Submission No 3

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

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The Director
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The Intellectual Disability Rights Service's submission to the Standing Committee on Social Issues' inquiry into substitute decision-making for people lacking capacity

Thank you for the opportunity to make a submission to the Standing Committee on Social Issues' inquiry into substitute decision-making for people lacking capacity.

Terms of reference

1. That the Standing Committee on Social Issues inquire into and report on the provisions for substitute decision-making for people lacking capacity in New South Wales, and in particular:

    a) Whether any NSW legislation requires amendment to make better provision for:

        i. The management of estates of people incapable of managing their affairs; and

        ii. The guardianship of people who have disabilities.

2. That the committee report by February 2010.

Introduction

The Intellectual Disability Rights Service's (**IDRS's**) submission focuses on the provisions and operation of the *Guardianship Act 1987* (NSW) and the *NSW Trustee and Guardian Act 2009* (NSW). These are the statutory instruments that most impact upon IDRS's clients' autonomy. Given how recent the *NSW Trustee and Guardian Act 2009* (NSW) is, it is not yet clear to IDRS whether the Act will operate to improve service delivery to IDRS' client-base. Certainly, as is expressed below, IDRS has grave concerns that service delivery by the NSW Trustee and Guardian will be even further stretched and poorer than before and there will be more frustration and complaints from clients.

About IDRS

IDRS is a community legal centre that provides legal services to persons with intellectual disability throughout New South Wales. IDRS's services include the provision of telephone legal advice and legal representation in select matters. IDRS engages in policy and law reform work and community legal education with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network (**CJSN**) which supports people with intellectual disability when they come into contact with the criminal justice system, particularly at the police station and at court.

Much of our work involves promoting the human rights of persons with intellectual disability so that they can make their own life choices and live independently and with dignity, and to have equitable access to justice. IDRS hopes that a human rights perspective will govern the NSW government's inquiry into substitute decision-making for people lacking capacity.

IDRS's clients include people with intellectual disability, acquired brain injury and developmental disabilities (including, for example, Aspergers' Syndrome and Autistic Spectrum Disorder).

Most of our clients live independently and make most, if not all, decisions about their lives for themselves. *Some* clients require *some* assistance with *some* decisions about their lives on *some* occasions and often assistance is provided by way of an informal arrangement between the person and trusted family members and/or friends who have a genuine interest in the welfare of the person and who have an ongoing relationship with them. Other clients are under more restrictive formal arrangements. These include:

- Persons subject to guardianship orders made by the Guardianship Tribunal of NSW
- Persons subject to financial management orders made by the Guardianship Tribunal of NSW
- Persons subject to orders managing their estate (or part thereof) made by the Supreme Court of NSW (exercising its *parens patriae* jurisdiction)
- Persons who are involuntary patients (as that term is defined in the *Mental Health Act 2007* (NSW))

IDRS's submission will focus on the experience of persons subject to formal guardianship or financial management orders made by the Guardianship Tribunal of NSW.

IDRS's philosophy on decision-making

People with intellectual disability are autonomous and independent human beings with wishes, hopes, likes and dislikes. Just because a person has an intellectual disability does not mean they can't make decisions for themselves.

There is no presumption that a person with intellectual disability does not have legal capacity to make decisions about their lives or to look after their own affairs. *Some*times *some* people with intellectual disability need help and support, on an informal or formal basis, to make *some* decisions in their lives – for example, about where they will live or about investing money for the future.

Decision-making needs to be regarded as a spectrum, with complete autonomy on one end (the default) and, at the other, substitute decision-making. In between is a scale of informal supported decision-making that varies from time to time and from decision to decision.

Supported and substitute decision-making arrangements do not require a formal guardian appointed by order of the Guardianship Tribunal of NSW or the Supreme Court of NSW. They can operate informally.

IDRS supports the principles enunciated in section 4 of the *Guardianship Act 1987* (NSW)[1] but considers they need refinement and expansion modelled on the general principles in the *Guardianship and Administration Act 2000* (Qld). Section 4 presently reads:

> "It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:
>
> (a) the welfare and interests of such persons should be given paramount consideration,
>
> (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
>
> (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
>
> (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
>
> (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
>
> (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
>
> (g) such persons should be protected from neglect, abuse and exploitation,
>
> (h) the community should be encouraged to apply and promote these principles."

IDRS submits that the word "must" should replace the word "should" in each of the sub-paragraphs in section 4.

