REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON SOCIAL ISSUES

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

At Sydney on Wednesday 4 November 2009

The Committee met at 9.15 a.m.

PRESENT

The Hon. I. W. West (Chair)

Dr J. Kaye
The Hon. T. J. Khan
The Hon. M. S. Veitch

CHAIR: I declare the hearing today open and welcome everyone to the third day of hearings of the Standing Committee on Social Issues Inquiry into Substitute Decision-Making for People Lacking Capacity. Today we will hear from Professor Ron McCallum and Professor Ian Hickie from the University of Sydney, the Hon. Greg James, QC, President of the Mental Health Review Tribunal, and representatives from the Land and Property Management Authority, and the Trustee Corporations Association of Australia. We will be hearing also from Ms Imelda Dodds, Acting Chief Executive Officer, NSW Trustee and Guardian, who will be appearing during this inquiry for the second time.

Before we commence I would like to make some comments about aspects of the hearing. In accordance with the terms of reference this inquiry will focus on systemic issues in relation to the provisions for substitute decision-making and, in particular, consider whether any legislative amendments are required to improve those provisions. It will not focus on individual cases. Therefore, I request that witnesses avoid mentioning individuals or details that may identify individuals or families unless it is absolutely necessary to address the terms of reference. The Committee has resolved previously to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing broadcast of the proceedings are available at the table by the door.

In accordance with Legislative Council guidelines for the broadcast of proceedings a member of the Committee and witnesses may be filmed or recorded, but people in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee the media must take responsibility for what it publishes or what interpretation is placed on anything said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. I advise also that under the standing orders of the Legislative Council any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such a committee or by any person.

The Committee prefers to conduct its hearings in public, however, the Committee may decide to hear certain evidence in private if there is a need to do so. If such a case arises, I will ask the public and the media to leave the room for a short period. Finally, I remind everyone to please turn off their mobile phones for the duration of the hearing. I am pleased and honoured to welcome our first witness, Professor Ron McCallum, and Ms Belinda Reeve. Thank you for your attendance today, it is greatly appreciated.

RONALD CLIVE McCALLUM AO, Professor of Industrial Law, XXX, XX, and

BELINDA HELEN REEVE, Researcher, XXX, XX, sworn and examined:

CHAIR: Professor McCallum, in what capacity are you appearing today before the Committee?

Professor McCALLUM: I am appearing in my personal capacity as a Professor of Law of the Faculty of Law and former Dean of Law of the University of Sydney. However, it would be pertinent to state that I am an elected member of the United Nations Committee on the Rights of Persons with Disabilities and that on Friday 23 October last in Geneva I was unanimously elected as the incoming chair for 2010 for this United Nations committee.

CHAIR: Ms Reeve, in what capacity are you appearing today before the Committee?

Ms REEVE: I am appearing in my personal capacity as a researcher at the Faculty of Law, University of Sydney. I should mention that I also assisted Professor McCallum when he appeared at a recent meeting of the Committee on the Rights of Persons with Disabilities.

CHAIR: Before we proceed to questions, Professor McCallum, would you like to make some opening comments?

Professor McCALLUM: Yes, thank you. On 3 May 2008 the United Nations Convention on the Rights of Persons with Disabilities came into force. On 16 July 2008 Australia ratified this convention and the ratification came into force on 17 August 2008. By ratification the Australian Government makes it clear that it regards the polity of Australia as being bound by this new United Nations convention. The convention seeks to uphold the rights of the 650 million persons around the world who are persons with disabilities, most of whom are living in the developed world. On 3 November 2008 at the United Nations in New York I was Australia's candidate for one of the 12 positions on the inaugural United Nations Committee on the Rights of Persons with Disabilities and I was elected at that meeting of the States parties.

The function of the committee is to monitor the United Nations Conventions on the Rights of Persons with Disabilities. It acts like the eight other United Nations treaty bodies. Under article 35 of the Convention on the Rights of Persons with Disabilities—which I shall henceforth call the convention—ratifying States parties must report to the committee within two years after ratifying the convention and after that time every four years, unless the committee requests further reports. The committee on which I sit and which I shall chair in 2010 will receive its first reports from countries like Australia, known as States parties, in June or July 2010.

The conventional also contains an optional protocol that allows individual persons with disabilities, and in certain circumstances their relatives, to bring a case before the committee if in their view they have been discriminated against contrary to the convention and there is no appropriate internal legal remedy in their home country. Already, as I understand it, a number of complaints under the optional protocol have been received by the Geneva office of the High Commissioner for Human Rights. Australia ratified the optional protocol on 21 August this year. I am sure that at earlier public proceedings and in your papers this Committee has some familiarity with the convention. Ms Belinda Reeve and I are happy to hand out copies of the convention if it is your wish. We appreciate that the document has not been handed first to Parliament, but it is simply a public document of the United Nations.

CHAIR: If you wish to tender that, we would appreciate it.

Copy of Document entitled Convention on the Rights of Persons with Disabilities tendered.

Professor McCALLUM: I surmise that the important part of these hearings is questions and discussion between Committee members and witnesses. However, without delaying you too lengthily, let me please say a few introductory words about the convention and to read at least three articles into the record. The convention adopts what is known as the Social Model of Disability, which requires one or two words of explanation. For the first two thirds of the twentieth century and earlier the prevalent model looking after persons with disability was the medical model. The notion was that we should try to cure as many persons with disability as we can and, if not, they should be looked after. Many were institutionalised in those days. By the

1970s we had moved forward, certainly in this country, to what we might call the social welfare model. Welfare was provided to enhance the lives of persons with disabilities, and many of us were encouraged and, indeed, assisted by Federal, State and on some occasions municipal governments to gain employment. Employment programs and social welfare programs did a great deal to enhance the lives of myself—it enabled me to get an education—and also my sisters and brothers with disabilities.

It is fair to conclude that in the past 15 years a new model called the Social Model of Disability has become the premier model, certainly around developed market economy countries. This is a recognition that the barriers that limit the lives of we persons with disabilities are in large part constructed by society; they are negative or limited attitudes or stereotypes. The social model seeks to dispel those stereotypes and attitudes and allow we persons with disabilities to lead our own lives, to be educated, to gain employment, to be spouses and/or partners, and to rear families.

After all it is really only through employment and family life that we gain our full place as citizens. This is enunciated in two articles of the convention, which I will ask Miss Belinda Reeve to read out: article 5 and article 8.

Ms REEVE: Article 5 entitled "Equality and non-discrimination":

(1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

(2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

(3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

(4) Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention

Article 8 entitled "Awareness-raising":

(1) States Parties undertake to adopt immediate, effective and appropriate measures:

(a) to raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(b) to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; and

(c) to promote awareness of the capabilities and contributions of persons with disabilities.

(2) Measures to this end include:

(a) initiating and maintaining effective public awareness campaigns designed:

(i) to nurture receptiveness to the rights of persons with disabilities;

(ii) to promote positive perceptions and greater social awareness towards persons with disabilities; and

(iii) to promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

(b) fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

(c) encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention; and

(d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Professor McCALLUM: Those two articles show the social model dimensions of the convention. The last article I will ask Belinda to read is article 12, which deals in part with substitute decision-making, the subject of today's hearing.

Ms REEVE: Article 12 entitled "Equal recognition before the law":

(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

(2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

(3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

(4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity 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. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests

(5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Professor McCALLUM: I asked to appear before this honourable Committee after 21 October this year because on that day, during the second session of the United Nations Committee on the Rights of Persons with Disabilities, that committee held its first day of general discussion. The committee on which I sit, and will soon chair, regards article 12 as being at the very centre of the convention. We wanted it to become the centrepiece of our first general day of discussion. Although the committee has not yet fully written up or, indeed, furnished its first interpretive declaration on the convention, it was recognised in that discussion with expert speakers that all persons with disabilities must be regarded by the law as possessing full legal capacity. It was also recognised that many of we persons with disabilities may need, either throughout our lives or during certain periods, assistance in fulfilling our legal capacity and, indeed, in making relevant decisions.

