Submission No 15

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

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Submission to the NSW Legislative Council Standing Committee on Social Issues' Inquiry into Substitute Decision-making for People Lacking Capacity

Background

1. I write this submission following a long history working as a substitute-decision maker. I worked for approximately 14 years at the former Office of the Protective Commissioner and Public Guardian. I was a Regional Manager in the Office of the Public Guardian between 1994 and 1999. I then held various positions in the Office of the Protective Commissioner. During the last six years I was the Deputy Protective Commissioner & Director Client Services, a position which under the *Guardianship Act 1987*, as enacted then, was also the Deputy Public Guardian. I completed my last eight months there acting as the Protective Commissioner & Public Guardian, following Mr Ken Gabb's resignation. I left the office and the NSW public sector in July 2007.

2. I make these comments cognisant and supportive of the Principles and Application of Principles of the *Disability Services Act 1993*[1], the general principles of the *Guardianship Act 1983*[2], the general principles of the *NSW Trustee and Guardianship Act 2009*[3] and the United Nations' *Convention on the Rights of People with Disabilities*[4].

3. I make these comments also very conscious of the fact that the need for substitute decision making will increase over time particularly as the number of people with dementia increases. In my view the current system – health and community services, as well as guardianship and financial management services, will be unable to cope with the demand unless are more a coherent approach to substitute decision making is not developed.

4. Such an approach will require an emphasis on planning ahead through the execution of enduring guardianship instruments and enduring powers of attorney, the introduction of statutory advanced care directives and plans, greater efforts to reduce the need for people to make applications and in helping them resolve disputes; and the pursuit of greater flexibility particularly in options relating the appointment of managers of estates.

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[1] Schedule 1

[2] Section 4

[3] Section 39

[4] See: http://www.un.org/disabilities/default.asp?navid=12&pid=150. I note in particular Article 3 General Principles.

5. Greater one on one individualised support, training in decision making and risk assessment and simply time, may allow some people who have decision making disabilities to participate more fully in decisions about their lives. If that was possible it would, in my view, reduce the need for guardianship and financial management orders to be made and reduce the ever increasing work on the relevant courts and tribunals, and by doing so, the Office of the Public Guardian and NSW Trustee and Guardian.

6. Great work is done by service providers in supporting people to make their own decisions, and in helping family and friends make decisions for them informally, without the need for an order. Sadly, funding constraints often reduce the ability of service providers to the needed support people with decision making disabilities to help them to learn the skills of good decision making.

7. In addition sometimes the decisions to be made require a more formal legal authority or document. But even when a guardian or financial manager is appointed, by order or by an instrument signed by the person prior to their loss of capacity, providing more intensive support to some people may still allow them to make decisions, in a supportive environment, which gives effect to their real wishes and desires.

8. Case manager numbers are limited – as is their time, and they are already overstretched. Even the recruitment and use of private citizens on a voluntary basis to do this work (another option) would require training, supervision and co-ordination.

9. A lack of funding and programs will add to the pressures to make more and more orders and remove people's rights and opportunities to make decisions about their lives. But as the likelihood of new funding to undertake such training and provide such support is low, in the face of other pressures on the service system for people with disabilities and mental illness, whatever changes substitute decision making system we have can still have a significant impact.

Management of Estates

10. In 2003, Mr Gabb and I worked together on a review of the *Protected Estates Act 1983*, now repealed and replaced by the *NSW Trustee and Guardianship Act 2009* (the new Act). That review was done in conjunction with OPC's many partner agencies in the disability sector. The recommendations for amendments to the *Protected Estates Act 1983* which were submitted to the Attorney General's Department of NSW but had not been taken up prior to both Mr Gabb and I leaving OPC. It is pleasing to note many of the recommendations we made, and supported

by many organisations the disability sector we consulted, have now made it into the new Act.

