW T&G has undertaken very preliminary analysis of the impact of a requirement to review all FMO's on a regular basis. We have modelled a two yearly review cycles plus an initial 2 year review plus a flexible subsequent review date. For the purpose of the exercise we have chosen 5 years as the maximum subsequent review date. We have also assumed this to be for all new orders from a prescribed date. Should retrospective reviews be introduced the workload would increase dramatically

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<sup>4</sup> 2 years is a recommended timeframe. The first year of a typical financial management order is very full of investigation and action. One year may be an appealing timeframe but can be too short for finalisation of critical activities that might them lead to the lapsing of an order. 2 years should provide sufficient space and provision exist for an earlier review on request.

In Scenario 1. all financial management orders for both new and existing clients would be reviewed initially at the end of the first 2 years and then each following 2 years until such time as the Order was discontinued. We estimate that an average (ie. combined Direct Management plus Private Management) of 6,381 Review Reports would be required to be produced to the Court and Tribunals each year over the next 5 years. This would result in an extra 15 full time staff being required just to undertake the work necessary to prepare reports for hearing.

In Scenario 2. all new financial management orders would be reviewed initially after the first 2 years and then subsequently after another 5 years if not discontinued earlier. We estimate that an average of 1,786 review reports would be required to be produced to the Court and Tribunals each year over the next 5 years (commencing from year 3). This results in an additional 4.2 full time staff required just to undertake the work necessary to prepare reports for hearing.

## Private Managers

### **14. In what circumstances can a private manager benefit financially after the death of the person? Can this occur when the financial manager is not a relative or close friend of the person?**

Once a person under financial management dies the order comes to an end. Under S96 of the *NSW Trustee and Guardian Act 2009* the NSW TG as Direct Manager has prescribed authority to complete transactions that commenced before the death of the person and to pay for funeral arrangements. No such equivalent exists for a Private Manager.

It should be noted that the Private Manager is required to attest any additional income/new assets when each years accounts are submitted for scrutiny. However there is no absolute guarantee that this will occur.

It is possible that Private Manager did not fully disclose the asset base of the client at the outset of or during the order – e.g. if the client inherited a beneficial entitlement during the course of the order. In such circumstances the asset would not be identified in the annual accounts and therefore be open to misuse.

This system does rely on a Private Manager advising the Executor of assets and liabilities in the estate and other institutions of the death of the person under management.

The Private Manager may still benefit if they were a beneficiary to a valid Will.

## Safeguards and Monitoring

### **15. It has been stated by a participant in this inquiry that legal action can only be taken by a client of the NSW Trustee and Guardian with the permission of the Trustee and Guardian. Where the conduct of the Trustee and Guardian is the subject of the complaint this effectively puts the Trustee and Guardian in a**

**position to prevent legal action being taken against itself.<sup>5</sup> Could you comment on this view?**

Various provisions exist for our clients to take legal action against NSW TG.

\* Applications to Supreme Court for directions. [ s.61 of the *NSW Trustee and Guardian Act 2009*]

\* Applications to ADT for review of decision [ s.62 of the *NSW Trustee and Guardian Act 2009*]

\* Applications for termination of management [ ss.86 to 88 of the *NSW Trustee and Guardian Act 2009*. Also relevant provisions of *Guardianship Act*]

\* Actions against NSW TG [or State of NSW] where Court appoints another person to act as tutor for a client [Rule 7.15 of *Uniform Civil Procedure Rules 2005*]

In practice this has occurred on a number of occasions.

Equally there are times when NSW TG has acted to curtail commencement of legal action. It is rare but necessary when a client has little insight and continually seeks to commence either frivolous actions or actions without cause and or poor prospects of success. In such instances we are obliged to ensure our clients funds are not wasted on fruitless legal action. It should be noted that such actions are not necessarily against NSW TG. On those occasions where we refuse to instruct our decision can be appealed to the ADT.

