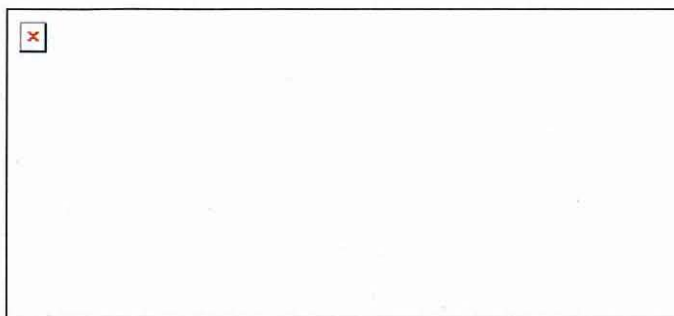


## INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

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The Director  
Standing Committee on Social Issues  
NSW Parliament House  
Macquarie Street  
Sydney NSW 2000

Submitted by email: [socialissues@parliament.nsw.gov.au](mailto:socialissues@parliament.nsw.gov.au)

2 October 2009

Dear Sir/ Madam.

**Re: Substitute decision-making for people lacking capacity**

The New South Wales Disability Discrimination Legal Centre (DDLC) welcomes the opportunity to contribute to the Inquiry into substitute decision-making for people lacking legal capacity.

The NSW DDLC was set up in 1994 to help people with disability to use disability discrimination laws. Our role is to provide accurate and easy to comprehend advice to people with disability in NSW who want to make a complaint of disability discrimination. We give free legal advice, run disability discrimination cases and represent people with cases of disability discrimination.

While NSW guardianship law is not an area directly within our expertise, NSW DDLC has expertise in the international law relating to guardianship. In particular, NSW DDLC (representing the National Association of Community Legal Centres) was heavily involved in the negotiations leading up to the completion of the *Convention on the Rights of Persons with Disabilities* and its subsequent ratification in Australia.

Australia ratified the *Convention on the Rights of Persons with Disabilities* (CRPD) on July 17, 2009. Any reform to NSW guardianship legislation should reflect the safeguards set out in CRPD, particularly Article 5 which provides for equality and non-discrimination and Article 12 which provides for equal recognition before the law. Paragraph 4 of Article 12 outlines mechanisms relating to the exercise of legal capacity. This includes to:

‘respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the

shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.'

Article 12 mandates that Capacity should be viewed as a continuum, with independent decision-making at one end of the continuum and substituted decision making at the other.

In every case, supported decision-making should be explored at first instance so as to assist people exercise their capacity. At the other end of the continuum, substitute decision-making, is available as a measure of last resort and any substitute decision making arrangements should be in place for the shortest time possible.

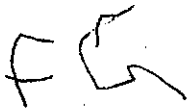
Currently, it appears to us that NSW Guardianship law is focused on substituted decision making and does not adequately facilitate or recognise supported decision making arrangements.

So as to capitalise on this opportunity to review guardianship laws in NSW, NSW DDLC recommends that the Committee consider the following terms of reference for the from the Victorian Law Reform Commission's review of the *Guardianship and Administration Act 1986* (Vic):

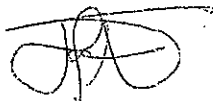
- The validity and efficacy of informal decision-making for an adult with impaired capacity
- The need to balance the protection of the interests of an adult with impaired capacity by a guardian or an administrator with the person's exercise and enjoyment of the human rights, such as the right to freedom of choice, association and movement, including consideration of whether the Act strikes the right balance between facilitating action in the best interests of an adult with impaired capacity and the person's rights as expressed in the United Nations Convention.

It may be that a further and more comprehensive review is needed in order to do this. Noting the brief nature of this submission, NSW DDLC also endorses the submissions made by People with Disability Australia, the Intellectual Disability Legal Centre NSW and the Disability Studies and Research Centre.

Thank you for the opportunity to contribute to what is an important inquiry.



Fiona Given,  
Policy Officer



Joanna Shulman,  
Principal Solicitor



Rosemary Kayess,  
Chairperson