11. The most fundamental principle behind the changes we suggested in relation to the management of estates was to provide as much flexibility and consistency as possible. In that way no matter in which court or tribunal the management of a person's estate was being considered, and orders made relating to the management of their estate, the same principles were applied, the same presumption of capacity unless proven otherwise presumed and, wherever possible and appropriate, someone other than the statutory financial manager in NSW appointed to manage the estate.

12. Our review clearly identified that there were significant anomalies between the various forums in which a financial management order could be made. The most flexible was the Guardianship Tribunal. However, there was some flexibility in the Supreme Court, but the Mental Health Review Tribunal or a magistrate sitting in a psychiatric facility had very little. These anomalies had developed over time, restricted by options provided for in statute, not through any clear decision to make them different, It reflected the fact that the development of the guardianship jurisdiction (by which refer to guardianship of the person and of the estate) particularly through the *Guardianship Act 1987* was more regularly updated, but the *Protected Estates Act 1983* was not developed consistently in parallel.

13. That is a problem which needs to be overcome as there is still opportunity for the *Guardianship Act 1987* and the new Act to suffer the same fate. As I mentioned later there may be utility in developing a substitute decision making statute which combines the provisions of guardianship of the person and guardianship of the estate to ensure the law develops consistently over time.

14. I welcome the Inquiry as a way of addressing those anomalies.

15. I note the Attorney General's letter referring the issue the subject of this inquiry to the committee and specific questions he raises which might be considered by the Committee. They are very important issues which flow directly from the principles mentioned above. I address those issues below.

Amend the new Act to allow the exclusion of parts of an estate from financial management

16. As noted in the Attorney's letter there is a provision in the *Guardianship Act 1987*, which has been there for many years, which allows for the exclusion of parts of an estate by the Guardianship Tribunal. Originally such an exclusion could only occur after the Guardianship Tribunal sought the view of the Protective Commissioner. That requirement, however, has now been removed in the new Act.

17. It must be noted that the Protective Commissioner (and any person managing an estate) held the power to return the management of part of an estate to a protected person under certain circumstances (see section 23A *Protected Estates Act 1983*; replicated in section 71 of the new Act). Sometimes the retention of the management of part of an estate such as a pension or benefit, means a world of difference to someone who is struggling to retain their independence, sense of self and dignity.

18. Similarly, it has also assisted in assessing the ability of a protected person to manage their affairs and to gain evidence which might be used in an application to have the protected estates order revoked.

19. The imposition of a financial management order is a major decision with significant impacts on the protected person and often those around them. It removes someone's right to make decisions about their life – without control over money a person is able to do little independently. Whilst financial management is often required to protect people and their estates from their own decision making, and sometimes others', we should provide flexibility in the way orders are made. That is not only to provide certainty to those providing goods and services, but most importantly to promote a person's independence and participation in decision making about their lives. Excluding part of an estate can mean the difference between hope and despair - particularly for those who have been independent all their lives and would otherwise now have no control; or those who have struggled for years against a controlling and de-personalising service system.

20. I strongly support such a provision.

Amend the new Act to allow the Supreme Court and Mental Health Review Tribunal (MHRT) to vary or revoke an order in certain circumstances

21. There is a provision in the Guardianship Act which allows the Guardianship Tribunal to do this (see section 25P of the *Guardianship Act 1983*). Whilst I understand it is not used frequently, this provision plays

an important part in providing flexibility to the substitute decision making system, and allows for a tailoring of financial management to a person's specific circumstances at a specific time.

Revocation

22. A person may not be able to manage their affairs but still have a small estate to manage, perhaps a pension. Management of their estate under a financial management order may be causing more harm to them e.g. psychological distress, than good. When balancing the costs and benefits of the presence of an order, and the risks, if any, associated with not having one in place, it would be sometimes preferable, for the person's welfare, to revoke it.

23. To not have this provision available to all relevant courts and Tribunals provides different possible outcomes for people, simply because of their current location or disability. That anomaly should not be allowed to stand.

Varying

24. Similarly, all courts and tribunals before which issues of the management of an estate can be considered should have the maximum flexibility possible to respond to a person's needs. The ability to vary an order is essential in order to be able to do that. A one size fits all style of managing an estate is no longer appropriate, and has not been for a long time.