**16. What provisions currently exist in NSW to penalise and order compensation from guardians or financial managers who are found to have acted dishonestly, without reasonable diligence and/or contrary to the terms of the guardianship or financial management order?**

This is a very broad and open ended question however briefly, NSW TG has power to bring Court action on behalf of a client under an FMO. [ s.16[1][s] and [t]. of the *NSW Trustee and Guardian Act 2009*] Such action may include civil actions for recovery of assets against former managers and also criminal proceedings. Where a Private Manager has acted inappropriately steps are taken to have them removed and replaced by either another Private Manager or NSW TG who can then commence recovery proceedings.

The Guardianship Tribunal or Supreme Court may require a private manager to give security. The Act is broad in its definition and indicates that security may comprise the assets of the client. Historically the courts could and did order security to be lodged by the manager from the managers own assets. In the event of misconduct and depletion of the estate recovery could occur through s.68 of the *NSW Trustee and Guardian Act 2009*. Senior staff advise that this has not happened since the mid 1980's and security typically comprises the assets of the managed estate.

Today in practice the Court or Tribunal rarely makes orders relating to Security Have generally looked to others to launch criminal – recently involved in a matter assisting police.

**17. What mechanisms currently exist in NSW for scrutiny of the actions of NSW Trustee and Guardian and the Public Guardian in relation to persons for whom either office has been appointed financial manager or guardian?**

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<sup>5</sup> Submission 4, People With Disability/Mental Health Coordinating Council, p 19

The NSWTG has a range of internal policies and external oversight to provide avenues of protection and appeal for people under a financial management or guardianship order.

First a complaint to the NSWTG can be lodged and is received by the Manager Quality Service and Community Relations who will initiate the inquiry into the matters identified.

Second an Internal Review of Decision can be requested. A client or key person in their life can request that a major decision be reviewed by an officer not previously involved and more senior than the originating officer. This officer has the power to confirm, vary or set aside the original decision and make a new decision in its place.

If the client or key person remains unhappy with the outcome they may then lodge an Appeal with the ADT

A person with a proper interest can also apply to the court or tribunal seeking a review of the original order.

Finally they may also take a complaint to the Ombudsman, Anti Discrimination Board or the Minister either directly or via a local Member of Parliament.

## **Review of Financial Management Orders by MHRT**

- 18. It has been recommended to the Committee that the *Guardianship Act* and the *NSW Trustee and Guardian Act* be amended to require automatic review of financial management orders made by the MHRT under ss 44 and 45 of the *NSW Trustee and Guardian Act* on release of the person the subject of the order from the mental health facility.<sup>6</sup> What is your view of this recommendation?**

NSWTG supports the MHRT conducting such reviews and in preference to the current practice of review by the NSWTG. In doing so we acknowledge that this would have resource implications for that Tribunal. It would be vital that the MHRT be able to apply the same criteria as the Guardianship Tribunal i.e. the capacity to revoke on best interests – which could include no further need, and regained capacity.

## **Questions for all Witnesses**

### **Assisted/Supported Decision Making verses Substitute Decision Making**

- 1. In relation “assisted” decision-making as opposed to “substitute” decision-making there is a question as to whether an assisted decision maker would make decisions that they (the assisted decision maker) thought were right or that were the wishes of the person being assisted. The second of these alternatives is some times referred to as respecting the person’s rights to make bad decisions. Can you comment on this? If Legislation providing for assisted decision making were to be introduced in NSW, how do you think it should address this issue?**

A partial response to this question was provided in evidence on the first day of the hearing. I noted then that this is a challenging ethical debate involving competing ethical principals with no simple answer.

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<sup>6</sup> Submission 25, Blake Dawson Pro Bono Team, p 8

Training and clear frameworks for decision-making will enable a more consistent application of both assisted and substituted decision-making for people who lack capacity. The Public Guardian in NSW has led work in Australia in the development of a decision-making framework which meets the standards and principals outlined in Legislation and practice. This framework includes a specific question for guardians when considering making a decision – does the person concerned have the capacity to make this decision on their own behalf at this point in time.

There will never be a perfect system for substituted or assisted decision-making and continual training needs to be undertaken to ensure that guardians and financial managers are aware of their own values and any risk of projection when making decisions for others.

A person's right to make a bad decision must be informed by their capacity to make that decision in the first place. If a person has capacity, even temporarily, then they should have the right to make a bad decision. However, a lack of capacity should not expose people to the potential for harm, abuse or neglect when they are not in a position to fully consider all of the alternatives available to them.