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[1] It is noted that these general principles are mirrored verbatim in section 39 of the *NSW Trustee and Guardian Act 2009* (NSW).

IDRS also submits that the New South Wales legislation needs to incorporate the more expansive, comprehensive and human-rights centred general principles in Schedule 1, Part 1 to the *Guardianship and Administration Act 2000* (Qld). For example:

(a) An adult is presumed to have capacity for a matter;

(b) All persons have the same basic human rights, regardless of a particular person's capacity;

(c) Personal decision-making is fundamental to a person exercising and enjoying their basic human rights, and

(d) A person's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

The general principles apply to the Guardianship Tribunal of NSW, NSW Trustee and Guardian and private guardians. In IDRS' view and reflected by the experiences of many of its clients who were under the financial management of the Office of the Protective Commissioner (now, subsumed by the NSW Trustee and Guardian) was funded so poorly that it actually *cannot* comply with these principles. If the New South Wales government is serious about reforming and improving guardianship and financial management in New South Wales, legislative changes must be supported by improved funding to the NSW Trustee and Guardian so they can properly fulfil their statutory mandate.

IDRS considers the principles in section 4 of the *Guardianship Act 1987* (NSW)[2] as just the starting point and that in several respects they require qualification or emphasis. IDRS also proffers the following additional principles and obligations as fundamental to laws and arrangements that restrict a person's autonomy by supported or substitute decision-making:

- the wishes, opinions and choices of the person must <u>always</u> be sought and considered;
- the privacy, cultural diversity and integrity of the person must <u>always</u> be respected;
- the least restrictive and intrusive intervention into the person's life;
- the ability to make decisions ('legal capacity') is a fluid concept that may vary from time to time and from decision to decision – it should not be regarded as a static, unchanging and one-time only classification;
- diminished decision-making ability should not be confused with difficulties or impairment in communication – people should be provided adjustments and alternative modes of communication to express themselves;

[2] And section 39 of the *NSW Trustee and Guardian Act 2009* (NSW).

- substitute decision-making as an absolute last resort;
- records[3] must always be kept about supported and substitute decision-making arrangements (informal and formal) and decisions made to ensure processes are transparent, subject to independent review and (if necessary) to appellate review by the courts;
- informal arrangements and support from family members, carers or friends who have close and continuing relationships with the person are preferable to formal orders of guardianship and financial management, and
- support provided to the person to make decisions must always be in the best interests and welfare of the person.

UN Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities (**CRPD**) and its Optional Protocol were adopted at the United Nations Headquarters in New York on 13 December 2006, and entered into force internationally on 3 May 2008. It is IDRS's submission that the New South Wales government should acknowledge the practical and symbolic import of this international convention by ensuring all laws in New South Wales meet the principles, intent and spirit of the CRPD.

Australia ratified the CRPD on 17 July 2008, making it one of the first Western countries to do so. On 30 July 2009 Australia acceded to the Optional Protocol on the CRPD providing a mechanism for Australians to make complaints to the United Nations Disabilities Committee for breaches of the CRPD (where domestic remedies have been exhausted). By ratifying the CRPD and adopting the Optional Protocol, Australia has signalled its intent to join other countries around the world in a global effort to promote the equal and active participation of all people with disability in society.

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all people with disability, and to promote respect for their inherent dignity. It seeks to redress the physical and social barriers, discrimination and disadvantage confronting people with disability throughout the world and to promote their full participation and recognition in civil, political, economic, social and cultural life.

Some of the CRPD's Articles that bear on the fundamental principles of autonomy, personal decision-making and self-determination include:

- Non-discrimination (Art 4)
- Equal protection before the law (Art 5)
- The right to equal recognition before the law (Art 12)

[3] Section 49 of the *Guardianship and Administration Act 2000* (Qld) contains an explicit duty to keep records (breach of which can attract a fine of up to 100 penalty units)

- Access to justice on an equal basis with others (Art 13)
- Freedom from exploitation, violence and abuse (Art 16)
- Protecting the integrity of the person (Art 17)
- Freedom of expression and opinion, and access to information (Art 21)

In the interpretation part of the CRPD Australia recognizes that people with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the CRPD allows for supported decision-making arrangements and substitute decision-making on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards (including review before a court or tribunal).

Australia also recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others and declares its understanding that the CRPD allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, only where such treatment is necessary to protect the health and welfare of a person or persons, as a last resort and subject to safeguards (including review before a court or tribunal).