25. I strongly support such a provision as raised by the Attorney.

Amend the new Act to allow the MHRT to appoint a private manager

26. Carers and family members play an important role in the lives of people with a mental illness. They know the person well and are a great support to them in the community and in hospital; when they are functioning well and when they are acutely ill. It is consistent with an approach of intruding into a person's life as little as possible if, when a person requires a financial manager, to appoint a person who the person knows and trusts.

27. The Supreme Court and the Guardianship Tribunal are able to make orders appointing private citizens as managers of an estate, under the supervision and direction of the NSW Trustee and Guardian. They have been able to do so for many, many years. Many private citizens currently do a wonderful job in managing the estates of family members and friends, and people coming before the MHRT should have this option

available to them as well. There is no good reason, in my view, why this level of flexibility should not be provided to people with a mental illness.

28. If that position is accepted there are procedural and costs implications. A court or tribunal when considering who is the best person to appoint as the manager of an estate is required to inquire about the fitness and suitability of the person to undertake the role. That means there needs to be an enquiry about the proposed private manager. If the NSW Trustee and Guardian is the only option as manager of an estate, it is much easier. A statutory officer's credentials are not questioned, they are a creature of statute and their appointment requires not further scrutiny. Financial implications should not, however, prevent the option of a private manager being appointed being available to the MHRT.

29. Simplicity is undoubtedly one reason why the appointment of the Protective Commissioner as the only option made available. However, simplicity should not stand in the way of a more individualised and flexible approach to these matters.

30. I must note that whilst the MHRT being able to appoint private managers is a very important development it would have a downstream impact on the NSW Trustee and Guardian, who is required to authorise and direct those managers. It may prevent the NSW Trustee and Guardian from being appointed to directly manage an estate but may place concurrent pressure on it by requiring the resources of the NSW Trustee and Guardian to be shifted to private management related tasks.

31. The question then becomes whether resources are redirected from the NSW Guardian and Trustee's direct management of estates to private management activities, or new funds are provided for this increase in work.

32. I strongly support such a provision as raised by the Attorney.

Appointment of a statutory officer as a last resort

33. I note the new Act does not require the NSW Trustee and Guardian to be appointed as a last resort as the manager of an estate, as is required in relation to the appointment of the Public Guardian as someone's guardian (see section 15 of the *Guardianship Act 1987*). I believe this needs to be considered by the committee.

34. With the growth in financial literacy within the community over the last decade or so, and the ready availability of professional financial advice from accountants and financial planners, as well as regulated financial

products, the ability of private citizens to undertake the responsibilities of a financial manager have been greatly enhanced.

35. Whilst it would be counter-productive to attempt to fetter a court or tribunal's ability to appoint the best possible manager of an estate, a provision such as that found in the *Guardianship Act 1987* in relation to guardians may help emphasise the need to, wherever possible, appoint a manager other than the NSW Guardian and Trustee.

Guardianship

36. For all intents and purposes all guardianship orders in NSW, for people 16 years of age and older, are made these days by the Guardianship Tribunal. A majority of orders being made appoint the Public Guardian, an outcome, which, as noted above, is the last resort. It is, in my view a much simpler process than that in place for the management of estates. That is a good thing.

Community Guardians

37. Before I left the Office of the Protective Commissioner & Public Guardian, the Office of the Public Guardian was considering introducing a new program called "community guardians". That concept is already in practice in other jurisdictions in Australia[5].

38. The program in Western Australia has been described as:

> *The Community Guardianship Program provides the opportunity for community members to take an active part in the lives of people with decision making disabilities. The Program aims to reduce the isolation experienced by vulnerable people with decision-making disabilities who do not have anyone else in their lives willing and able to take on a decision-making role for them.*[6]

39. As I understand it the community guardians program being pursued in NSW is for the statutory guardian to recruit private citizens to undertake substitute decision making for people for whom the Public Guardian is appointed guardian, and delegate the Public Guardian's decision making functions. That is the model used in Victoria. The Western Australian model sees the community guardian appointed by the State Administrative Tribunal with assistance from the Public Advocate.