Article 12 (4) is pertinent here and it shows, at least in my view, at paradigm shift. It really says that where we persons with disabilities need assistance in making relevant decisions, the appropriate mechanism is supported decision-making. In other words, that we have a network of persons whom we know, family members and others, who can support us in making decisions. But it is also clear that article 12 (4) contemplates, in very limited circumstances, forms of substitute decision-making. Indeed, substitute decision-making goes on all the time. We all have had to make from time to time substitute decisions for a very small children et cetera. We recognise in the convention that substitute decision-making does take place with we persons with disabilities, but the convention makes it very clear that it should be a last resort, for the shortest period of time, and it should be scrutinised by forms of judicial oversight. Indeed, some of my colleagues assert that article 12 (4) of the convention places the onus upon those who establish regimes of substitute decision-making to justify whatever limited extent of substitute decision-making exists.

In finishing, let me emphasise once more that the polity of Australia, its Federal, State and municipal governments, are bound by this convention and are bound by article 12 (4). Now that we have signed the optional protocol if a person believes that they have been discriminated against, and their activities have not been dealt with in accordance with article 12, and particularly in accordance with the safeguards embodied in paragraph 4, and if they have no internal redress, they are entitled to complain to the committee on which I sit. I suspect that from around the world in the next few years the committee on which I sit will receive a number of complaints in relation to legal capacity and decision-making. Thank you, Committee members, for giving Ms Belinda Reeve and I time to together make this opening statement.

The Hon. MICHAEL VEITCH: Thank you, Professor McCallum; that was fascinating. You spoke about three concepts in your summary: Supported decision-making, assisted decision-making and substitute decision-making. In the context of this inquiry, how do you see those three concepts being articulated in a legislative framework in New South Wales?

Professor McCALLUM: First and foremost I think these forms of decision-making are, what I would describe as, on a continuum. I really see the difference between supported and assisted decision-making on the one hand, and substitute decision-making on the other. In relation to assisted decision-making, that is where persons assist people like me with disabilities to make decisions. They do not make the decisions themselves, but assist we persons with disabilities to make the decisions by, perhaps, explaining to us the consequences of decisions and what options there are, but allowing us to make the decisions. Often we parents do that with teenage children who may be making decisions, and by giving advice and discussion we assist them to make the decisions. There is no hard and fast line but when we get to substitute decision-making there is recognition that

the person with a disability or, in more homely instances, the toddler is not making the decision; others are making it on her or his behalf. Maybe the person with a disability is seriously unwell, maybe unconscious or there may be other factors.

So I see it on a continuum, but the convention makes it very clear that once we move into the realm where others are actually making the decision, and we have gone away from persons assisting with the making of the decision, substitute decision-making needs to be as a last resort, to be of the shortest duration and to have judicial oversight. I am not an expert on New South Wales guardianship law; I have some general familiarity. But my understanding of the Guardianship Act 1987—and I am happy to be corrected—is that it was written a long time before this convention and it seems to me that it does not regard forms of substitute decision-making necessarily as temporary; in fact some of the guardianship orders can be open ended. This Act was written at the time of the social welfare model and, perhaps, does not understand the privacy that we should now put on assisted decision-making.

A more recent statute—of course statutes as we all know, and you as legislators know, need to be seen in their chronological settings—the Queensland Guardianship Act 2000, seems to come closer to the mark. By saying this I do not wish to cast any aspersions on those people, public servants and others, who give up their time to administer our Guardianship Act 1987. The law binds us all and our job is to administer the existing laws. That does not mean that we turn our eyes against law reform, but our purpose is to administer the existing law. In that respect I think our public servants have done a very good job. My argument is with the setting or framework of the law, and I am simply asserting to you that a lot has gone by in the 22 years since that statute was enacted.

The Hon. MICHAEL VEITCH: When you talk about judicial oversight as per article 12, how would you see that as being accomplished in the New South Wales framework?

Professor McCALLUM: I think that there really needs to be time limits on guardianship orders, and reviewed every 12 months by an independent body with judicial standing. It is unlikely that this would be a court but we do have tribunals like the Mental Health Tribunal and others. I think we need to have review of every guardianship order, certainly no longer than every 12 months. In the general questions which you posed and were sent to us by Mr Clarke I would also add that I think there appears to me to be room for the establishment of a public advocate in this State of ours to assist with this process. Many of my sisters and brothers with disabilities who are under guardianship orders do not have any family. It is those persons who do not have family or friends to advocate on their behalf, for a whole range of circumstances of which you would all be familiar, who often require or usually require the assistance of a public guardian.

The Hon. MICHAEL VEITCH: Earlier you spoke about the spectrum for decision-making from supported, through assisted to substitute, who do you think is best qualified or how do you think the assessment can be made as to where an individual would reside along that decision-make spectrum?

Professor McCALLUM: First and foremost the person themselves, their views ought to be taken into account. At the very centre of the convention is that the views of persons with disabilities should be recognised. Of course, there will be circumstances where it may be difficult to ascertain the views of one of my sisters and brothers who have disabilities. I would have thought family members, again, would be another group and perhaps that is why we need a public guardian and maybe members of a guardianship board or authority. Let me repeat, these lines are very difficult to draw and that is why I described it as a continuum. What the convention requires is that once you get to substituted decision making it should be for the shortest time as is appropriate and that it should be constantly reviewed.

It would be wrong, at least in my view, to say there should never be substituted decision making. Substituted decision making goes on all the time and often goes on with, we parents, very small children, but often when we ourselves have elderly parents in nursing homes, while it may be deemed that children are assisting their aged parents to make decisions, in reality I think many of those decisions are substituted decisions. What we argue in the convention and as a member of the United Nations committee of experts on this, I would argue with you is, the key issue is that we recognise that all persons have legal capacity, whether they be newborns, the elderly, able bodied or, like myself, persons with a disability. What we argue in the convention is that where we need assistance then assisted and supported decision making is appropriate, but there is a recognition that in a very few occasions substituted decision making will be required—this must be monitored and it must be appropriate to the individual circumstances of the case.

The Hon. MICHAEL VEITCH: The committee has heard evidence that people are able to make decisions about, say, their financial affairs but there is a view that they are unable to make decisions about their medical affairs. How are those differing circumstances accommodated—I am mindful of the convention—in the drafting of possible legislation?

Professor McCALLUM: There are all sorts of decisions that we make, and some decisions are easier than others and some do not have consequences. If I choose to wear a different coloured pair of sock tomorrow because I like the feel of them that is an easy decision to make and it has no real consequences whatsoever. Small decisions on finances can be made without huge consequences. Medical decisions have very severe consequences on occasions. I would have thought that substituted decision making there should be of a last resort where my sister or brother with a disability is not in a position to make a decision, albeit supported by members of her or his family or friend. It takes discernment, and although I am not an expert on guardianship law I think any amendments need to be tailored to make it clear that the guardianship person or authority must only make decisions and make orders for a limited duration, and that always the guardianship authority should take into account where it can be ascertained the views of my sister or brother with a disability and also the views of family members.

These are fraught decisions. Often parents are faced with very fraught decisions in relation to medical decisions for their children. We recognise in our human family that in most but not all instances parents act in the best interests of their children and we generally do not require judicial oversight. When we are dealing with persons with disabilities and government authorities, no matter how willing and generous, we recognise that there is always room that decisions may not be made in the best interests of a person with disability and that is why the convention requires some form of judicial oversight. I would think that what one needs to help tailor this is some broad objects of any amending piece of legislation, putting in to those objects parts of Article 12(4) to make it very clear that decisions will be of short duration, will be reviewable and will be as a last resort. Perhaps also we need to establish laws to enable or better enable we persons with disabilities to gain assistance from family and friends, whether through some registration process, I am not sure, so that we can in the first instance, and where it is appropriate, be assisted to make the decisions for our own lives. These are very difficult situations and I do not pretend sir to have all the answers. You will have other experts before you who have greater day-to-day experience with guardianship, and although they will not mention cases, their wealth of experience will give you a better idea than I could from my university enclave of these issues.

The Hon. MICHAEL VEITCH: In the whole legal context you actually have not mentioned the capacity to appeal a decision that has been made about making decisions about your own affairs. Do you have a view on that? How should it be accommodated or should it be permissible?

Professor McCALLUM: I certainly think appeals should be permissible. I did speak about judicial oversight and my understanding was that this judicial oversight would be very frequent. If we are dealing with medical interventions, for example, such as sterilisation I would hope there would be appeal processes. The question is who would have standing? Again, maybe that is a role for the public advocate, maybe it is a role for family members, particularly when medical interventions are irreversible. The whole issue of medical interventions to my sisters and brothers who have mental disabilities that I might describe as psycho-social disabilities are again fraught with complexity and I think there should be appeal rights. I am not an expert on that area but my sense tells me that I think in the past there has been more intervention in that area than common sense would warrant. I know in Victoria there are more people, as I understand it, under the various forms of restrictive orders, that is, persons with mental disabilities, than there are persons in prison. Again that has also something to do with the fact that many of my sisters and brothers with mental and cognitive disabilities are at the bottom of the social hierarchy, often without family and often without gainful employment.