Australia recognizes the rights of persons with disability to liberty of movement and to freedom to choose their residence, on an equal basis with others.

It is incumbent upon the New South Wales government, as a leading member of the Commonwealth, to uphold and implement the principles, intent and spirit of the CRPD in its social policy, allocation of resources and legislation. This is especially so in regards to any legislation that restricts a person's liberty, freedom of choice and expression as do the *Guardianship Act 1987* (NSW) and the *NSW Trustee and Guardian Act 2009* (NSW).

Duties and obligations on guardians and financial managers

IDRS submits that the *Guardianship Act 1987* (NSW) should be amended to have express duties and obligations on guardians and financial managers, breach of which can lead to revocation of the guardian or financial manager's appointment and fines being incurred. IDRS suggests the following duties[4] be added:

- A duty to act honestly and with reasonable diligence
- A duty to act as directed by the terms of the order
- A duty to avoid conflict transaction

[4] The *Guardianship and Administration Act 2000* (Qld) makes these three duties explicit (sections 35, 36 and 37) as the key responsibilities of guardians and financial managers, breaches of some of which attract criminal penalties (fines of up to 200 penalty units) and the revocation of appointment.

Section 59 of the *Guardianship and Administration Act 2000* (Qld) requires a guardian or administrator (financial manager) to pay compensation to a protected person for a failure to comply with that Act.

IDRS supports the inclusion of these same duties (and penalties for their breach) and a provision for compensation in New South Wales legislation. This will markedly improve accountability and service provision.

Problems experienced by IDRS clients under guardianship and financial management

IDRS's solicitors engage in approximately 20 formal advice sessions per week and have carriage of up to 40 ongoing cases at any one time. Between 1 July 2008 and 30 June 2009 the percentage of advice sessions regarding guardianship and/or financial management was 17% - this is approximately four advice sessions per week. A similar proportion of IDRS's ongoing casework involved guardianship and financial management matters. Based on the data collected from this work, IDRS has identified a number of systemic problems experienced by clients in the areas of guardianship and financial management and these are outlined below. IDRS submits that the New South Wales government needs to respond to and counter these problems by adequately funding and resourcing the statutory bodies whose functions involve guardianship and financial management and by making improvements to guardianship and financial management legislation .

The poor performance, service delivery and practices of the OPC and OPG (now NSW Trustee and Guardian)

Where a person does not have a family member, friend or other person with a genuine concern for their welfare who is willing and able to take on the role of guardian or financial manager, the Guardianship Tribunal will appoint the Public Guardian and, in the case of financial management, the Protective Commissioner.

IDRS has consistently received complaints from people who have as their financial manager the Protective Commissioner (**OPC**) or the Public Guardian (**OPG**) (now NSW Trustee and Guardian) as their guardian. Complaints about the OPC and OPG include:

- use of 'client service teams' leading to no particular person being responsible or accountable for any particular client;
- inconsistent service delivery and information to clients with disability which understandably leads to incredible levels of stress and frustration for those people
- slow (to no) responses to requests from clients;
- bills not being paid;
- slow decision-making;
- an unwillingness to spend the time needed to understand the needs, changing circumstances and idiosyncrasies of clients;
- a lack of individualised service to the needs and wishes of each client;
- being left for extensive periods of time 'on hold' when clients telephone the OPC and OPG and being forced to leave voicemail messages that do not get

returned or answered, and
- concerning cynical and pejorative attitudes of some OPC and OPG staff to their clients and to disability.

Few, if any, OPC clients had individualised financial plans and budgets specifically tailored to their lifestyle needs and aspirations. Few clients have had regular direct personal contact with OPC staff, and for those reasons it is submitted that it was impossible for the OPC to really know if the person's assets are being used for their benefit or in their best interests.

A merger of the NSW Public Trustee, the OPC and OPG to form the NSW Trustee and Guardian (announced by the New South Wales government on 11 November 2008 in its mini-budget) commenced on 1 July 2009 and it is IDRS's fear that service delivery will be even further stretched and poorer and there will be more complaints for IDRS to pursue.