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[5] Western Australia and Victoria. See http://www.publicadvocate.wa.gov.au/_files/Community_Guardianship_AGAC_Paper09.pdf and http://www.publicadvocate.vic.gov.au/Services/Community-Guardians.html

[6] Whisson & Jones (2009). *Western Australia's Community Guardianship Program.*

40. This type of development is a creative response to the fact of ever increasing numbers of people coming under public guardianship and static or reducing resources. I fully support this type of development if it means that people who are under guardianship are able to receive more consistent and regular contact and the highest possible quality of substitute decisions. The question is what model is used – community guardians selected, appointed and delegated by the Public Guardian or appointed by the Guardianship Tribunal with their own decision making functions?

Delegation by the Public Guardian

41. I note that Section 77 of the Guardianship Act was recently amended to broaden the Public Guardian's ability to delegate his decision making authorities. Prior to 1 July 2009 the provision read:

> **77 The Public Guardian**
>
> (1) There shall be a Public Guardian and a Deputy Public Guardian.
>
> (2) The Protective Commissioner shall be the Public Guardian and the Deputy Protective Commissioner shall be the Deputy Public Guardian.
>
> (3) The Public Guardian has the functions conferred or imposed on the Public Guardian by or under this or any other Act or law.
>
> (4) During any illness or absence of the Public Guardian or during any vacancy in the office of the Public Guardian, the Deputy Public Guardian has the functions of the Public Guardian.
>
> (5) Any function exercised by the Deputy Public Guardian while acting pursuant to subsection (4) shall be deemed to have been exercised by the Public Guardian.
>
> (6) No person shall be concerned to inquire whether or not any occasion has arisen requiring or authorising the Deputy Public Guardian to exercise the functions of the Public Guardian.
>
> (7) The members of the staff of the office of the Protective Commissioner shall be the members of the staff of the office of the Public Guardian.

42. On 1 July 2009 it changed to:

> **77 Public Guardian**
>
> (1) There is to be a Public Guardian.
> (2) The Public Guardian is to be the person holding office as such under Chapter 1A of the *Public Sector Employment and Management Act 2002*.
> (3) The Public Guardian has the functions conferred or imposed on the Public Guardian by or under this or any other law.
> (4) The Public Guardian may delegate to a person, of a class of persons approved by the Minister or prescribed by the regulations, any of the Public Guardian's functions, other than this power of delegation.

43. Whilst most of the changes relate to the changes associated with the introduction of the NSW Trustee and Guardian through the new Act, subsection 77(4) is of note. Previously, the only similar power of delegation to someone external to the Office of the Protective Commissioner & Public Guardian was found in section 78, which remains unchanged, and covered only functions in relation to medical and dental consents in Part 5 of the Guardianship Act:

> **78 Delegation**
>
> (1) The Public Guardian may delegate:
> (a) to any officer employed within the Department, or
> (b) to any other person prescribed by the regulations or belonging to a class of persons prescribed by the regulations,
> the exercise of any of the Public Guardian's functions under Part 5.
> (2) The Public Guardian may delegate to any member of the staff of the office of the Public Guardian the exercise of any of the Public Guardian's functions, other than this power of delegation.

44. I am not aware that this provision has, in recent memory, ever been used.

45. It is arguable that the introduction of subsection 77(4) allows for the introduction of a community guardian program, if the selected model is to allow a class of persons to be delegates of the Public Guardian for any of his functions under the Guardianship Act, not just medical and dental consents made under Part 5 of the Act.

46. This is, by and large, the model used in Victoria. The Public Advocate has managed such a program for many years and there are a significant number of private citizens assisting people with decision making disabilities as a result.

47. The Public Advocate of Western Australia chose another model where the relevant Tribunal appoints the community guardian, identified and trained by the Public Advocate. This model is of more recent origin to the Victorian model, and much, much smaller.

