

**Submission  
No 59**

**INQUIRY INTO DOMESTIC VIOLENCE TRENDS AND  
ISSUES IN NSW**

**Organisation:** NSW Public Guardian

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**Public Guardian**  
Attorney General & Justice

**SUBMISSION TO THE NSW LEGISLATIVE COUNCIL'S  
STANDING COMMITTEE ON SOCIAL ISSUES  
REGARDING THE INQUIRY INTO DOMESTIC VIOLENCE  
TRENDS AND ISSUES IN NSW**

**23 SEPTEMBER 2011**

**The Public Guardian recommends that Section 48 of the *Crimes Act 2007* be amended to allow for an application for an AVO to be made by the person, and/or their appointed guardian, and/or NSW Police.**

## **An overview of the role of the Public Guardian**

### **The Legislation**

The *NSW Guardianship Act* was enacted in 1987, against a backdrop of the closure of institutions, to protect the welfare and interests of people with disability and to ensure access to the range of community-based services that could provide them with the same opportunities as other people in the community.

The *Act* has been amended on a number of occasions since 1987. For example, in 1998 it was amended to allow for the appointment of enduring guardians. In 2004, further amendments to the *Act* enabled decisions made by the Guardianship Tribunal or the Public Guardian to be reviewed by the NSW Administrative Decisions Tribunal.

### **NSW Public Guardian**

The Public Guardian is an independent statutory official. The Public Guardian is part of the Department of Attorney General and Justice and is supported administratively by the NSW Trustee and Guardian.

The Public Guardian exists to promote the rights and interests of people with disabilities through the practice of substitute decision-making, advocacy and education. The Guardianship Tribunal appoints the NSW Public Guardian as the guardian of last resort and the Public Guardian then acts as a substitute decision-maker for people under his guardianship.

### **The Role of the Public Guardian**

The Public Guardian may be given the authority to make lifestyle decisions for a person in areas such as where the person lives, what services they receive, including access to legal services, and to give consent to medical and dental treatment. The appointment of the Public Guardian is time limited and the appointment is reviewed by the Guardianship Tribunal at the expiry of the term of the order.

The Public Guardian, through its Private Guardian Support Unit provides an information and referral service to people who have been appointed as a guardian by the NSW Guardianship Tribunal or appointed as an enduring guardian by the person with the disability prior to the onset of incapacity.

The Public Guardian is currently the guardian for approximately 1800 people with disabilities who reside across NSW. This includes people from the most vulnerable groups in the community. People under the guardianship of the Public Guardian are affected by disabilities such as mental illness, developmental or intellectual disability, dementia, anorexia, alcohol and/or substance related brain damage and traumatic brain injury. A significant number of people are also vulnerable to abuse, neglect and exploitation.

### **Relationship of guardians to persons under guardianship**

Section 21 of the *Guardianship Act* 1987 states that:

- (1) Subject to any conditions specified in the order, the guardian of a person the subject of a plenary guardianship order:
  - (a) has custody of the person to the exclusion of any other person, and
  - (b) has all the functions of a guardian of that person that a guardian has at law or in equity.
  
- (2) Subject to any conditions specified in the order, the guardian of a person the subject of a limited guardianship order:
  - (a) has custody of the person, to the exclusion of any other person, to such extent (if any) as the order provides, and
  - (b) has such of the functions of a guardian of that person's person, to the exclusion of any other person, as the order provides.
  
- (2A) Subject to any conditions specified in the order, the guardian of a person the subject of a guardianship order (whether plenary or limited) has the power, to the exclusion of any other person, to make the decisions, take the actions and give the consents (in relation to the functions specified in the order) that could be made, taken or given by the person under guardianship if he or she had the requisite legal capacity.

### **Ancillary powers of guardian**

Section 21 B of the *Guardianship Act* 1987 states that:

A guardian may, on behalf of a person under guardianship, sign and do all such things as are necessary to give effect to any function of the guardian.

A guardian has a general duty to act in the best interests of the person under guardianship. As such, the Public Guardian has an inherent advocacy role in relation to each person under his guardianship.