Dr JOHN KAYE: I begin by thanking Professor McCallum and Ms Reeve for coming today and for saying what an honour it is to have an acknowledged international expert in this area, and a great voice for Australia internationally in the area of the rights of people with disabilities. I think I heard you say that you were in favour of the creation of a public advocate which has certainly been proposed by other witnesses before this committee that New South Wales needs to establish a public advocate to promote and protect the interests of people with disabilities. In first instance, will you comment on that proposal? Am I correct in saying that you support the creation of a public advocate? Will you also comment on what you see as the role of a public advocate?

Professor McCALLUM: First and foremost I do support the establishment of a public advocate. I have been educated in part by the submissions which are on the website which have been made to your

committee. I do not fully understand as yet the limitations between the Ombudsman's power, the Mental Health Tribunal, the Guardianship Board and where a public advocate would sit.

Dr JOHN KAYE: You are not on your own there. You are in good company.

Professor McCALLUM: I suspect there may need to be some reorganisation. The Ombudsman—if I can say as an aside, I teach that in public law in third year—has branches of operation, which one would not necessarily expect from the growth of that body since the 1970s. I think that for many of my sisters and brothers with disabilities who have not had my educational advantages, and often have psycho-social disabilities and do not have loving families, I think it is important that there be a person that they can turn to, a person who is designed to act as their advocate. In all these things, sir, what will be as important as the law is the selection of that person, a person who is sensitive and appropriate. By establishing a public advocate that is not in any way to demean officials who are undertaking guardianship duties. They are very special and appropriate but by their very nature, they differ from a public advocate's role.

A guardian has the responsibility not only of short-term but of longer term decisions and often on significant financial decisions. It is important to counterbalance that to have a public advocate who can appeal or who can appear in review proceedings to determine whether it is still appropriate for such guardianship and other forms of substituted decision making to be made. I appreciate that this is another call upon the public purse but I think it is a worthwhile call particularly given that many of my sisters and brothers who are under guardianship or similar orders are really at the bottom of the hierarchy in society in the areas of wealth, education and employment.

Dr JOHN KAYE: Thank you, your answer adds a dimension to the committee's understanding of the difficulties. I refer to the case of a person with the greatest degree of intellectual impairment. How would that person access the services of a public advocate? Would a public advocate be in a position to intervene proactively in that case? If not the Public Advocate, should the Public Guardian be in a position to intervene collectively in such cases?

Professor McCALLUM: You do raise the nub of the problem, and the most complicated issues. There are a small number of my sisters and brothers with such deep intellectual disabilities that it may be hard to determine their interests. One would go to family members, who generally will act in the best interest of their fellow family members. I think a Public Guardian would need some proactive powers to go and visit institutions. Many of the persons with intellectual disabilities of which you and I have now been speaking are in institutional care. The cases are very sad and heartrending. Whether it be the Public Advocate or the Public Guardian there needs to be some form of proactivity. I repeat that the number of what we persons with intellectual disabilities who cannot make our wishes known is much smaller than we would like to think.

Working with many friends with cognitive disabilities, often it is the way we question them. If I were to say to one of my disabled friends—and I am thinking of a young man now whose name I will not mention—did he like the film we saw together last night, he would have great difficulty answering that. Could I say I liked it or disliked it? He could not give me an answer. However, if I said to him, "Could you tell me about the film you saw with me last night, its story?" He would give me a very coherent answer. I know that is a trite example but often it is training, understanding and living with my sisters and brothers with intellectual disabilities that allows us to ascertain in various ways what their interests are, what their views are, and as part of assisted decision-making it is getting to know how to put issues to persons with cognitive disabilities.

In my own case, for the record, I should say I have been totally blind since shortly after my birth. I am a retinopathy of prematurity child. I was born about 10 weeks premature, and between 1945 and 1955, in order to keep us alive, they used World War II cockpit fighter pilot technology. In other words, they put us in perspex humidity cribs and fed us pure oxygen, which caused blood vessels in the eye to contract. Fresh blood vessels grew on the backs of our retinas and within days those retinas were pulled off. We are an interesting cognitive group around the world. The most famous and most wealthy, sadly, is not me; it is Stevie Wonder, the singer.

Leaving that aside, it is difficult to talk to me about seeing the stars because I cannot see them but I could explain to you how the universe works and how the galaxy works, and if you question me in a different way you could get knowledge from me. Again, I use that fairly trite example that a lot of experience is needed and a lot of understanding and empathy to work with my sisters and brothers with intellectual disabilities. One of the first things you have to be is comfortable in your own skin.

Dr JOHN KAYE: Thank you to that. Can I take you now to the issue of a recommendation that came from the Public Guardian that section 21A of the Guardianship Act be amended to allow the police to exercise all reasonable force on a person who is under a guardianship order to move them from one place of residence to another. I am wondering how that idea, where somebody has clearly expressed that they do not wish to move from one place to another, yet the Public Guardian says they should move from one place to another, the situation there is not appropriate, how that idea squares off against paragraph (4) of Article 12 of the declaration that was read to us by Ms Reeve earlier. Is there a way in which those two concepts can co-exist?

Professor McCALLUM: I do not like the amendment at all, of being able to use reasonable force to move one of my sisters and brothers with disabilities from one residence to another. At the very least I would have thought what is required is some sort of order from an oversight body, from some form of judicial oversight. One would want to know the reasons why the person has to be moved from one place to another. Is it from one institution to another? Our Prime Minister is sitting patiently at the moment with 78 asylum seekers on a boat off Indonesia where no-one wants to go in and use reasonable force to remove them. I think it is felt by both governments that their dignity is important. I would be very concerned, other than in cases of extreme emergency, that guardians could give orders to police to use reasonable force without any form of judicial oversight or control. In fact, I venture to think if someone was removed like that and complained under the optional protocol, the committee on which I sit—and I would not be sitting on complaints from Australia—would hold the Australian Government accountable. So, I would suggest to you, with the greatest of respect to the Public Guardian, that without a more detailed knowledge of the safeguards of such an amendment, it would be contrary to the convention.

Dr JOHN KAYE: Can you envisage safeguards that would allow such an activity to take place and still be consistent with our obligations under the convention?

Professor McCALLUM: Yes. Article 12, paragraph (4) makes it clear that the convention recognises that on occasions decisions about we persons with disabilities may have to be taken by external bodies other than families or friends. What it requires is that these decisions be measured and appropriate and be for the shortest period of time and that there be some form of judicial oversight. If you want to get an order for the police to move one of my sisters and brothers with disabilities, it needs to be done by some form of judicial order, by application of the guardian to some judicial body, maybe a tribunal, where the Public Advocate would have access. Of course, there may be emergency situations—I cannot quite think of a ready example—where it may be imperative, perhaps, on grounds of health or the outbreak of disease that someone may need to be moved promptly, but I think that would require, if I could call that an ex parte order of movement, though that be brought before a judicial tribunal with the Public Advocate having access within 24 or 48 hours. We would not do that to people without disabilities, and what we would not do to people without disabilities I would not do to persons like me and others with disabilities.

Dr JOHN KAYE: Thank you for that very useful answer. Leading on from that question can I ask you something in a more general way? Let us consider a hypothetical situation arising where somebody who is being assisted in making decisions expresses a strong preference for a particular decision that the assisting person recognises to be not in the best interest of the person whose decision is being assisted. I am sorry, I have possibly made that more complex than it is, but I think you get the gist of what I am saying. How do we resolve this? What sort of legislative framework can we set up where, consistent with the excellent articles of the convention, we resolve a situation where I, as an assister in decision-making, recognise that what is going on is really not in the best interest of that individual but that individual is strongly expressing a preference for this course of action?