## Capacity

### 2. It has been suggested to the Committee that decision-making capacity should be regarded as a spectrum with complete autonomy at one end and substitute decision-making at the other.

- **Who do you believe is qualified to assess where on this spectrum a person may be and what information is required to make this assessment.**

In the first instance health and allied health professionals are well placed to provide Courts and Tribunals with contemporary evidence that will enable them to determine whether, at a given point in time, a person has or has not got the capacity to make decisions in all or part of their life.

The assessment of capacity has been well covered in the Capacity Toolkit produced by the Attorney General's Department. This toolkit was developed in consultation with a wide range of expert input and its singular success is testimony to the need for the tool and the regard with which it is held.

However, the question of assessing capacity to make decisions does not stop at the end of a Tribunal or Court hearing. As noted above it's beholden upon a financial manager and/or guardian to consider on each occasion when making a decision for a person under an order whether that individual is capable of making the decision in their own right in this particular point in time or whether they will be able to make the decision of support from a substitute decision-maker.

- **In practice, how could substitute decision-making arrangements be constructed to accommodate the fact that a persons' capacity may vary from time to time and situation to situation.**

Please see the comments above and also those in relation to the difference between excluding part of the estate versus making an order for part of the estate.

The Guardianship Act is properly weighted towards careful, individual assessment of each matter. This approach should be carried through in all relevant Legislation and would therefore demand that at the point of application and hearing the question of fluctuating capacity is addressed and the order crafted accordingly. Secondly, Legislation could be crafted to require guardians and financial managers to formally consider the question of capacity whenever they are making a decision on behalf of an individual under an order. Finally the complaints and review processes currently in place and whatever future arrangements may be considered also provide a safety net to ensure that a person's capacity is properly considered in decision-making.

### **Restrictive Practices**

3. **It has been argued by another enquiry participant that a primary reason for the appointment of a guardian is to authorise the use of restrictive practices upon a person with a disability, including chemical, mechanical and physical restraint, detention, seclusion and exclusionary time out. It has been further argued that an independent public office be established to regulate the use of restrictive practices in NSW.**

- **Can you comment on the use of restrictive practices in NSW in the context of Guardianship Orders? What provisions are there existing in the NSW Legislation to regulate the use of restrictive practices?**
- **Do you think there is a need to amend NSW Legislation in relation to the use of restrictive practices?**

With respect, at the outset of my evidence to this enquiry both written and oral I have indicated that I would contain my comments to the area of financial management for which I am directly and statutorily responsible. Because the financial management services of NSW TG are not directly involved in the exercise of restrictive practices, it would be inappropriate for our agency to make comment on these points. However, I am confident that my colleague the Public Guardian will provide members with a comprehensive and informed view on these questions given his office's regular appointment to consent or not to a positive behaviour program that incorporates restrictive practices.



