

**INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR  
PEOPLE LACKING CAPACITY**

**Organisation:** Public Interest Advocacy Centre Ltd  
**Name:** Ms Brenda Bailey  
**Position:** Senior Policy Officer  
**Telephone:** 02 8898 6500  
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**public interest**  
ADVOCACY CENTRE LTD

**Least restrictive practices: Submission to the NSW  
Legislative Council Standing Committee on Social Issues  
Inquiry into substitute decision-making for people lacking  
capacity**

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**Brenda Bailey, Senior Policy Officer**

# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's work on mental health and disability issues

PIAC has an ongoing objective of improving access to justice for people with disability, including people living with mental illness. Throughout its history, PIAC has worked on these issues through a range of policy projects as well as litigation. For example, in 2006, PIAC examined the issue of capacity, its legal definition and the issues the legal profession confronts in taking direction from clients who may lack capacity. The report explained the concept of the continuum of capacity, which is relevant to the issues in this submission. That is, in making a decision about capacity, an individual can sit anywhere in a range that starts from full capacity (in all or some areas of life) to supported decision-making in the middle, to the other end of the continuum where substitute decision-making for all life matters is necessary. To increase the complexity, where an individual sits on this continuum may not be static, but move from one end of full capacity to very little.<sup>1</sup> In this context, the courts and tribunals that make decisions relating to the well-being of people lacking capacity need a legislative framework that is flexible so that arrangements can be made that take into account changing individual circumstances.

A current project of PIAC is the Mental Health Legal Services Project. The project, launched in 2008, strives to support legal services, broaden the view of justice, enhance consumer participation, create inclusive

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<sup>1</sup> Robin Banks, Emma Golledge and Carol Berry, *Are the rights of people whose capacity is in question being adequately promoted and protected?* (2006) Public Interest Advocacy Centre <[http://www.piac.asn.au/publications/pubs/sub050706\\_20060705.html](http://www.piac.asn.au/publications/pubs/sub050706_20060705.html)> at 1 September 2009.

services and build greater understanding of mental illness and legal needs. It is PIAC's view that unless critical circumstances prove the contrary, consumers should be presumed to retain individual agency and the capacity to act in their own best interests. Individuals should, to the extent of their capacity, guide and be involved in all decisions that affect their well-being. This position should be reflected in legislative reforms and the practices of courts, tribunals, government and organisations supporting individuals.

## Consultation with the disability sector

PIAC is concerned that the timeframe of this inquiry being conducted by NSW Legislative Council Standing Committee on Social Issues (the Standing Committee on Social Issues) does not allow for more thorough consultation with the mental health, disability and aged care sectors and their consumers. Resources and more time for services to consult with consumers to explain options and encourage debate would result in a better understanding of the issues and generate outcomes that are more likely to meet the concerns of community members most affected by potential changes to the relevant legislation.

## Response to the Terms of Reference

PIAC welcomes the opportunity to provide input into the Standing Committee on Social Issues Inquiry into the substitute decision-making for people lacking capacity.

PIAC submits that the *Trustee and Guardian Act 2009* (NSW) (the Act) requires amendment to increase the options available to courts and tribunals and to improve access by those who are the subject of orders to review of orders for substitute decision-making.

In relation to the Act, PIAC, in this submission, considers how to ensure:

- the review processes are accessible for people with episodic health conditions, or conditions that may change over time, to regain control of their affairs;
- that only those areas of a person's life where substitute decision-making is required are transferred to a guardian for decision;
- that substitute decision makers provide support for the person under guardianship to manage their own affairs and be involved in decision making wherever possible;
- competent management of estates by private and public managers.

## Access to review of guardianship orders and substitute decision-making

Unless a guardianship order is for a fixed period and is reviewed at the expiry date, it is very difficult for a person subject of an order to seek a review of that order. The process for review will depend on who has issued the order—Guardianship Tribunal, the Supreme Court or the Mental Health Review Tribunal—with different rules applying for each.<sup>2</sup> Considering the inconsistencies in processes and the difficulty of managing the legal processes it is not surprising that estate management orders without an expiry date are rarely revoked and usually operate on a perpetual basis. In 2007-08, the Guardianship Tribunal processed 370 reviews of financial management orders of which only 35 percent were revoked.<sup>3</sup>

Individuals seeking a review must overcome lack of support to make their own decisions, lack of access to legal advice and an independent advocate, and gain support from the body or person who controls their finances and other life decisions.

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<sup>2</sup> Client Assessment and Referral Unit, *Mental health tribunals and 'orders' – A brief guide* (2003) Legal Aid NSW <<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=678&cid=924&id=527%209>> at 1 September 2009.