Professor McCALLUM: I think there will be very few instances where you would want to intervene. I have children who are young adults—if I can use that expression—just out of teenage years. Sometimes they make decisions that I think are not in their best interests but I recognise they have to learn about life. Many of my friends in the last two years, quite learned lawyers and others, have clearly made financial decisions that it is clear to me have not been in their best interests. I do not want to trivialise this matter and I am not seeking to trivialise your example, which is of significance. I am saying this to illustrate that on many occasions part of being in life is making decisions that may not be in our best interests but which we have to live through as part of the human family—falling in love with someone that is not in your best interest, et cetera.

The question really is what is the magnitude and nature of this decision? Is it a decision where a person with a cognitive disability is clearly going to be swindled or is it that the house in which they want to live is further away from their family than their family might like? I think if we establish a system of assisted decision-

making, it must be assisted decision-making. If some decision is taken by a person with disabilities that an assisted decision maker is concerned about, maybe they have to go to the Public Advocate. Unless we are dealing here with serious medical issues or living in squalor or disease or, to use the old-fashioned expression of being in moral danger, if I could put it in that colloquialism, I think we need to allow we persons with disabilities to make decisions. I wish when I was 21 and made some decisions in my life I had had the experience I have now. It is part of living. I am not seeking to trivialise. I am simply suggesting to you there will be fewer of those decisions than we might suppose, and that is perhaps one reason why we might need a Public Guardian.

CHAIR: Assisted decision-making appears to be in the clear area of the judicial framework as opposed to some definitive legislative clause, and the Public Advocate I would be looking at from the point of view of an advocate for the person seeking assistance as opposed to a tribunal—does that make any sense?

Professor McCALLUM: Yes.

CHAIR: I had the distinct impression you were looking at the Public Advocate as some sort of tribunal as opposed to an advocate?

Professor McCALLUM: No. There are models of assisted decision-making around the world. I am not an expert on this. Some of the disability centres that spoke to you in submissions mentioned these. The Public Advocate is not the tribunal. The Public Advocate is a bit like an Ombudsman, to use that overworked expression, a person who will act upon the interests. A Public Advocate should be able to bring appeals against orders—guardianship and other financial orders. That needs to be a form of judicial oversight. That might well not be a court but maybe a tribunal with persons on it recognised for their legal and other skills in relation to we persons with disabilities. The Public Advocate needs to be a free person, like an amicus curiae in a court, to act and be the friend of and understand we persons with disabilities.

We are only going to safeguard my sisters and brothers with disabilities if we divide up powers between guardianship, between judicial oversight and the Public Advocate and where we can establish and learn to grow accepted models of assisted decision-making through family and friends and through other persons. So I agree with you.

CHAIR: I would like to continue with questions, but, unfortunately, we have run out of time. Thank you for your attendance today, it has been greatly appreciated.

Professor McCALLUM: Ms Reeve and I are grateful for being given this opportunity.

CHAIR: The Committee may have additional questions, which will be sent to you within the next seven days. Questions on notice may be incorporated into that, if that is okay with you.

Professor McCALLUM: Yes, thank you. If you send them by email we will do our best to comply.

(The witnesses withdrew)

PETER JOHN WHITEHEAD, National Manager, Fiduciary Solutions, Perpetual Limited, 123 Pitt Street, Sydney,

IAN PENDLETON, General Manager, Fiduciary Solutions, Perpetual Limited, 123 Pitt Street, Sydney,

ROSS WILLIAM ELLIS, Executive Director, Trustee Corporations Association of Australia, G.P.O. Box 1595, Sydney,

PAUL ANTHONY O"NEILL, Business Development Manager, Trust Company Limited, 35 Clarence Street, Sydney, and

PETER HALDANE BRYANT, Group Legal Counsel, Trust Company Limited, 35 Clarence Street, Sydney, affirmed and examined:

CHAIR: Would anyone like to make an opening statement?

Mr ELLIS: Yes, I would like to make a brief statement. We appreciate the opportunity to be here. There are five of us, and originally there were to be only three with two observers. But the other two were asked to join us in case they had some answers to provide to the Committee. By way of background, the Trustee Corporations Association of Australia [TCA] is the peak representative body for the trustee corporations industry in Australia. We represent 17 organisations, which comprise all of the public trustees around the country and the great majority of the 10 private statutory trustee companies. Trustee corporations have been providing wealth management services for more than 120 years. Currently they are licensed and regulated by the respective State and Territory governments, but that role will soon move to the Commonwealth with the Australian Securities and Investments Commission becoming the new national regulator for private trustee companies and for any of the public trustees that popped into that scheme.

Under the new regime, trustee companies will continue to be subject to high standards of fiduciary duty. Like other trustees they will remain subject to the prudent person principles, as in the New South Wales Trustee Act 1925, but, because trustee companies are in the business of acting as trustee the legislation requires them to demonstrate a high standard of care, diligence and skill in managing the affairs of other people more than non-professional trustees. Trustee companies are required to have appropriate expertise and internal operating systems in order to carry out their functions in an efficient manner. The traditional services that trustee companies offer include estate planning and wills, administration of deceased estates, acting as trustee for personal trust and charitable trusts, powers of attorney and financial management orders.

Those last two items—powers of attorney and financial management orders—would be particularly relevant for this Committee. On a national basis TCA members manage more than $4 billion of assets under financial management orders that have been issued by various courts and tribunals for about 35,000 people deemed unable to manage their own affairs. Each year our members prepare several thousand powers of attorney for clients. Some of those powers remain in the drawer to be activated at a later stage if the person loses capacity while some powers are activated upon execution. Members currently manage about $6 billion worth of assets for about 8,000 clients under active powers of attorney. We would be happy to take the Committee's questions.

The Hon. MICHAEL VEITCH: From the outset, do you all have a similar management model and fee structure for managing the orders, financial affairs, estates, et cetera? Is it all pretty much the same?

Mr ELLIS: I will hand that to the practitioners.

The Hon. MICHAEL VEITCH: I know that may be a corporate arrangement, but I would like to know how it works.

Mr ELLIS: Trust and Perpetual could comment on their approach.

Mr O'NEILL: From Trust Company's point of view, we certainly have a set of guidelines as to what we might charge and how we might apply our fee structure. In being appointed in some matters we do have a mind to the other participants in the market place. So it is a commercial marketplace for us. We are probably mindful of the pricing structures and procedures of other institutions that operate in the same space. I would

have to suggest, and I think that, we all have a similar pricing structures and similar operational structures in terms of the people behind the scenes who carry out the work on behalf of those people, but I do not think we could intricately explain each others' processes.

The Hon. MICHAEL VEITCH: I understand.

Mr PENDLETON: Certainly we advertise for the upper caps as we are required to do for the trustee fees that would be subject to charging, but we would probably negotiate, more often than not, actual fees that are below those caps, depending on the nature of the matter.

The Hon. MICHAEL VEITCH: Does that differ greatly from the Public Trustee?

Mr ELLIS: Peter could probably speak from past experience.

Mr WHITEHEAD: I was the Public Trustee in New South Wales up until 30 June. Our regulated fees were, naturally, set at a maximum as well and we would negotiate on some matters. But bearing in mind that a very large proportion of the Public Trustee's matters were small, it would be very inefficient and cost-ineffective to have negotiated strongly on those types of matters. But at the upper end of matters there would be negotiation because we are in the same market in that sense.

The Hon. MICHAEL VEITCH: Thank you. The Attorney General has asked the Committee to consider amending the NSW Trustee and Guardian Act 2009 to allow the relevant court or tribunal to exclude parts of an estate from a financial management order. In your submission you note the relevance of section 40 of the Act which states that an order may be made under this chapter for the management of the whole or part of the estate of a person. What are your views on how excluding parts of an estate differs from making an order for part of an estate?

Mr ELLIS: When I saw that question, I thought the end result was no different.

The Hon. MICHAEL VEITCH: No different, ultimately.

Mr ELLIS: Just coming at it from a different side. People who are more directly involved may like to add something. Peter?

Mr WHITEHEAD: There can be a perception, when you are seeking an order for part of an estate to be managed, that you have made a judgement that the person already has capacity to retain self-management of certain assets, which is a very positive input into how you proceed. However, as Ross Ellis just said, when a tribunal is considering what type of order to make it really has to focus in the best interests of the person and, therefore, make a judgement that they make the right order to suit the assets and the specific decisions that will have to be made by that person. Whether you take a decision-specific approach or a functional approach, we are involved in financial management in this industry, so there will be levels of capacity of clients that would be able to handle a small amount of money, a floating amount that they could use for their day-to-day benefit.