IDRS is also concerned that it is not prudent that one statutory body should control both the management of a person's estate and financial affairs and that person's lifestyle and health decisions. In IDRS's view, it makes for less accountability and the greater potential for conflicts of interest. Also, if a 'negative culture' about challenging disabilities permeates the NSW Trustee and Guardian (as has been expressed by clients to IDRS about some of the current bodies) or particular clients are 'black-listed', then the effect on clients will be catastrophic. No other jurisdiction in Australia has a combined public guardian and public trustee. IDRS calls for the retention of an independent and adequately resourced office of the public guardian.

IDRS submits that many of the service delivery problems can be ameliorated by better resourcing, funding and training of the OPC and OPG (now NSW Trustee and Guardian) by the New South Wales government. However, IDRS submits that the New South Wales Legislature also has a role to play in improving the experience of clients of the OPC and now the NSW Trustee and Guardian, namely, by ensuring guardianship and financial management laws:

- are genuinely least restrictive;
- provide for automatic periodic review of all guardianship and financial management orders, and
- provide for regular audits, reviews and reporting of the OPG (now NSW Trustee and Guardian), OPC and any other government body bestowed with guardianship or financial management functions.

Absence of a Public Advocate in NSW

IDRS submits that the New South Wales government should legislatively appoint a public advocate, as exists in South Australia, Western Australia, the Australian Capital Territory, Victoria and Queensland. Such an independent body could be a powerful voice for vulnerable people, including those subject to guardianship and financial management. The public advocate could scrutinise and take action against other government agencies to promote and protect the rights of persons under guardianship and financial management and could effect systemic improvements in

those areas. Presently, the OPG (NSW Trustee and Guardian) has no mandate to assist an individual unless appointed as their guardian and even then in many cases there are myriad problems (discussed above). This leads to cases where the OPG (NSW Trustee and Guardian) is appointed, or re-appointed, as guardian not because the person needs someone to have formal decision-making authority, but because the person needs the advocacy that the OPG (NSW Trustee and Guardian) can provide, as a complement to its decision-making role.

The OPG (NSW Trustee and Guardian) should be a 'pro disability', activist, human-rights focussed and independent body, able to scrutinise and take action against other government agencies to promote and protect the rights of persons under guardianship. However, the OPG (NSW Trustee and Guardian) does not fulfil this role; whereas an independent public advocate could.

In other Australian jurisdictions, a public advocate exists who has a legislated capacity to advocate for an individual without the need for a guardianship appointment. It should not be necessary to take away a person's right to make their own decisions in order for them to have advocacy services. IDRS submits that a public advocate in New South Wales should advocate for the rights of all persons with disability who are at risk and who are vulnerable, including (but not limited to) persons under guardianship and financial management.

People with intellectual disability are some of the most vulnerable and voiceless people in New South Wales. The need for a robust, well-resourced and fiercely independent public advocate[5] in New South Wales has never been so paramount.

Lack of clarity in the process of determining whether a guardianship order should be made

In order to make a guardianship order, the Guardianship Tribunal of NSW must be satisfied that:

- a person has a disability;
- that disability renders that person totally or partially incapable of managing his or her person , and
- that person is in need of a guardian[6].

<u>"need"</u>

In practice, many cases boil down to the third pre-requisite; that is, the question of whether there is "need" for an order. However, the *Guardianship Act 1987* (NSW) is not clear that this approach is correct. Sub-section 14(2) of the Act spells out various matters that the Tribunal shall have regard to when deciding whether to make a guardianship order. These factors are basically re-statements of some (but not all) of the matters covered by the general principles in section 4 of the Act, plus an additional requirement for the Tribunal to consider the views of any spouse or carer.

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[5] It is submitted that s97 of the *Guardianship and Administration Act 1990* (WA) and s209 of the *Guardianship and Administration Act 2000* (Qld) contain good examples of the sorts of functions, particularly in regards to systemic advocacy, such an office in NSW should fulfil.

[6] s14(1) of the *Guardianship Act 1987* (NSW)

The Appeal Panel of the NSW Administrative Decisions Tribunal has held that sub-section 14(2) of the *Guardianship Act 1987* (NSW) calls for the Guardianship Tribunal of NSW to consider and weigh up all the matters covered in that sub-section (*IF v IG* [2004] NSWADTAP 3 at paras 26-28, 31). The Panel noted that "[t]hose matters have no hierarchy or weighting", although "[e]ach is a mandatory consideration" (para 26).