Considerations when appointing guardians

48. I note in particular that when considering who should be appointed a person's guardian the Guardianship Tribunal is required by law to take into account various factors. Section 17 of the Guardianship Act states, in part:

> **17 Guardians**
>
> (1) A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that:

> (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship,
> (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and
> (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.
> ...

49. That provision clearly sets out important issues which the Tribunal must consider when appointing a guardian. However, as things currently stand the model to be used by the Public Guardian is not clear. What the appropriate checks and balances required to ensure the selection, appointment, training and supervision in a proposed community guardians program are not yet specified.

50. I note that if the proposed model is to be as a delegate of the Public Guardian the functions that can be delegated are potentially wide ranging. Whilst the Public Guardian's most usual functions are innocuously termed Medical and Dental Consent, Health Care, Accommodation and Services, the types of decisions that can be made, with appropriate wording of the details of those functions, can be quite significant and of serious consequence.

51. With appropriate authorisation of the Guardianship Tribunal the Public Guardian is able to consent to a person being restrained, to keep them in a place against their wishes and to return them to that place, to medical and dental treatment of the person against their wishes, to decide who has access to the person and ultimately to consent to decisions at the end of someone's life[7].

52. None of these decisions are ones outside of the competence of the Public Guardian or the staff of the Office of the Public Guardian. They undertake their roles, make the relevant substitute decisions and provide the relevant substitute consents sensitively and professionally, often in difficult familial circumstances.

53. However, there is a difference between these decisions and consents being undertaken by those with professional qualifications and experience, who have withstood vetting processes involved in the employment in the public sector and provided appropriate regular professional development and professional supervision; those who are

[7] see *LE and LF v Public Guardian* [2009] NSWADT 78 (9 April 2009)

appointed after a consideration of their fitness and suitability by a court or tribunal process; and those who are chosen by the Public Guardian from a class of persons approved by the Minister or by regulation.

54. Of course it may be that the matters to be delegated to the community guardians are quite straightforward and uncontroversial, as in the Western Australian model. If that is so the level of concern would be less.

55. In making these comments I am not wishing to second guess the Minister's decision making or the robustness of the Public Guardian's selection, appointment, training and supervision process. However, in thinking about this welcome development, I wonder whether there needs to be additional safeguards built in to ensure statutory checks and balances in relation to the community guardian program and to provide for such a program specifically within guardianship legislation?

56. Just as this is a welcome development for guardianship of the person, there may also be some utility in considering it for guardianship of the estate, though possibly with similar safeguards as currently in place for private managers.

Private Guardian Support

57. Some years ago the Office of the Public Guardian developed a new service to support private guardians in their work. This was a very welcome development and through it people who may not have otherwise felt able to take on the role have been able to do so quite successfully. Of course it has also assisted to a limited extent in preventing the appointment of the Public Guardian, which is also a good outcome. The statutory power under which this program operates is section 79 of the Guardianship Act, a very broad power to educate "members of the public" about various issues relating to the practice of guardianship.

58. There is no statutory requirement for this service to be provided and it could be reduced or deleted at any time due to budgetary constraints or reductions.

59. It may be helpful for the committee to consider whether specifically stating the Public Guardian's role in relation to educating, supporting, and possibly specifically assisting or mentoring private guardians and community guardians in relation to their decision making is detailed more specifically.

Alternative Dispute Resolution

60. Section 66 of the Guardianship Act requires conciliation to be attempted before the Tribunal makes a decision. It states:

> **66 Conciliation to be attempted**
>
> (1) The Tribunal shall not make a decision in respect of an application made to it until it has brought, or used its best endeavours to bring, the parties to a settlement.
> (1A) Subsection (1) does not apply in respect of an application if the Tribunal considers that it is not possible, or appropriate, to attempt to bring the parties to a settlement.
> (2) Any meetings conducted or proceedings held in the course of attempting to bring or bringing the parties to a settlement shall not be conducted or held in public.
> (3) Any statement or admission made during the course of a conciliation hearing is not, except with the consent of all the parties, admissible as evidence in proceedings before the Tribunal or in any court.