But in terms of the high-level function or decisions that they have to make about investment of a large sum of money, they may not have that capacity. So you may exclude certain assets that are well within their realm of possibility of managing. Plenary orders make an assumption that they have got no residual capacity to deal with any assets of a financial nature. That is a bit over the top sometimes.

The Hon. MICHAEL VEITCH: Can you provide an example of what would be excluded?

Mr WHITEHEAD: You may have a bank account with a floating amount of maybe only up to $10,000 that they would have a perfect understanding to manage within the risk of not being harm to their larger financial management, but if they had investment in a large investment portfolio of shares or, for instance, in managed investment scheme funds then obviously there are decisions that have to be made at particular times to make sure that those assets are protected and within the whole financial plan for the person.

The Hon. MICHAEL VEITCH: It has been argued that considering which parts of an estate to include in an order is more consistent with the presumption of capacity and applying the least restrictive alternative when considering which parts to exclude to reverse it that rather than look at exclusion look at inclusion. What are your views about that?

Mr ELLIS: I think that approach is consistent with the United Nations Convention on the Rights of Persons with Disabilities. Even though the end result may be the same, as Peter says, it can be a perception.

The Hon. MICHAEL VEITCH: I just want to know the process through which a private trustee corporation as opposed to the New South Wales Trustee and Guardian would be appointed as a financial manager for a person deemed to be lacking capacity. What is the process?

Mr O'NEILL: I should point out that I am probably one of the few here not legally qualified but on a day-to-day basis I am active in this space so I will give it my best shot. There seem to be two parts in New South Wales, one through the New South Wales Supreme Court, and those are usually in matters where there has been an accident or a medical mishap or some sort of circumstance that has seen an individual acquire a disability and potentially an incapacitation to look after their own affairs financially. In those sorts of circumstances you will find that a plaintiff law firm or a plaintiff lawyer will become involved and will do what they can to get the best financial outcome for their client. Usually that process takes quite some time, but at some stage along the way they will have made a determination by the involvement of various medical professionals that the person in question is likely to lack the capacity to look after their own financial affairs.

Organisations like my own and some of the others here, we are, I guess, introduced into the matter at that time by the plaintiff lawyer. They will usually speak with the injured person's tutor or next friend or the person who has assisted them in bringing the action in the first place, and they will usually put a number of organisations up for consideration to be appointed financial manager—that might be the New South Wales Public Trustee, it might be Perpetual, it might be a trust company and any others. I think also there is occasionally consideration of a family member. We find that it is usually a family member and the injured person who take a liking to one organisation or another after they have had the facts laid out before them as to who they might like to see appointed as the financial manager and at that point will be asked to provide various affidavit material to have our appointment confirmed by the New South Wales Supreme Court.

The "B" side to that is any interested or concerned individual out there in the community may make application to the Guardianship Tribunal for a friend, a family member or a neighbour if they see that there is someone in the community who seems to lack capacity to look after their own affairs, so in this case there might be no award or anything, it might be someone who has been quite capable of looking after their own affairs for X number of years, but, by means of perhaps age onset, dementia or any other circumstance, people might have due concern and may approach the New South Wales Guardianship Tribunal and the tribunal itself can also make a financial management order and we would then, if it was an organisation like ours, we would then be subject to oversight by what was the Office of the Protective Commissioner but now the New South Wales Trustee and Guardian.

The Hon. MICHAEL VEITCH: Are the financial orders infinite or are they time-framed and reviewable, and, if so, by whom?

Mr O'NEILL: Anyone kick me under the table if I say the wrong thing. My understanding is that the order is infinite unless stated otherwise. I do not think I have ever seen one stated otherwise—certainly via the Supreme Court. We do find that the orders themselves, when they see us appointed, are then followed up by something called a letter of directions and authorities from the New South Wales Trustee and Guardian and that will put some limitations on what it is considered that the appointed financial manager can and cannot do without prior reference to the oversight body.

The Hon. MICHAEL VEITCH: If someone from the community were to consider that in their view the financial management of an individual's affairs was inappropriate, can they seek to have someone else appointed to manage the trust or the affairs—a financial order?

Mr O'NEILL: I would have a crack at this answer but I would probably defer to someone else first.

Mr WHITEHEAD: We like to say yes, it can be referred back to the Supreme Court or the Guardianship Tribunal for a review and a replacement if there are grounds for that to occur. When appointment has been made of a trustee corporation, obviously it is a very big decision to make to have a corporation involved in someone else's life so they would have to show that they had been very negligent almost in terms of the investment decisions before that could occur, or sometimes it can actually occur that there has been a breakdown of a relationship and it is in the best interests of a person to have another manager appointed.

The Hon. MICHAEL VEITCH: How do you bring that action? If I were to bring that action on behalf of someone what would be the process?

Mr WHITEHEAD: You would bring a summons to the Supreme Court or an application to the Guardianship Tribunal.

The Hon. MICHAEL VEITCH: With regard to the regulation of your industry, how are you regulated? Is it through ASIC?

Mr ELLIS: At the moment it comes under the State and Territory governments. What is about to happen early next year is that the traditional trustee company services that I mentioned earlier—powers of attorney, wills, estate administration—that part of the business used to be deemed financial services under the Corporations Act and will be subject to Commonwealth regulation and ASIC will be the national regulator. The Public Trustee will have the option to join that new national scheme if they wish, but it will be compulsory for all private trustee companies, so there will be national regulation by the Australian Securities and Investments Commission.

The Hon. MICHAEL VEITCH: What is the advantage of having your affairs managed by a private trust company as opposed to the Public Trustee?

Mr ELLIS: I thought you were going to ask compared to a private manager in terms of an individual person, and the big advantage there is just the expertise, the resources, the experience, the fiduciary obligations and the skills that these companies bring having been in the business for over 120 years. I would not differentiate between the Public Trustee or the private trustee companies because they both handle a lot of that business and, as Peter said, the Public Trustee tends to get the smaller matters in dollar terms but the same obligations are imposed on the trustee.

Mr WHITEHEAD: They both have the resources and investment options to meet their client needs, so they will have tailored solutions depending on the nature of the client base. As Ross said, you could not really differentiate benefits or disadvantages between the two. It depends on client choice and preference for the style of management.

The Hon. MICHAEL VEITCH: There has been a fair bit of testimony given to us urging New South Wales to move towards having a public advocate. How do you see the role of the public advocate with regard to financial money orders and particularly how it would relate to the way your industry manages those things?

Mr WHITEHEAD: I have been a long-term proponent for having a public advocate to appear on behalf of people at a tribunal hearing so that there is this independent view to make sure that the best interests are being achieved. In terms of working out who should be the financial manager for the person, there is often disputes within a family that can cause the wrong decision to be made or difficulties for the Guardianship Tribunal, as good as they are, to sort out these problems. They do a very good job to make sure that the person's interests are being best independently advocated rather than someone's own viewpoint as to why they may want to take on that role.

From our point of view, if there was a large conflict it will be clearly seen as an advantage, in a way, to have an advocate pick up on those issues and advocate for an independent financial manager on behalf of the person rather than the tribunal having to respond to only viewpoints seen through the eyes of that person but through probably vested interests of members of the family

Mr O'NEILL: I would concur. I think from a day-to-day point of view it is sometimes good to have an independent party. I think our role is often scrutinised by family members who, in some circumstances, do not necessarily have the other individual's best interests at heart. That is not always the case, but you do see the best and the worst of people in this role and sometimes we find that the individual that we are protecting will sometimes question the decisions that I would like to say we make together but sometimes we do need to impose a view for their own benefit. In circumstances like that it would be good to have an impartial individual like a public advocate to either reaffirm that we are doing the right thing on their behalf or to question our decision and maybe make us come at it in a different way. But I think the role would be welcome.

CHAIR: In every case would you see a difficulty from any angle, whether it is resources or any other reason, where there was a difference of opinion between yourself and the protected person for the matter to be referred to some independent tribunal which involved advocacy?

Mr O'NEILL: This is a difficult question, because the New South Wales Trustee and Guardian, formerly the Office of the Protective Commissioner, really do provide that role in some way, shape or form already. As I mentioned earlier, and I hope I am not backtracking too far, but we are given this letter of directions and authorities that gives us some freedom to manage the client's affairs as best we see fit together. But there are things where they will insist that we put a separate application through to the New South Wales Trustee and Guardian. Sometimes that actual application or our consideration of a request from the client needs to go before the New South Wales Trustee and Guardian. So they really do provide that oversight in some cases.