### **Interaction with the criminal justice system**

The Public Guardian interacts with the criminal justice system when a person under guardianship is arrested and charged with a crime. The person may already be under the guardianship of the Public Guardian, or the Public Guardian may be appointed because the person has been charged with a crime. In these situations the Public Guardian seeks to ensure that the police and courts are aware of the

person's disability, that the person is appropriately legally represented and their rights are protected.

The Public Guardian may be appointed following an application by any person who has an interest in the welfare of the person including a legal practitioner who holds the view that the person cannot provide them with proper instructions.

### **Legal function**

Historically when appointed for a person involved in the criminal justice system, the Public Guardian would be given a services function or a legal services function in the guardianship order. Under that function the primary role of the guardian would be to ensure that the person under guardianship had access to proper legal representation, and to arrange for clinical assessments and reports to be available for the consideration of the relevant court or tribunal.

Increasingly however, the Public Guardian is being appointed by the Guardianship Tribunal with a legal services function which includes the authority for the Public Guardian to both appoint and instruct legal practitioners for the person.

The function is given in circumstances where a legal practitioner or another party believe that the person cannot properly instruct a legal representative because of their disability. Such matters include legal proceedings before administrative tribunals including immigration matters, Family Court proceedings and criminal matters before the Local Court.

An order containing such an authority will often be worded along the following lines:

“To make decisions in relation to the legal proceedings a person is presently engaged in”;  
“To appoint and provide instructions to a legal practitioner”.

With a legal function the Public Guardian's role can be broad and involve a wide range of advocacy.

The Public Guardian will liaise with a legal practitioner and provide information in the interests of a person under guardianship. The Public Guardian's view is that liaison with a legal practitioner can also occur under other functions (most often a services function), depending on the circumstances of the person and the nature of the issues arising.

Thus, the Public Guardian may decide to liaise with a legal practitioner (if this will be in the interests of the person under guardianship), despite not having a specific legal function. The Public Guardian may take this step if the legal issues arising impact upon areas of the person's life in which the Public Guardian has decision-making authority.

However, the Public Guardian will not seek to instruct a legal practitioner on behalf a person under guardianship unless he has a specific function authorising him to do so.

Where police or legal matters impact on areas of the Public Guardian's decision-making, the following actions may be undertaken without further specific functions:

- consent to the release of information to a person's legal service/practitioner;
- provide advice to NSW Police about the need to interview a person with an intellectual disability in accordance with the NSW Police Commissioner's Instructions 37.14 (that any interview should be conducted in the presence of an "appropriate adult");
- request that the person's case manager, or a nominated other, attend police or other investigative interviews to provide support;
- advocate for a person to be assisted by a service provider to take out an Apprehended Violence Order (AVO). This may occur where a person has the capacity to use the legal processes available, and wishes to follow through with the provisions of an AVO;
- make representation to the NSW Police, requesting that an AVO be sought on the person's behalf;
- seek the advice of, or refer complaints to, the appropriate bodies regarding discrimination or other matters. Such authorities include: the NSW Anti-Discrimination Board, Human Rights Commission, NSW Ombudsman, Licensing Branch of the Ageing & Disability, Home Care, National Abuse and Neglect Hotline and the Health Care Complaints Commission;
- make written representation to the court advising of the Public Guardian's involvement with a person guardianship.

There has been much discussion over a number of years about what role, if any, guardians should play in the legal proceedings of persons they represent. An earlier report of the Law Reform Commission indicated that the Public Guardian should have a clearly defined role in protecting the interests of people with disabilities before the courts. It is clear that over recent years the Guardianship Tribunal has responded to the needs of people with disabilities involved in legal proceedings by appointing the Public Guardian with specific functions designed to protect the interests of this very vulnerable group.

### **Access function**

Where a guardianship order contains an access function, the Public Guardian may consent to a proposal to limit the access of others who threaten the well being or safety of the person under guardianship. The implementation of these decisions can be problematic and is often dependent on the service and support structures around the person with the disability and on the goodwill of the parties involved.

The protection afforded to the person can be further jeopardised where the person under guardianship initiates contact or invites the subject of the access decision into his or her home. This is not an uncommon outcome where the person under guardianship may have limited memory of the agreed access plan, or because of his or her disability lacks the insight to recognise the importance of complying with the plan. The enforcement of an access plan in these circumstances is made more difficult as there are limited avenues for the enforcement of a decision under the *Guardianship Act*. Such a decision is only enforceable under provisions of the Act relating to the obstruction or threat to a person exercising functions under the Act.