61. There has been a significant amount of literature in recent years about the utility of alternative dispute resolution (ADR) in relation to legal proceedings. Indeed there are requirements in some jurisdictions that that ADR of various forms is considered, if not attempted, and a certificate provided prior to matters moving to hearing.

62. ADR is not a panacea for all inter-personal conflicts, and indeed that is why we have decisional dispute resolution embodied in courts and tribunals. However, its utility in the substitute decision-making arena, in my view, has never been fully tested in NSW.

63. If one sees everything from pre-application to the person no longer being under guardianship or their estate under management on a continuum, there are various places where ADR may be of assistance, and may avoid the need for orders to be made and/or assist parties to make decisions collaboratively.

64. Whilst not doubting that the Tribunal does indeed use its best endeavours to bring the parties to settlement I sometimes wonder whether the Tribunal itself is best placed to be the sole place where this is formally considered. It may be useful to review the use of ADR in the family law jurisdiction[8], for example, dealing as it does with family dispute resolution, and to introduce measure which may assist disputing parties to resolve their disputes without recourse to the Tribunal or the statutory public guardian or financial manager.

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8 see Parts II, III, IIIA and IV of the *Family Law Act 1975*

65. I acknowledge time pressures and the urgency of certain decision would impact on the ability to undertake ADR in each and every matter. However, there would, in my view, be a large number of cases which have no such pressures and which may benefit from the application of ADR in an attempt to divert matters from the Tribunal and the need for an order to be made.

66. The involvement of a person with a disability provides extra challenges for ADR in this area. That said, a person's ability to participate should not be rejected on the basis of their disability and assumptions about whether they could or could not participate meaningfully if they had appropriate support.

67. Aside from that conflict which leads an application to be made regularly involves family members other than the person the subject of the application. These may be matters which could benefit from more concentrated effort from specialised ADR practitioners.

Palliative care

68. In a recent decision of the Administrative Decisions Tribunal of NSW, the president, O'Connor DCJ clarified that it was within the Public Guardian's power to consent to a "palliative care plan which may in certain circumstances have the consequence that death will ensue"[9]. That position was reached after a significant period of uncertainty for medical practitioners and others created by an earlier decision of the ADT[10].

69. I believe it would be beneficial for the committee to consider whether there is a need to provide a statutory authority enabling a guardian to consent to a palliative care plan, developed by a specialist physician, components of which may as a consequence lead to someone's death. Such a development would provide a much stronger foundation from which everyone can work, with appropriate protections for all concerned.

70. This in no way should be seen as promoting euthanasia. It is arguing for a clearer and readily accessible statement of the law.

Ulysees Agreements

71. Flexibility and self determination must be an important feature of any substitute decision-making system. One way that has been pursued particularly in North America, has been through Ulysees Agreements.

[9] see *LE and LF v Public Guardian* [2009] NSWADT 78 (9 April 2009)

[10] See *WK v Public Guardian* [2006] NSWADT 93 (30 March 2006)

The Representation Resource Centre in British Columbia, Canada, describes Ulysees Agreements as:

> *a type of Representation Agreement (legal document) used by adults with a mental illness who want to plan for times when they need assistance with decision-making. With the help of friends, family members and other trusted people such as health professionals, the adult plans what needs to be taken care of during times of illness. This plan is put in writing in the form of a Representation Agreement*[11].

72. The Ulysees Agreement enshrines the person's own plan for what should happen in relation to important aspects of their lives should they become unable to make decisions.

73. This approach provides assistance to the person and engages them in the decision making around planning for what to do in advance. It is particularly useful for people with an episodic mental illness, who may have long periods when they can make decisions without any assistance. The person chooses the actions to be taken; they choose the people they trust to institute those actions; they identify how the agreement is triggered; and how the decision is made about when it is no longer needed. It can be given legal effect, as it has been in British Columbia, Canada[12]. One commentator notes "the law allows representation agreements that delegate a wide range of decision-making powers, from small matters only to life and death. The powers can be split up between one or more persons and even, in the case of non-health or personal care powers, to a bank or trust company"[13].