<sup>3</sup> Guardianship Tribunal, *Annual Report 2007-2008* (2008) 42.

Several changes could be made that would improve access to review of orders.

- A statutory requirement for regular review of orders could be created through legislative amendment. Such a review provision could expressly provide that the result of the review could be permanent revocation of an order or revocation for a period of time, or for changes in management of affairs. This would allow people with episodic conditions to regain control over their affairs when they have relevant decision-making capacity.
- The advocates for a person who is the subject of an order should be able to seek a review of the order, and legal support should be made available to assist a person who is the subject to the order and (at the person's request) their advocate to participate in the review.
- Legal action for a review of an order should not be at the discretion or require the support of the Protective Commissioner or guardian.

## Conflict of interest

The Guardianship Tribunal, Public Guardian and the Department of Ageing, Disability and Home Care (DADHC) are the responsibility of the Minister for Disability Services. Although the Public Guardian sits within the Department of Justice and Attorney-General, it still reports to the Minister for Disability Services. As the Minister is responsible for the Department which licenses and funds services for people with disability, there is a clear conflict of interest, as most people under guardianship are provided with services by DADHC. A separation of the service provider from the guardian is needed to ensure the guardian can support people subject to orders to challenge service providers through the complaint process and if necessary, through court processes.

## Defining areas of decision-making and management of estates

Orders that provide blanket coverage of an area of life, such as financial management or health issues, fail to allow individuals to experience the least restrictive management of their affairs, or allow them to be supported and develop ways to manage in the future.

For example, an individual may be able to manage weekly expenses, but not to manage a large lump sum or investment portfolio. A recent study of mental health tribunals in Australia<sup>4</sup> provided a case study of a hearing in which the Mental Health Review Tribunal (MHRT) was reluctant to appoint the Protective Commissioner to protect a patient's financial assets, which included a large lump-sum payment. The MHRT did not think it had the power to limit the authority of the Protective Commissioner to manage just the lump sum. There were no concerns about the consumer managing her day-to-day finances. If the Protective Commissioner was required to provide assistance using the 'least restrictive option', there should be the option of some decisions being left to the individual in their care.

Section 44 of the *NSW Trustee and Guardian Act 2009* (NSW) provides that the MHRT must, if it determines that a person is 'not capable of managing his or her own affairs, order that the estate of the person be subject to management under this Act'.<sup>5</sup> This provision is all encompassing in its language and provides no mechanism for the MHRT to make an order limited to some aspects of the person's affairs.

While the *NSW Trustee and Guardian Act 2009* (NSW) appears to envisage a situation where only part of a person's estate may be subject to a management order or the manager may give written authorisation to

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<sup>4</sup> Terry Carney, David Tait and Fleur Beaupert, 'Pushing the Boundaries: realising rights through mental health tribunal processes' (2008) 30 *Sydney Law Review* 329.

<sup>5</sup> *NSW Trustee and Guardian Act 2009* (NSW) s 44.

the person<sup>6</sup> to manage some part of their own estate<sup>6</sup>, it is not clear that such limited orders are able to be made by the MHRT, for example.

Unlike the *Guardianship Act 1987* (NSW)<sup>7</sup>, the *NSW Trustee and Guardian Act 2009* (NSW) does not set out principles to guide the operation of the Act or those authorised under the Act.

The general principles in the *Guardianship Act 1987* (NSW) relevantly include the following:

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

PIAC supports changes to the legislation that reflect these principles and that would:

- presume capacity for all adults, specifying presumption in relation to persons with impairment and disability;
- ensure decisions are based on the least possible interference with the autonomy of the person;
- direct the court or tribunal to determine decisions in respect to a specific issue or subject matter;
- allow orders that provide support or control for part of an estate or affairs.

## Appropriate controls over estate managers

Whatever arrangements are made for substitute or supported decision-making, an independent authority should be in place to oversee arrangements and to identify and take action on abuse or neglect.

Incentives are needed to encourage competent management of the estate. Introducing financial incentives could improve the performance of managers. The estate manager (public or private) should be responsible for any costs incurred by neglect or carelessness. For example, where penalties or interest are charged for late payments, these should be borne by the estate manager's office and not the individual subject to the orders.

PIAC supports the introduction of an independent authority to oversee and review the work of guardians and the Protective Commissioner to investigate abuse or fraud, to ensure that there is no conflict of interest and to establish incentives for improved management performance.

## Response to specific amendments

The Terms of Reference refer to specific amendments suggested by the NSW Attorney General. PIAC submits the following general comments in relation to the questions.

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<sup>6</sup> *NSW Trustee and Guardian Act 2009* (NSW) s 71.