I guess it would be in circumstances where we potentially made a decision for the client and the New South Wales Trustee and Guardian had provided oversight and either agreed or disagreed with us, then there might be a view towards involving an advocate.

CHAIR: I am looking at it from the point of view that the person you are protecting has full capacity and that if you were to put forward a concept that was different to what they were saying, whilst you are agreeing there is not a problem but when there is a disagreement between the person you are protecting and yourself as to the way forward that in that case it should automatically go before some tribunal?

Mr PENDLETON: Ross mentioned before that we are moving into a new regulatory regime next year where ASIC will be the prime regulator, and one aspect of that regime will be that we need to have in place an independent complaints service where such complaints need to be held and the form of that service is still to be determined, although it is quite likely it will be an arm of the Financial Ombudsman's Service [FOS], which is the complaints mechanism that all our other clients access when they have got a problem with what we do.

CHAIR: I was looking at it from the point of view that the protected person had the presumption of capacity as opposed to some internal or external review mechanism divorced from the perceived capacity of the protected person.

Mr WHITEHEAD: The issue there is that because there is a financial management order in place there has been a determination of some lack of capacity—

CHAIR: Yes, but that lack of capacity has been determined to be forever at a particular point in time. That is the difficulty we are confronting.

Mr ELLIS: It can be reviewed.

Mr WHITEHEAD: Also, if it is only in respect of part of their estate they have the ability to continue to make those decisions for the part that is not covered.

CHAIR: Yes, but obviously we are concentrating on the area where they are perceived not to have the capacity at a particular point in time.

Mr O'NEILL: This might not go all the way to answering your question, but in relation to the lack of capacity, from time to time I will have clients who will say, "I think I really have improved and am capable of looking after my own affairs." We would then encourage them. We would use their funds to enable them to see the appropriate medical specialist to be reassessed so that if there was a determination by the two doctors that are required, we would then look at whether there maybe is an ability or a realistic chance of an approach to the Guardianship Tribunal, for instance, for a determination of capacity. I was just jumping on the point that it can be reviewed even though that determination has been made sometime in the past, presumably for their life expectancy.

Getting back to the question about the role of the advocate, I think there are a number of occasions in any financial management order where there is a disagreement. We often refer to the first six to 12 months as a settling-in period where we try to get to know the clients and have an understanding of their past lifestyle and expectations and balance that with what we believe they can afford with the money we might be managing on their behalf. Where it would seem there is a fundamental conflict in terms of what they might want to do and what might be affordable, certainly from my point of view and maybe selfishly I would love the knowledge that

the Public Advocate would be able to be called in to make a determination one way or the other. There is in the marketplace an organisation called Disability Advocacy Services. We have clients from time to time ask for their involvement. Again, we welcome it. We get permission from people to share information with Disability Advocacy Services and they do take up the battle for the client.

CHAIR: The question I am asking is what difficulties would you have should we reverse the onus of proof if it is perceived there is a full capacity, and if there is an argument as to incapacity the onus of proof would be on you to establish incapacity, not the other way around so that the protected person has to approve capacity?

Mr O'NEILL: Again, if I am not missing the point of the question, going back to the origins of our involvement, we do not look to see that the client is determined to lack capacity. It is usually family or relatives on behalf of that client. I guess I am talking about where there might have been an award of compensation. In those circumstances it is usually the case that someone who presumably knows the person and has had concern has been required to prove that the person lacked capacity by getting the relevant medical information. I guess you would probably have to flick that part on its head as well, would you not?

Dr JOHN KAYE: Thank you for coming today and sharing your expertise with us. I want to separate out your role from that of the NSW Trustee and Guardian. Do you provide identical services to the NSW Trustee and Guardian and does the Trustee and Guardian provide identical services to you? That is, what do they do that you do not do, and what do you do that they do not?

The Hon. MICHAEL VEITCH: The point of difference.

Mr ELLIS: People lacking capacity can have the New South Wales Trustee and Guardian appointed—the former Office of the Protective Commissioner [OPC] role—or the decision can be made to appoint a private manager. The private manager can be a trustee company or a family member et cetera. In that sense if a trustee company is appointed it is doing a similar role to that which the New South Wales Trustee and Guardian would do under its direct management of clients. They would also have a secondary role, as touched on before, of providing oversight to all private managers in terms of how those private managers are handling the funds of the represented person.

Dr JOHN KAYE: An individual who presents with the need for financial management could end up with you or the New South Wales Trustee and Guardian. The law is neutral as far as that is concerned. There are no specific classes of individuals who would end up with your kind of service?

Mr ELLIS: Not to my knowledge.

Mr WHITEHEAD: There is a last resort role for the New South Wales Trustee and Guardian that I notice has been raised in previous submissions or at hearings, so in a sense if there is no-one else they have this role to fill. Infants are specifically mentioned in the Civil Procedure Act, not necessarily by default, but the Trustee and Guardian is mentioned specifically in favour of what they can do compared to what trustee companies can do. It may be a suggestion to see whether we could possibly review that to make sure that it is a level playing field. That is referred to in section 77 and section 78 of the Civil Procedure Act. Overall we have an obligation as a trustee, whether you are the New South Wales Trustee and Guardian or a trustee company, to meet our fiduciary obligations, and they are controlled by various parts of the legislation and the common law. Our product range and our obligations arising out of that product range are the same in terms of being assessed against a prudent and diligent fiduciary.

Dr JOHN KAYE: What are the factors that determine a decision going in favour of the Trustee and Guardian or in favour of a trustee corporation?

Mr ELLIS: As Paul touched on before, part of it is the initial negotiation with family members, and they might just feel a good relationship with a particular party that is nominated as a possible—

Dr JOHN KAYE: So there are not specific legal or legal practice reasons why?

Mr ELLIS: Peter and Paul and others might elaborate but that is a starting point. The family has a big input into who is chosen as the manager. Obviously, a lot will depend on the nature and size of the protected

person's estate or their affairs. The location of the person and their assets can have a bearing. Peter, would you like to add to that?

Mr WHITEHEAD: Just what other estate planning options are put to them in the process of taking the client on board and getting the confidence that the organisation you are creating a relationship with will provide those services and report to you and meet the standards of the principles of best practice in financial management.

CHAIR: Are there financial considerations as to whether or not an amount in the estate would determine whether it is viable to look after it from a profit point of view?

Mr ELLIS: That comes back to earlier points that the private trustee companies are in the business of providing these services. They would be more able to look at the size of the estate involved and how they could add value to managing that. As Peter has said, the New South Wales Trustee and Guardian is regarded more as the last resort, which could tend to be the smaller estates.

CHAIR: Can you give me a rough estimate as to when a financial estate becomes viable in terms of return and, secondly, are you able to make a stab at the rough percentage of people who are clients who do not have family?

Mr ELLIS: I would not have the numbers for those who do not have family.

CHAIR: A rough estimate; a stab at a percentage.

Mr WHITEHEAD: One other aspect of your question that I can comment on is the fact that the New South Wales Trustee and Guardian is funded by Treasury for community service obligations and in order to calculate a cut-off point when a matter needs that funding that has been determined by agreement with State Treasury. You might like to direct that question to the New South Wales Trustee and Guardian or to the acting chief executive officer.

Mr ELLIS: I have the Office of the Protective Commissioner annual report figures as at June 2008, under the previous structure. The total number of persons being represented in terms of their financial affairs was something over 11,000. The OPC was handling almost 9,000 of those directly and private managers have been appointed for about 2,500 of those people in New South Wales. That ties up with trustee company members nationally handling about 35,000 clients lacking capacity.

Dr JOHN KAYE: So 35,000 nationally would be equivalent to about 10,000 in New South Wales, would it not?

Mr ELLIS: We do not have the State-by-State figures.

Mr WHITEHEAD: You are approximately correct.

Mr ELLIS: It sounds about right.

Dr JOHN KAYE: I am having difficulty tying up those figures because you said there were 2,000 being managed privately, if my memory serves me correctly.

Mr ELLIS: In New South Wales.

Dr JOHN KAYE: But from your other figure of 35,000—

Mr ELLIS: That is nationally.

Dr JOHN KAYE: Being managed privately nationally or totally?

Mr ELLIS: By trustee companies nationally.