Advanced Care Directives and Planning

74. A consideration of developments in relation to substitute decision making should also lead to a consideration of ways in which people can plan ahead. As I understand it advanced care directives are able to be executed by individuals in NSW, but have limited legal effect. They are, however, available to people in other Australian jurisdictions[14].

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[11] See: http://www.kamloops.cmha.bc.ca/files/kamloops/Ulysses%20Agreements%20_2_.pdf and www.rarc.ca

[12] Section 9, *Representation Agreement Act RSBC 1996* (British Columbia); see http://www.mediator-roster.bc.ca/public/pdf/Ulysses_Agreements.pdf

[13] http://www.duhaime.org/LegalResources/ElderLawWillsTrustsEstates/LawArticle-146/Representation-Agreements-in-British-Columbia.aspx

[14] See *Medical Treatment Act 1988* (Vic); http://www.nwmdgp.org.au/pages/after_hours/GPRAC-CIS-01.html; http://www.amavic.com.au/page/About_Us/AMA_Agenda/Advance_care_planning/

75. The enactment of provisions recognising advanced care directives and plans may reduce the need for medical practitioners and others to seek a consent from the Guardianship Tribunal or seek an order appointing a guardian to consent to situations as described above. Properly executed and regularly updated such a development would support the integrity of the person in making decisions about what happens to them.

Terminology

76. There has been discussion for some time about the standardisation of terminology for referring to someone subject of a guardianship or financial management order. I believe this review provides an opportunity to address that issue and introduce the term "represented person".

Public Advocate

77. During my time at the Office of the Public Guardian there was significant discussion about the need for a statutory advocate in NSW. At that time, the mid to late 1990s, there was a Public Advocate, or equivalent, in a number of other jurisdictions in Australia. Since then more have appeared.

78. A significant portion of the work of the Office of the Public Guardian is advocating for its clients - arguing against the wrong application of service access criteria; getting service options developed; and arguing for access by some of the most vulnerable members of our community to receive services, often from government agencies.

79. The Office of the Public Guardian has had a great deal of success in achieving positive outcomes for its clients because of its efforts in individual advocacy. Because of this success, I believe, the Public Guardian has been appointed some people's guardian – to help fix problems with the service system.

80. One of the things that it has tried to do over the years has been to raise specific issues on a system-wide basis. However, its efforts have been hampered by ever increasing numbers of people appointed and the priority in making decisions for them.

81. I understand the Public Guardian recently restructured the office to provide more effectively for a systemic advocacy function, that is a welcome move, but without proper resourcing or authority its achievements will be limited.

82. The introduction of a Public Advocate, or an explicit statutory public advocacy authority for the Public Guardian, may assist in diverting people from the guardianship and financial management system. It could ensure service providers are fulfilling their responsibilities in relation to service access, participate in developing service models and prevent applications for guardianship or financial management orders being made because of problems in the service system and its responsiveness to people's needs.

83. Successful advocacy before an application is made will not only save money in the form of tribunal costs and ongoing costs of the Office of the Public Guardian and NSW Guardian and Trustee, but would preserve people's integrity and their decision making independence.

Two Ministers

84. One of the anomalies of the substitute decision making system at present is that there are two Ministers involved. The Minister for the purposes of the *Guardianship Act 1987* is the Minister for Disability Services and that for the *NSW Trustee and Guardian Act 2009* is the Attorney General. The Public Guardian is a position created by and exercises their functions under the *Guardianship Act 1987*, but is administratively part of the NSW Trustee and Guardian and reports ultimately to the Director-General of the Department of Justice and Attorney General and the Attorney General. The committee may wish to consider whether that separation is desirable and/or still required.

I trust these comments are helpful to the committee.

Mark Orr
26 August 2009