Imelda Dodds  
A/CEO  
NSW Trustee and Guardian

**Former PTNSW Measures**

M e a s u r e	Historical Actual				Target 2008-09				Actual 2008-09			
	2004-05	2005-06	2006-07	2007-08	Sep Qtr	Dec Qtr	Mar Qtr	Jun Qtr	Sep Qtr	Dec Qtr	Mar Qtr	Jun Qtr
<input type="checkbox"/> Customer Satisfaction Index (CSI) (Measured annually)	81%	77%	73%	80%	n.a.	n.a.	n.a.	not set	n.a.	n.a.	n.a.	77%
<input type="checkbox"/> Process Improvement Satisfaction Index (PISI) (Measured Annually)	75%	70%	66%	76%	n.a.	n.a.	n.a.	not set	n.a.	n.a.	n.a.	70%
<input type="checkbox"/> Average months to finalise Estates (Each Quarter)	6.0	5.4	5.4	6.0	7.0	7.0	7.0	7.0	6.5	6.0	6.1	5.8
<input type="checkbox"/> % of Admin Time within Target	n.a.	n.a.	n.a.	n.a.	80%	80%	80%	80%	70.4%	77.6%	76.5%	78.7%
<input type="checkbox"/> Number of Existing Client Wills (Each Quarter)	5,744	5,743	5,904	5,705	1,578	1,394	1,394	1,394	1,333	1,299	1,317	1,386
<input type="checkbox"/> Number of New Client Wills (Each Quarter)	4,619	5,241	5,589	5,769	1,428	1,604	1,604	1,604	1,450	1,413	1,377	1,670
<input type="checkbox"/> Number of New Estates (Each Quarter)	1,785	1,830	1,788	1,829	507	464	464	465	440	476	479	359
<input type="checkbox"/> Value of New Estates (Each Quarter)	\$459m	\$493m	\$490m	\$532m	\$135m	\$130m	\$130m	\$131m	\$105.6m	\$120.7m	\$135.6m	\$122m
<input type="checkbox"/> Number of New Trusts (Each Quarter)	888	844	857	775	230	206	206	208	201	180	156	252
<input type="checkbox"/> Value of New Trusts (Each Quarter)	\$72m	\$58m	\$55m	\$54m	\$16m	\$12m	\$12m	\$12m	\$13.5m	\$13.5m	\$8.9m	\$12.3m
<input type="checkbox"/> Number of New Active Powers of Attorney (Each Quarter)	121	125	99	106	48	34	34	34	31	33	83	82
<input type="checkbox"/> Value of New Active Powers of Attorney (Each Quarter)	\$33m	\$34m	\$38m	\$31m	\$14m	\$10m	\$10m	\$9m	\$13.4m	\$10.1m	\$27.8m	\$22m
<input type="checkbox"/> Number of New Safeguard Assist Powers of Attorney made (Future business) (Each Quarter)	1,428	1,674	1,759	2,020	450	550	550	550	496	407	453	533

Performance Measures - Commentary

Current Performance (For each Quarterly Update, provide commentary that will assist the reader to interpret the Report Card, particularly where "Actual" service measures differ significantly from "Targets".)

	Measure (as above if required)	Comment
<input type="checkbox"/>	Customer Satisfaction Index (CSI) Measured annually	Annual beneficiaries survey conducted June 2009 had a CSI of 77 compared to 80 in 2008. Annual Will clients survey had a CSI of 94 compared to 92 in 2008. Overall client index: CSI 86.5 compared to 86 in 2008.
<input type="checkbox"/>	Process Improvement Satisfaction Index (PISI) Measured annually	Annual Beneficiaries Survey conducted June 2009 had a PISI of 70 compared to 76 in 2008. Annual Will clients survey had a PISI of 92 compared to 89 in 2008. Overall client index: PISI 83.5 compared to 82.5 in 2008.
<input type="checkbox"/>	Average months to finalise Estates Each Quarter	Result YTD: 5.79 Better than target (7 months) but down on last year's result of 5.64
<input type="checkbox"/>	Number of Existing Client Wills Each Quarter	Result YTD: 5335 Down on Target by 953 Down on Last Year by 370
<input type="checkbox"/>	Number of New Client Wills Each Quarter	Result YTD: 5910 Up on Target by 198 Up on Last Year by 141
<input type="checkbox"/>	Number of New Estates Each Quarter	Result YTD: 1754 Down on Target by 146 Down on Last Year by 75
<input type="checkbox"/>	Value of New Estates Each Quarter	Result YTD: \$483.9m Down on Target by \$41.1m Down on Last Year by \$48.4m
<input type="checkbox"/>	Number of New Trusts Each Quarter	Result YTD: 789 Down on Target by 61 Up on Last Year by 14
<input type="checkbox"/>	Value of New Trusts Each Quarter	Result YTD: \$48.2m Down on Target by \$4.3m Down on Last Year by \$6.1m
<input type="checkbox"/>	Number of New Active Powers of Attorney Each Quarter	Result YTD: 229 Up on Target by 79 Up on Last Year by 123
<input type="checkbox"/>	Value of New Active Powers of Attorney Each Quarter	Result YTD: \$73.3m Up on Target by \$30.8m Up on Last Year by \$42m
<input type="checkbox"/>	Number of New Safeguard Assist Powers of Attorney made (Future business) Each Quarter	Result YTD: 1889 Up on Target by 89 Down on Last Year by 131