NSW Council for Intellectual Disability
Level 1, 418A Elizabeth Street
Surry Hills NSW 2010
Phone: 02 9211 1611 Fax: 02 9211 2606
mail@nswcid.org.au
ABN 25 001 318 967

Response to questions on notice from the Standing Committee on Social Issues inquiry into substitute decision-making arrangements for people lacking capacity

Jim Simpson
10 November 2009

Question in hearing on portfolio responsibility for the Guardianship Tribunal
As requested, we provide information of what has happened in two other States to support our argument that key features of the Guardianship Tribunal are best maintained by keeping it in the Disability Services portfolio. The key features include:

- Processes that are non-legalistic, non-adversarial and informal so as to maximise the participation of people with disabilities and promote conciliation.
- Cases being heard by three members with a range of disability expertise and experience.
- An investigative approach including the Tribunal having adequate Investigative staff so that the tribunal has the range of relevant evidence.
- The tribunal not being part of a broader tribunal so that it can maintain a culture suited to its sensitive and unique work and avoid resources being diverted to other priorities.

In NSW, the Guardianship Tribunal has been able to maintain these features for twenty years except for the recent legislative changes that allow reviews of orders to be heard by one member.

Below, we compare this experience with that of the tribunals in Victoria and Western Australia. We base this comparison on legislation, annual and inquiry reports, consultation with individuals with long term involvement with local guardianship systems and our own experience over time. (We were actively represented on the working parties that developed and implemented the NSW Guardianship Act in the 1980s and have been close observers of the system since then. The writer is also a longstanding member of the Tribunal, a writer and conference presenter on guardianship issues and was an honorary consultant to the Australian Law Reform Commission in its development of guardianship legislation for the ACT.)

In making these comparisons, we again stress that we are not seeking to criticise the Attorney-General's portfolio. We are rather saying that the role and procedures of the many tribunals attached to the Attorney-General's Department are predominantly different to those required by the Guardianship Tribunal. We feel that the Guardianship Tribunal is more likely to retain its key features as a specialist tribunal in the Disability Services portfolio.

Victoria - In Victoria, the guardianship tribunal (originally the Guardianship and Administration Board) has always been in the Attorney General's portfolio. The tribunal's legislation originally required that it sit as a three member multi-disciplinary tribunal. The original members developed a strong and positive culture based on the bringing together of individuals with a range of relevant professional and disability

expertise and their sharing that through sitting together. Later, the legislation was amended and the tribunal moved to sitting predominantly as a single member. Our understanding is that as time went by, it proved difficult to maintain the culture of the tribunal.

Some years later, the tribunal was absorbed into the Victorian Civil and Administrative Tribunal (VCAT). While there continued to be a specific list for guardianship matters, the specialised membership of the tribunal diminished and we understand that the procedures have become more legalistic. Members who hear guardianship matters are the same people as hear a range of other matters, in particular residential tenancies and civil claims.

Over time, the tribunal's staffing to prepare matters for hearing also diminished. The Office of the Public Advocate does investigate some applications but this is only a small minority. (In 2008-2009, VCAT heard 9698 guardianship matters but OPA's budget for investigations was only $825,000. See annual reports of VCAT and OPA.)

Western Australia - In Western Australia, the guardianship legislation was developed by the Minister for Health but then implemented by the Attorney General. The guardianship tribunal (the Guardianship and Administration Board) was a separate tribunal until about 2005 when it was absorbed into the State Administrative Tribunal. This was after a parliamentary inquiry in which all relevant submissions either opposed this course or expressed concerns about it. www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/8E15F0ACAC12A61148256F3A0007E6CC/$file/ln.sat.041027.rpf.024.xx.a.pdf , Chapter 14.

The inquiry heard that, until that time, the tribunal's membership included senior lawyers as president and deputy president, with the balance of membership being,

> "…multi-disciplinary, drawn from a wide variety of backgrounds with a variety of expertise appointed during the tenure of different governments over the past decade with a common and deep commitment to the rights and interests of persons with disability."

The Chief Justice opposed the tribunal being merged into SAT, pointing out that the guardianship jurisdiction was part of the Supreme Court's inherent jurisdiction but its sensitive nature had made it appropriate to excise the jurisdiction into a specialist tribunal.

The inquiry received submissions that absorption into SAT would impede physical and social access for people with disabilities. The inquiry considered recommending that absorption not proceed. But, by then, the guardianship tribunal had already been physically moved to the SAT premises and the inquiry did not see it as feasible for this to be reversed.

After the absorption into SAT, we understand that the role of non-legal members has diminished and that hearings are more formal and court like making them less open to the full participation of people with disabilities.

In 2009, a parliamentary inquiry considered the administration of the SAT. The Disability Services Commission raised a range of concerns about how the guardianship jurisdiction was operating. While the inquiry accepted the SAT's reassurances on some issues, it found that the tribunal was deficient in the extent to which it addressed power imbalances facing people with disabilities, in access to its premises for people with disabilities, in availability of disabled parking and in space

and privacy in waiting areas..
http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/A0BA5F7E0AD6041EC82575BC002027CD/$file/ls.str.090520.rpf.014.xx.a.pdf

In the early years of the WA guardianship tribunal, we understand that the Office of the Public Advocate was adequately able to investigate matters for the tribunal. Over time, resource limitations led to difficulties obtaining appropriate investigations. The SAT heard 3157 guardianship matters in 2008-2009 but only 721 were investigated prior to the hearing. (See annual reports of the SAT and OPA.)

Written questions
We answer as follows to the other questions on notice from the Committee:

Questions specifically to us
3 and 4 - We feel sections 14(2) and 25G should be simplified so that, once incapability to make decisions has been found, the question then becomes need for an order on the basis that less formal support with decision making is not adequate. Need would however be partly informed by the principles in section 4.

6 and 7 - The Guardianship Tribunal oversees restrictive practices by appointing a guardian who can give or refuse consent for the practice. The Tribunal commonly places a condition on the order requiring that positive programs accompany any necessary restrictive practice. This approach has ensured that restrictive practices have to be justified to a guardian and usually only occur in the context of more positive approaches to address the causes of the person's challenging behaviour. The limitation of the approach is that it only arises where an application is made to the Tribunal.

More specific legislation might provide more thorough protection against inappropriate restrictions. We do not have specific view on the form such legislation should take.

9 and 10 – We support these proposals.

11 – We feel that the current "person responsible" definition works reasonably well. If two "persons responsible" disagree, an application can be made the Guardianship Tribunal.

12 – We do not see the need to give persons responsible broader legal authority. Authority is needed in relation to medical treatment because of the need for a legal consent; similar authority is not needed in relation to services or accommodation decisions unless coercion is needed, in which case the scrutiny of the Tribunal is a necessary safeguard.

13 – We do not have a considered view on this issue.

Questions to all witnesses
1 – If the person's wishes are to be overridden, the safeguards of guardianship may be needed. An assisted decision maker should respect the wishes of the person, though helping him or her to be aware of options and ramifications of those options. We doubt the need to legislation in relation to assisted decision making.

2 – A professional such as a clinical psychologist is usually best qualified to form a professional view about capacity. At a judicial level, a multidisciplinary tribunal is best qualified. An individual's unique level of capacity can be accommodated by

guardianship orders being confined to specific classes of decisions and being regularly reviewed.

3 – We are generally supportive of this proposal, in particular for the role of the Public Guardian to be broadened to allow it to advocate for individuals with a disability and on systemic issues. Such a public advocate would complement the roles of the other bodies mentioned.