To date the Public Guardian is unaware of any instances where a charge of obstruction had been laid.

### **Third Party Applications for AVO's**

The Public Guardian concurs with the position outlined in the 2003 Law Reform Commission Report regarding the vulnerability of people with disabilities and the limitations on their access to the protection order scheme provided by the AVO legislation.

A guardian has a duty to observe the general principles of the *Guardianship Act 1987* (NSW) when exercising functions under that Act. The principles state that the welfare and interests of the person are to be given paramount consideration. In representing a person under guardianship, or in providing support to private guardians, the Public Guardian has regular contact with services and professionals in the community around issues of violence and abuse. This contact may include requesting police assistance to ensure the safety and wellbeing of a person under guardianship or requesting the provision of legal services to assist in promoting and protecting the rights of the person under guardianship.

Currently the Public Guardian will advocate for service providers to assist a person under guardianship to use the legal avenues available and apply for an AVO where this is necessary. The Public Guardian may request that the NSW Police Service make an application for an AVO on behalf of a person under guardianship who is unable to pursue the matter for him or herself. However, the degree of police discretion involved in this process of applying for an AVO creates some uncertainty and may place too great a burden on the person in need of protection to pursue the matter. This can be further complicated by individual police officers having varying degrees of knowledge and experience of people with disability, of the authority of a guardianship order and the role of a guardian.

The *NSW Crimes Act 2007* provides for Apprehended Domestic Violence Orders (ADVOs) and Apprehended Personal Violence Orders (APVOs) to be granted where the applicant fears that he or she will be the victim of some form of physical, psychological or emotional abuse. The Public Guardian is of the view that the policy objectives of the AVO provisions are consistent with the principle of the *Guardianship Act* that states that a person under guardianship should be protected from abuse, neglect and exploitation.

The Public Guardian notes that the 2003 NSW Law Reform Commission Report on the Inquiry into Apprehended Violence Orders recommended: (Recommendation 18):

Authorised third parties should be allowed to make applications on behalf of people with an intellectual disability, people under Guardianship Orders and people with certain physical disabilities.

This would provide greater access for people with disabilities to this mechanism for protection and would assist a guardian to promote the welfare of the person, and to protect him or her from abuse neglect and exploitation.

However, when the *Crimes Amendment (Domestic Violence) Act 2006* and subsequent *Crimes Domestic and Personal Violence Act 2007* were passed these changes were not included. It is not clear why this recommendation was not adopted at the time. Hansard recordings note the support for the Commissions' Report through both houses of Parliament but do not record any discussion or dissension related to this issue of third party applicants.

## Legal Precedent

In 2011 the Public Guardian sought Crown Solicitors representation to submit to the Local Court that the Public Guardian be recognised as the applicant for an AVO for a woman under guardianship.

The Crown Solicitor successfully made the following argument:

### Guardian as applicant for an ADVVO

The *Guardianship Act 1987* provides for the making of plenary or limited guardianship orders: s.16(1)(c). If the order is a limited one, then the order must specify which of the functions the guardian shall have in respect of the person under guardianship: s. 16(2)(b).

Section 21 C of the *Guardianship Act* provides that the decisions or actions of a guardian are to have effect as if the decision or action had been taken by the person under guardianship, and that the person had the legal capacity to do so:

*"21C: Acts of guardian take effect as acts of person under guardianship*

*A decision made, an action taken and a consent given by a guardian under a guardianship order have effect as if:*

*(a) the decision had been made, the action taken and the consent given by the person under guardianship, and*

*(b) that person had the legal capacity to do so (if the person would have had that legal capacity but for his or her disability)."*

Section 21 (2A) is to similar effect.

The right to apply for an apprehended violence order is governed by s.48 of the *Crimes (Domestic and Personal Violence) Act 2007* ("the CDPV Act"). That section relevantly provides:

*"48 Making of application for an order*

*(1) An application for an order is to be made in accordance with this Part, despite any provision of any other Act or law (whether or not enacted or made before or after the commencement of this section).*

*(2) An application for an order may be made only by:*

*(a) a person for whose protection the order would be made, or*

*(b) a police officer.*

*(3) Despite subsection (2), only a police officer may make an application for an order if the person for whose protection the order would be made is a child*



at the time of the application.