Dr JOHN KAYE: So there are 35,000 nationally and only 2,000 in New South Wales. There should be about 10,000 in New South Wales.

Mr WHITEHEAD: The balance would be managed by the New South Wales Trustee and Guardian.

Dr JOHN KAYE: So the 35,000 are in public or private management?

Mr ELLIS: Yes.

Dr JOHN KAYE: I am sorry, I misunderstood. Those figures do tie up.

Mr ELLIS: Our members include all the public trustees, including now the New South Wales Trustee and Guardian.

Dr JOHN KAYE: Would it be fair to say that the 2,000 clients that your industry manages in New South Wales would be largely, not entirely, the upper end clients—people with large estates?

Mr ELLIS: Yes.

Dr JOHN KAYE: Please do not take these questions the wrong way. I genuinely want to know this. What is the formula that determines what profit you make out of a client? How is that all set up? Is there a fixed fee schedule and that is all you make, or do you share in the benefits of investment? How is that all done?

Mr PENDLETON: There is a fixed percentage of income and capital that is applied to each client's account and that is taken by Perpetual. As far as how that is assessed against what profit an organisation makes it is a very difficult thing to assess. Every client is different, their needs are different and the degree of contact they have with us different. It is almost impossible to give you what percentage in profit a company like ours would make.

Dr JOHN KAYE: You take a fixed percentage of the capital and the income of each and that percentage is set?

Mr PENDLETON: It is negotiated for each matter.

Mr ELLIS: Maximum rates are set in the legislation but members negotiate depending on the circumstances of the individual case.

Dr JOHN KAYE: So there is a maximum rate and then on a case-by-case basis you negotiate with whoever is the competent authority, so to speak, as to what that should be?

Mr PENDLETON: Yes.

Dr JOHN KAYE: What are the maximum rates?

Mr O'NEILL: I think it is up to a maximum of 5.5 per cent of initial capital sum and up to a maximum of 6.6 per cent of the income earned.

Mr ELLIS: The income earned on the investments.

Dr JOHN KAYE: From the gross income earned on the investments you take—

Mr O'NEILL: Actually income only. As you may know, investments might generate both growth and income.

Dr JOHN KAYE: Yes.

Mr O'NEILL: It is on the income component only.

Dr JOHN KAYE: From the gross income you take 6.6 per cent?

Mr O'NEILL: No. By legislation it can be up to a maximum of 6.6 per cent of the income generated. But that is not to say that in every case it is 6.6 per cent.

Mr ELLIS: That 0.6 includes the GST.

Dr JOHN KAYE: I am not someone with great financial expertise. There is a complex range of trade-offs when you are making these decisions between risk and security, and between income and capital growth. Most people make a whole range of those decisions either consciously or unconsciously when they do their own investment. You are making those decisions on behalf somebody else?

Mr ELLIS: Yes.

Dr JOHN KAYE: Different people have different degrees of risk aversion. I look at myself and my brothers, for example, and I am totally risk aversive; my brothers like to be more risky in what they do. Different people have different attitudes to capital growth and income. Obviously, you have expertise in talking to people and evincing from them what they want and what they need and bouncing out those two factors. How do you go from that to a decision about these trade-offs?

Mr O'NEILL: In each case it is the same process you would take for any client, whether or not they lack capacity. You sit down with the individual and, depending on their level of incapacity, we assume at the outset they have around them a trusted network of individuals that—it could be family members or at least people who have assisted them in bringing this action before the court. Let us assume we are talking about a compensation matter to start with. In those instances probably the overriding consideration we have is that there is an amount of money that has potentially been awarded. The best way to consider that is that that may be the last payday that person is ever going to have. We have to try to do some financial modelling and forecasting to see what can be done to make this money last that client's anticipated life expectancy.

That factor becomes one factor in how aggressive or conservative you would need to be in the investment portfolio that might be put together. Let us assume though that there would appear to be enough money to not require a lot of risk-taking or conservatism, one way or the other, to see this money last that individual's lifetime. We then try to look at their lifestyle habits or circumstances towards investment in the period prior to this event that caused their incapacity and we try to mirror the habits they have had in the past. Let us flip that to someone who has not necessarily had a compensation award sum but maybe over time has acquired a need for management and someone has approached the Guardianship Tribunal. In those situations the process is largely the same. There is a history of the type of investment attitude they might have had, but there is also an understanding of how much longer they are likely to need to be dependent on this money. Other factors that might kick in as well are that in some situations people are precluded from any further social security benefit for a period of time, usually when there is a compensation award.

The Hon. MICHAEL VEITCH: A lump-sum payment?

Mr O'NEILL: That is right. Or, alternatively, there may already be a benefit and income coming in. Again, you measure the income they have against their lifestyle requirements and a decision is made along the scale of absolutely conservative to absolutely aggressive. It is rare that it is at the absolutely aggressive end.

Dr JOHN KAYE: Again, please do not take this question the wrong way, but those decisions will have an impact on the profit your corporation will make?

Mr O'NEILL: They possibly do.

Dr JOHN KAYE: I am not trying to be rude, but how are those decisions regulated to make sure that it is the client who is coming first and not the corporation?

Mr O'NEILL: Certainly from the point of view of circumstances where we are overseen by the Office of the Protective Commissioner, you really have two sets of eyes on the plan. It might be a glib statement, but I feel I can hold hand to heart and say that is not really the consideration in what will be the best generation of income for our own company. The worst thing in the world you can have happen is a shortfall. You really want to do the best for your client, particularly because it is not just a consideration of income but also a consideration of reputation. We would not be considered for these matters unless we were deemed to be doing the job properly by virtue of the family members and the oversight body.

Dr JOHN KAYE: It basically comes back to the Office of the Protective Commissioner [OPC]?

Mr O'NEILL: That is certainly not the only consideration, but they are a second set of eyes.

Dr JOHN KAYE: Does the OPC look at each individual decision you make? Does it go down to the level of your investment decisions? Does it get a full set of data on that?

Mr O'NEILL: No. I am glad you asked me this because it is something I certainly would like to comment on. No, usually we need to submit an initial plan of management at the time of our initial appointment. We are reviewed on at least an annual basis where we have to provide a set of accounts, accounting for every dollar that is spent and showing whether the investments et cetera still fit within our initial plan and whether everything is seemingly going towards or along the way we had indicated at the outset. During the year though there are some big considerations that we need to apply directly to the Office of the Protective Commissioner for approval. They are usually property purchases or motor vehicle purchases. But I would like to say that there are situations where family members—we are talking here about private financial managers, but sometimes they are not companies like ours, they are individuals. I think there is a question on the degree of scrutiny that is required on individual decisions that are overseen by the Office of the Protective Commissioner because it can really slow down the process on behalf of the clients or the individuals whom we represent.

I hope I am not sounding selfish in saying this but I think organisations like ours probably are scrutinised in so many different ways that I would like to think there could be some argument that trustee organisations could be given perhaps a little more leeway in the decisions that can be made than individuals who might be appointed on a client's behalf, by sheer virtue of the expertise and the level of oversight we face.

The Hon. MICHAEL VEITCH: What is the court process for an individual financial manager to be appointed as opposed to your organisation or the Public Trustee? How does that happen? What sort of qualification background needs to be presented? Can I just rock up and say I want to start managing?

Mr WHITEHEAD: Within the protective jurisdiction of the court it is a requirement that the court look at the qualifications, expertise and ability of a private manager to meet that role. They have to provide that assurance to the court that the decision the court would make in their favour was going to be the right decision. Of course, then the review mechanism that does occur kicks in once the order is there. The New South Wales Trustee and Guardian will have a role in annually reviewing. It is a level of that review that really will determine how good that person is doing their job. That is the difference. Trustee companies will have internal controls in meeting their fiduciary obligations to have an annual review at least on investment under the Trustee Act. There are already a number of controls for that person, but for a private person they are not really answerable to anyone or the court should someone find they need to have them removed because they are not doing the right thing. That is a much more less-transparent process, of course, because they are not doing this as part of their daily job like a trustee company.

CHAIR: What happens when there is a financial management order? Are you able to get involved in managing estates without a financial management order?

Mr WHITEHEAD: Yes, under a power of attorney.

Mr ELLIS: A main example would be during power of attorney. A lot of people take them out as a safety net in case they lose capacity. The attorney is not called upon to act unless that person loses capacity. Other people think, "Well, this is a good thing, I'm getting old, finding difficulty managing, I still have capacity but I'm prepared to sign a power of attorney to have someone competent do this for me." That is another traditional area for trustee companies.