IDRS is concerned that often informal supports, adjustments and measures could be put in place to adequately address any real concerns or risks a person faces with respect to their decision-making, but, for whatever reason, they are not put in place or even trialled. Applications for formal guardianship orders are too readily resorted to. This also flies in the face of recent amendments to the *Disability Discrimination Act 1992* (Cth) that purport to extend the grounds of unlawful disability discrimination to cover situations where there is a failure to make reasonable adjustments [see sections 5 and 6 of the *Disability Discrimination Act 1992* (Cth)].

IDRS is also concerned that at times applications are made for guardianship orders by persons who simply disagree or do not approve of another person's decisions (usually based on moral, religious or personal beliefs). Just because a person with intellectual disability wants to spend time with a person or doesn't want to attend a service or institution or they hold a particular opinion or belief, this does not necessarily mean they need a guardian.

When considering the 'need' limb the Tribunal should ask itself:

- is the application motivated by moral, religious, political or personal beliefs[7]?
- what supports, adjustments and measures have been taken to limit any real and identified risks associated with the person's incapacity to make decisions?
- are they sufficient to allay the risks?
- is the person willing to accept and cooperate with these supports, adjustments and measures?

IDRS submits that sub-section 14(2) needs to be clarified by stating that:

1. all the matters in section 4 of the Act (general principles) must be considered;
2. all informal arrangements of supported decision-making for the person have been considered and exhausted, and
3. the making of an order must be as a last resort.

Lack of clarity in the process of determining whether a financial management order should be made

[7] Section 3(3) of the *Adult Guardianship Act* (NT) makes it clear that a person's capacity should not be called into question because of a particular political, anarchic, religious, irreligious, legal, illegal, moral or immoral opinion they hold or activity they engage in. Section 6A of the *Guardianship and Management of Property Act* (ACT) s6A holds that a person cannot be taken to have impaired decision-making capacity only because they are eccentric, do not express a particular political or religious view, are of a particular sexual orientation, or have engaged in illegal or immoral conduct.

Under section 25G of the *Guardianship Act 1987* (NSW) the Guardianship Tribunal of NSW can make a financial management order in respect of a person "only if it has considered the person's capability to manage his or her own affairs and is satisfied that:

a) the person is not capable of managing those affairs, and

b) there is a need for another person to manage those affairs on the person's behalf, and

c) it is in the person's best interests that the order be made."

In IDRS's view this 'test' for a person to be drawn under a financial management order is much less onerous than the 'test' that needs to be satisfied by a person to get out of a financial management order – that is, the 'test' for revocation. IDRS submits that this should not be the case.

<u>The 'capable of managing one's affairs' limb</u>

The often-cited authority for determining whether a person is capable of managing their own affairs is the NSW Supreme Court judgment of Justice Powell in *PY v RJS* [1982] 2 NSWLR 700:

> "It is my view that a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:
>
> (a) that he or she appears incapable of dealing, in a ***reasonably competent fashion***, with the ordinary routine affairs of man; and
>
> (b) that, by reason of that lack of competence there is shown to be a ***real risk*** that either:
>
> (i) he or she may be disadvantaged in the conduct of such affairs; or
>
> (ii) that such moneys or property which he or she may possess may be dissipated or lost … ***it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner***"
> [**IDRS's emphasis**]

Justice Powell, in another case, *Re C (TH) and the Protected Estates Act* (1999) NSWSC 456, helpfully provides further guidance on this limb:

> "… ***it is not a question of whether the Protective Commissioner or somebody else could manage the affairs of the applicant better***, or that if the applicant was left on her own the likelihood would be that her funds would soon be dissipated. One cannot be too paternalistic. ***People have the right to manage***

> ***their affairs***, unless they fall below the level that is prescribed by the Act." [**IDRS's emphasis**]

In IDRS's view, the New South Wales legislation does not make these fundamental principles explicit and it should.

The 'need' limb

IDRS submits that the requirement that "there is a need for another person to manage those affairs on the person's behalf" ((b) above) is unclear. This lack of clarity was explored in *Re R* [2000] NSWSC 886. In that case Justice Young (at paragraph 31) was inclined to see need as flowing automatically from a finding that the person was not capable of managing their affairs ((a) above). With respect, IDRS does not agree with that view and strongly submits that the 'need' limb be regarded as a separate and distinct inquiry in all cases.

IDRS is concerned that often informal supports, adjustments and measures could be put in place to adequately address any real concerns or risks a person faces with respect to their financial decision-making, but, for whatever reason, they are not put in place and trialled. Applications for formal financial management orders are too readily resorted to. This also flies in the face of recent amendments to the *Disability Discrimination Act 1992* (Cth) that extend the grounds of unlawful disability discrimination to cover situations where there is a failure to make reasonable adjustments [see sections 5 and 6 of the *Disability Discrimination Act 1992* (Cth)].