(4) An application for an order:

(a) may be made by more than one person, and

(b) if made by a police officer, may be made on behalf of more than one person, and

(c) if made by a person for whose protection the order would be made (the applicant), may also be made by the applicant on behalf of any other person with whom the applicant has a domestic relationship.”

Section 48 limits the circumstances in which a person can apply for an AVO on behalf of another. Applications can usually only be made by police officers or in the circumstances outlined in s.48 (4){c}. However, it is submitted that effect of s.21C of the *Guardianship Act* is that the acts of a guardian are taken to be the acts of the person under guardianship. Therefore when a guardian makes an application for the protection of a person who is the subject of a guardianship order, it is as if the person is making the application themselves.

The applicant acknowledges that there is an argument that subs. 48(1) restricts reliance on the *Guardianship Act* when making an application under subs. 48(2).

However, the applicant submits that s.48(1) is directed to circumstances where a person has some legal rights to act on another's behalf, such as where there are Family Court orders, a power of attorney or a person consents to act as tutor under the Uniform Civil Procedure Rules, but is not a legally appointed guardian.

The applicant submits that the better view of this application is that it is made “in accordance with this Part”, because the guardian stands in the shoes of Ms X, so that it is, in effect, Ms X who is making the application for her own protection under s. 48(2)(b). The applicant submits that this reading of s. 48 should be preferred for the following reasons:

a) Unless the CDPV Act is read in this way, a person who is the subject of a guardianship order, and who lacks the capacity to make an application herself, would be reliant on the police to make the application for her. This would increase the vulnerability of a person who is already vulnerable by reason of her lack of decision making capacity.

b) Reading the CDPV Act to allow a guardian to apply for an ADVO on behalf of a protected person is consistent with the objects of the CDPV Act, in that it reduces and prevents violence by a person against another person where a domestic relationship exists: s. 9(1)(b). As such, the applicant submits that this interpretation should be preferred: s. 33 Interpretation of the *Guardianship Act* 1987.

c) The CDPV Act is beneficial legislation. As such, “[i]t should not be excluded or confined by ...exceptions...except to the extent that those exceptions are clear~ and “[a]ny doubt ...should be resolved in favour of the enhancement of the [beneficial entitlement] and against its diminution of the operation of the exclusion”: *Cole v Director-General of Department of Youth and Community Services* (1986) 7 NSWLR 541 at 543 per Kirby J.

For these reasons, the applicant submits that she is entitled to make an application for an ADVO for the protection of Ms X and that this Court is able to grant such an application, if it is satisfied that the prerequisites for such an application are met.

The Public Guardian does not want to rely on the resources of the Crown Solicitors Office to represent such matters on each occasion. The Public Guardian believes that the inclusion of a person's guardian as an applicant for AVO's is consistent with the articles within the United Nations Conventions of the Rights of Persons with Disabilities (UNCRPD), particularly the person's right to exercise their legal capacity. The UNCRPD is an important impetus for change and innovation within the disability sector. While all Articles of the Convention are relevant to disability services, this project is founded on the underlying principles of presumption of capacity for all persons with disability, the principle of least restriction and the promotion of supported decision making. In particular, Article 12.3 of the UNCRPD states that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". This includes providing persons with disability with support to make decisions in all areas of life.

Article 5 of the Convention (about equality and non-discrimination) places an obligation on services to eliminate all forms of discrimination and to ensure that reasonable accommodation is provided to allow a person with disability equality before and under the law.

**The Public Guardian recommends that Section 48 of the *Crimes Act 2007* be amended to allow for an application for an AVO to be made by the person, and/or their appointed guardian, and/or NSW Police.**

The Public Guardian submits that the suggested amendment refers to the changing policy environment in Australia. This is a movement away from a welfare approach to supporting people with decision making disabilities to an approach characterised by recognising the fundamental human rights of people with decision-making incapacity.

The Public Guardian welcomes the opportunity to clarify any aspects of this submission and to appear before the Committee at a public hearing that may be associated with this inquiry.

This submission does not need to be kept confidential.

Yours sincerely,



Graeme Smith  
PUBLIC GUARDIAN  
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