<sup>7</sup> *Guardianship Act 1987* (NSW) s 4.

The proposed amendments should not be considered in isolation from the outcomes of this Inquiry. That is, the Standing Committee on Social Issues may recommend more extensive changes that would provide greater protection and access to decision-making processes than the following amendments:

- (i) Amend the *NSW Trustee and Guardian Act 2009* (NSW) to allow the relevant court or tribunal to exclude parts of an estate from financial management.
- (ii) Amend the *NSW Trustee and Guardian Act 2009* (NSW) to allow the Supreme Court or the Mental Health Review Tribunal (MHRT) to vary or revoke and order, on the application of a person who, in the opinion of the Supreme Court or the MHRT, has a genuine concern for the welfare of the protected person.
- (iii) Amend the *NSW Trustee and Guardian Act 2009* (NSW) to allow the MHRT to appoint a private manager or guardian.<sup>8</sup>

## General comments

Courts and tribunals should have greater flexibility in deciding what areas of a person's affairs require a substitute decision-maker, and when and how the person will require support in order to manage their affairs. Support should be available and provided in a form that is suitable to the individual's circumstances and abilities.

In the example provided above<sup>9</sup>, the individual had the intellectual capacity to manage her day-to-day affairs, but due to mental illness could not manage a large, lump sum payment. Since the hearing to decide on management of financial affairs was before the MHRT, there was no alternative to appointing the Protective Commissioner.

The MHRT should have the flexibility to appoint a private manager or guardian to provide support to the individual to manage their affairs and limit the matters that can be controlled by a guardian or estate manager.

The matter of seeking a review of an order requires widespread reform. Allowing advocates and family members to initiate the process would go some way in improving the situation, but the major obstacles for review would remain unchanged.

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<sup>8</sup> Letter from John Hatzistergos, NSW Attorney General, to the Chair of the Legislative Council Standing Committee on Social Issues, 30 June 2009, at [http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/eedcc12fc63d6ec7ca2575ec00003769/\\$FILE/Attorney%20General%20letter%20to%20Chair.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/eedcc12fc63d6ec7ca2575ec00003769/$FILE/Attorney%20General%20letter%20to%20Chair.pdf) at 2 September 2009.

<sup>9</sup> See the example above under 'Defining areas of decision-making and management of estates', 3.

# Recommendations

## **Recommendation 1: Guardianship objectives**

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*PIAC recommends that all legislation related to determining capacity, appointing guardians or trustees, and establishing bodies to review those decisions have as its objective: that unless critical circumstances prove the contrary, consumers should be presumed to retain individual agency and the capacity to act in their own best interests. Individuals should, to the extent of their capacity, guide and be involved in all decisions that intimately affect their wellbeing.*

## **Recommendation 2: Reviewing orders**

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*PIAC recommends that relevant legislation should be amended to provide for:*

- a) regular reviews of orders that can result in an order being revoked permanently or for a period of time, or for changes in management of the estate or substitute decision-making;*
- b) an advocate for the person under the order being empowered to seek a review of the order;*
- c) legal support to be available to the person under the order;*
- d) the advocate or the person under the order with the right to seek a review without requiring the support of the estate manager or substitute decision-maker (private or public).*

## **Recommendation 3: Limiting substitute decision making**

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*PIAC recommends that the relevant legislation be amended to include the following principles.*

- a) The freedom of decision and freedom of action of individuals who are or may become the subject of orders should be restricted as little as possible.*
- b) The views of individuals who are the subject of orders in relation to the exercise of power under those orders should be taken into consideration and be given as much weight as possible.*
- c) Individuals who are or may become the subject of orders should be encouraged and supported, as far as possible, to be self-reliant in matters relating to their person, domestic and financial affairs.*

*PIAC recommends that relevant legislation should be amended to:*

- a) direct the court or tribunal to confine the scope of substitute decision-making decisions to the specific issue or subject matter on which decisions are needed and capacity is lacking;*
- b) give courts and tribunals the power to make orders for supported decision-making arrangements as well as substitute decision-making arrangements.*

## **Recommendation 4: Improved management of estates**

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*PIAC recommends that:*

- a) an independent authority be established to oversee and review the work of estate managers (public and private) to ensure there is no conflict of interest and to investigate and take action on abuse or fraud; and*
- b) relevant legislation be amended to introduce incentives to improve the management of estates, such as managers bearing the costs of losses due to their negligence and removing the monopoly of the Public Trustee and Protective Commissioner.*



***Recommendation 5: Amendments proposed by the NSW Attorney General***

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*PIAC recommends that the Standing Committee on Social Issues should not consider any proposed amendments in isolation from submissions made to the Committee and outcomes of this Inquiry.*