IDRS is also concerned that at times applications are made for financial management orders by persons who simply disagree or do not approve of another person's financial decisions (usually based on moral, religious or personal beliefs). Just because a person with intellectual disability wants to spend their money on sex services, entertainment or gambling, this does not automatically mean they need a financial manager.

When considering the 'need' limb the Tribunal should ask itself:

- is the application motivated by moral, religious or personal beliefs[8]?
- what supports, adjustments and measures have been taken to limit any real and identified risks associated with the person's incapacity to manage their financial affairs?
- are they sufficient to allay the risks?
- is the person willing to accept and cooperate with these supports, adjustments and measures?

IDRS submits that section 25G of the Act, on financial management orders, needs to be clarified by stating that:

1. all the matters in section 4 of the Act (general principles) must be considered;
2. all informal arrangements of supported financial decision-making for the person have been considered and exhausted, and
3. the making of an order must be as a last resort.

[8] *Ibid.*

The ‘best interests’ limb

Under section 25G of the Act, the Guardianship Tribunal of NSW must also satisfy itself that “it is in the person’s best interests that the order be made”. IDRS submits that the clarification suggested for section 25G above would also assist in determining whether it is in the person’s best interests that a formal financial management order be made.

No periodic review of financial management orders

At present, financial management orders are only reviewed on application by a person or if the Guardianship Tribunal of NSW has specified that a review will occur. Reviews are the exception, not the rule. IDRS submits that financial management orders should be automatically reviewed at least every two years. Section 28 of the *Guardianship and Administration Act 2000* (Qld) provides for automatic reviews. So too, section 84 of the *Guardianship and Administration Act 1990* (WA) provides for automatic reviews of administration and guardianship orders.

This will improve the accountability of private managers and the NSW Trustee and Guardian, and will improve the experience of people subject to financial management orders by allowing them an opportunity to contest an order and to show the Tribunal that their circumstances may have changed and the order can be varied or revoked. This will require the Guardianship Tribunal of NSW being properly funded and resourced for this task, so that reviews will be meaningful and procedurally fair.

The finality of financial management orders and their blanket nature

Once a financial management order is made, it is in place indefinitely unless revoked at a review. Those engaging the financial management application process of the Guardianship Tribunal of NSW are not always aware of this, nor are they aware of how difficult it is to vary or revoke orders.

Most financial management orders are also cast in the widest of terms, in that they cover all the financial affairs of the person. Most do not differentiate between different parts of the person’s financial affairs nor do they acknowledge that there may really only be a need for the order for a limited period of time or for a particular part of the person’s estate (eg investing a large inheritance). Section 25E(2) of the *Guardianship Act 1987* (NSW) does allow the Guardianship Tribunal to exclude certain parts of a person’s estate from financial management. It is the view of IDRS that the discretion to exclude some parts of the estate under section 25E(2) should be more often actively considered by the Guardianship Tribunal in keeping with the general principles in section 4 of the Act. To this end, IDRS submits that section 25E(2) should be amended to read (amendment *in italics*):

> “The Tribunal may exclude a specified part of the estate from the financial management order *and must consider this for every application and review of a financial management order*.”

It should be foremost in the minds of Guardianship Tribunal members that a person may only need a short-term order or that it might be in their best interests that the order applies only to certain parts of their estate.

Problems with revocation

As mentioned above, in IDRS's view the 'test' a person needs to satisfy for revocation under section 25P of the *Guardianship Act 1987* (NSW) (and the evidence they need to present) is far too onerous, particularly when compared to the 'test' needed to be satisfied to put the person under the financial management order in the first place. IDRS submits that this should not be the case.

Sub-section 25P(2) of the *Guardianship Act 1987* (NSW) says that the Guardianship Tribunal of NSW may revoke a financial management order only if:

a) it is satisfied that the protected person is capable of managing his or her affairs, or

b) it considers that it is in the best interests of the protected person that the order be revoked (even though it is not satisfied that the protected person is capable of managing his or her affairs)

IDRS considers it starkly unfair that there is no alternative limb in section 25P(2) for there no longer being a 'need' for a person's affairs to be managed by another person available to a person to seek revocation, while there is a 'need' limb in section 25G to place the person under a financial management order. IDRS strongly submits that section 25P(2) should include a 'no longer a need' alternative limb, with wording like:

c) it is satisfied that there is no longer a need for another person to manage the affairs (currently under management) on the person's behalf.

Given the complexity of properly preparing and making revocation applications[9], IDRS submits that there is a need for applicants to have legal representation[10]. IDRS submits that the legislation needs to include a provision for the Guardianship Tribunal to appoint a legal representative to assist a revocation applicant, similar to the current provisions in section 58 (Right of appearance) of the Act in relation to the appointment of separate representatives.

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[9] Leading judgments like *Re Ghi (a protected person)* [2005] NSWSC 581, *PY v RJS* [1982] 2 NSWLR 700 and *Re C (TH) and the Protected Estates Act* (1999) NSWSC 456 show just how comprehensive and systematic the evidence needs to be for a revocation application to be successful.

[10] Section 13(2) of the *Adult Guardianship Act* (NT) requires the Adult Guardianship Executive Officer to ensure that in any guardianship application proceedings the person about whom the application is made is legally represented. Section 97(1)(d) of the *Guardianship and Administration Act 1990* (WA) requires the Public Advocate to seek assistance for any represented person or person in respect of whom an application has been made from any government department, institution, welfare organisation or the provider of any service, and, where appropriate, to arrange legal representation for the person.

Capable of managing affairs

There is nothing in section 25P of the Act that directs or mandates the Guardianship Tribunal on whether (and, if so, when) a financial management order should be varied. If revocation is sought on the ground of re-gained capacity, the person needs to prove 'the reverse of the incapable test'. That is, the person needs to provide evidence to satisfy the Guardianship Tribunal that they are now able or capable of managing their financial affairs. For example, the person might get a report from a medical professional or caseworker that says their condition has improved and they are now again able to manage their financial affairs. This often applies to someone who has had a stroke, or has a brain injury or mental illness. Generally it is more difficult for someone with intellectual disability who might be more likely to put in evidence that they have had budgeting training and have ongoing financial counselling support and so are now better able to manage their finances or it could be that drug and alcohol problems were contributing to their inability and these are no longer a problem. It is very difficult to show re-gained capacity without professional support if the person hasn't been given a short-term trial to confirm they can manage their finances adequately (as was formerly available under s23A of the *Protected Estates Act 1983* (NSW) and as now appears available under section 71 of the *NSW Trustee and Guardian Act 2009* (NSW)).

IDRS submits that the process of applying for trials giving a person a chance to show they can better manage their finances (as was formerly available under s23A of the *Protected Estates Act 1983* (NSW) and as now appears available under section 71 of the *NSW Trustee and Guardian Act 2009* (NSW)) needs to be promoted and more readily accessible for people under financial management orders. This could be achieved by making it a process that must be considered and offered by the Guardianship Tribunal at the (automatic periodic) reviews.

Best interests

The alternative limb of sub-section 25P(2) of the *Guardianship Act 1987* (NSW) that permits the Guardianship Tribunal to revoke a financial management order is the 'best interests' limb. People with intellectual disability tend to be more successful with revocation applications on the ground of best interests. These applications involve showing that there is no longer a need for the order because there are no longer risks to the person's finances. For example, a person who was exploiting them is no longer in their lives or there are now ways to manage the risk to their finances and, as a result, it is in the person's best interests that the order be removed.

Many of the people contacting IDRS about financial management orders find the restrictions very distressing, frustrating and detrimental to their lives. They are often limited in many aspects of their lives – for example, some clients have not been able to access funds for food, transport and other necessities. For many others, negotiating for money to enjoy some special event or occasion, outside their usual routine (for example, a gift for a friend's birthday or to attend a special event, like a concert or dinner) proves to be impossible. IDRS submits that there should be an obligation in the legislation that the effect of the financial management order on the person and the relationship between the person and their financial manager be taken into account by

the Tribunal when considering the 'best interests' limb of sub-section 25P(2) of the *Guardianship Act 1987* (NSW).

Thank you again for allowing IDRS the opportunity to make its submission to the Standing Committee on Social Issues' inquiry into substitute decision-making for people lacking capacity. If there any aspect of this submission that you would like to discuss further with IDRS or you would like IDRS to speak to this submission at any upcoming public hearings, please do not hesitate to contact us on 9318 0144.

Yours faithfully,

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