CHAIR: How is that point of loss of capacity determined?

Mr ELLIS: The same sort of considerations.

Mr O'NEILL: I have to admit that that is not an area with which I am involved daily, but I think there would be some sort of medical component required.

Mr WHITEHEAD: Generally, if needed, there will be a detailed report, but in many cases it becomes obvious. If you have been dealing with this client in another capacity as an investment client or as a will client, they may be coming in to see you, you will generally get a phone call from a member of the family to say,

"Look, we have this power of attorney in place. We know that mum's just got a diagnosis of early dementia. We would like you to become involved now." If necessary, you can get a written medical report to confirm that status of loss of capacity. There are a number of arguments about whether you should make that a compulsory piece of information before you commence to act. But that may be adding a level of extra regulation to what is a fairly normal event when someone is diagnosed and they have a preplanned power of attorney ready to kick in.

The Hon. MICHAEL VEITCH: A lot of debate has been put to the Committee about enduring power of attorney, living wills and all that sort of stuff. Is their capacity for those to be extinguished or negated in the making of a financial management order? If so, if you were appointed the manager, would you give consideration to the previous arrangements even though they may have been negated by the order?

Mr WHITEHEAD: By law you are required to take note of that existing document, but it is suspended once the management order is made.

The Hon. MICHAEL VEITCH: It is suspended?

Mr WHITEHEAD: It is suspended.

Mr ELLIS: Yes, under the law.

Mr WHITEHEAD: Therefore, that person does not have any legal or fiduciary responsibility in respect of those assets for that person anymore. However, if there are partial management orders made or exclusions, an existing attorney can continue to act for those matters that are not covered by that management order. As we go through recognition of people's capacity to self manage for some of their estate, we will possibly be having a new area of monitoring to determine how we balance, between the attorney and a financial manager, the needs of the client for those different areas. The person may still want the attorney to act for part of their estate in certain circumstances because they might be going on holidays and they may need decisions in respect of that. There can be a dual role in those cases but, certainly, if it is a plenary order the power of attorney is suspended until reviewed and changed.

CHAIR: And the financial management order is ongoing because it does not have a term?

Mr WHITEHEAD: That is right.

CHAIR: Whoever had the power of attorney would have to bring a Supreme Court action?

Mr WHITEHEAD: Or approach the Guardianship Tribunal.

The Hon. MICHAEL VEITCH: To ensure that some sort of consideration still is being given to it even though it has been suspended?

Mr WHITEHEAD: It would occur only if there were concerns about a person's capacity to self manage and, therefore, have an ability to continue with the power of attorney arrangement for some of the assets that have been excluded. In many instances it would be unlikely to cause a major problem where a person is severely brain injured or has well-advanced dementia. It would be unlikely that you would need to have a financial management and power of attorney existing together.

CHAIR: I would have thought that dementia cases are increasing exponentially?

Mr WHITEHEAD: They are.

CHAIR: And they are the ones that will cause those issues?

Mr WHITEHEAD: They are but, as you say, you retain capacity, and we have got to work on the presumption of capacity being retained for certain decisions. But you will get to a point where you will not have any residual capacity to make many decisions at all, whether it is in a financial or personal decision-making capacity.

The Hon. MICHAEL VEITCH: Returning to the issue of a personal financial manager. Your industry has a degree of regulation by legislation oversight et cetera. For example, if I were to turn up to seek

control of my mother's financial affairs and then, through bad financial decisions of my own, the size of the estate was reduced, what recourse can be taken against an individual, as opposed to recourse against your organisations?

Mr WHITEHEAD: The standard of care that you have to operate under is much less than for professional organisations such as a trustee company. You have a test under the Trustee Act, for instance, if we are going to talk about investment decisions, to operate not as a professional body at the time of making those decisions but in your individual capacity, so you may not be successfully sued. It may be very difficult for it to be shown that what you had done was something that you would not do with a reasonable level of advice and support in making that decision. But you have an obligation to consider a number of factors, whether you are a private trustee, individual or a trustee company, and those factors are in the Trustee Act in terms of investment. It is just that the level of exposure to risk for a private person is much lower. But a prudent person test still supports people getting advice and they get greater protection if they get that advice. So if you were a private person you would get the advice, you would rely on it, and you would probably be protected because you have that professional advice from an investment planner or—

The Hon. MICHAEL VEITCH: Is there insurance?

Mr O'NEILL: I was just going to add—and I invite comment if I say the wrong thing—but I believe when an organisation such as ours is appointed the words "without security" are often included in the orders. I believe that sometimes if an individual is appointed the court can ask that there be some sort of security provided more or less as a backup or a guarantee, probably more along the lines of fraud or negligent activity as opposed to making bad decisions. I do not know the legislation and how that works but I thought that might answer partly what you are asking there.

Mr WHITEHEAD: The New South Wales Trustee and Guardian might ask you to lodge the certificate of title for a property with them or they may be able to take some funds that you have for the investment of your mother, for instance, to be placed within their investment as well. There are ways and means but a wrong investment decision without advice will expose you to greater risk.

The Hon. MICHAEL VEITCH: My next question relates to the degree of documentation that is required. I have ascertained that you have a case management model that you use, where there is a team of people involved in the intellectual input into the decision; if a private individual was managing the affairs are there any documentation processes or obligations for substantiating the decisions that were made?

Mr ELLIS: There are still obligations on the private person, the annual report at least to the trustee and guardian, to explain the expenditure they have incurred on behalf of that person over the period.

Mr O'NEILL: I do not know what requirements there are of them because we are not really involved in those circumstances.

Mr WHITEHEAD: If it was under power of attorney there are common law requirements to keep proper records. Under the Powers of Attorney Act the document that is created as a regulated document has a brief note at the end of it advising private people, who are attorneys, as to what they really should be doing and where they can go to seek further assistance to know their obligations.

Mr ELLIS: That is the sort of thing that the Australian Securities and Investments Commission is presently looking at: guidelines and standards that will apply to trustee companies in all their traditional service areas—wills, estates, powers of attorney—covering things like their expertise and their systems, and, as you touched on, insurance. So the Australian Securities and Investments Commission will have rules and requirements for any entity that wishes to be a licensed trustee company, so extra onus, extra fiduciary responsibility.

CHAIR: Thank you all for your attendance this morning to assist the Committee in its inquiry. There may be further questions on notice sent to you within the next seven days with your indulgence.

(The witnesses withdrew)

(Short adjournment)

IAN HICKIE, Executive Director, Brian and Mind Research Institute, University of Sydney, 100 Mallett Street Camperdown, sworn and examined:

CHAIR: In what capacity do you appear before the committee?

Professor HICKIE: As Executive Director, Brain and Mind Research Institute, University of Sydney.

CHAIR: Do you want to make an opening statement?

Professor HICKIE: I think the issue of having decision-making processes in place, based on capacity, is a terribly important one for people with mental health problems and that in the past the legal situation surrounding these issues for consumers or patients themselves, and their carers, have been extremely difficult to transact within our traditional approaches. From a community point of view I think this is a terribly important issue to try to develop better processes to respect the various needs and wishes of those who are affected by mental illness.

The Hon. MICHAEL VEITCH: This morning Professor McCallum spoke to the committee about the spectrum of decision making. I think he referred to support decision making, assisted decision making and then right through to substituted decision making. In regard to people with a mental illness what is your view about that spectrum as opposed to the current arrangements whereby one is either in or out of the system?

Professor HICKIE: I think it is very easy to be critical of the current arrangements. They do not seem to serve well the interests of most people who are affected. To be a critic of the current situation is relatively straightforward, based essentially in eighteenth and nineteenth century ideas of capacity and certainly prior to a modern understanding of those issues, and certainly in the area of mental illness to the extent to which people's capacity making varies, as a consequence of receiving treatment or due to natural variations in the course of their illness. So the spectrum operates over time but also with regards to capacity, I think the issue is, of course, also what you are making decisions about in various areas. So the notion of a universal that one has or has not capacity for the whole range of decisions that one might need to make is also important.

That has become particularly important in the area of mental illness because of our expectation, as with other illnesses, people will live the great majority of their life in the community and need to make decisions about a whole variety of issues with regards to accommodation, finances, personal privacy, interactions with the health system and each of those may require different levels of decision making or be affected to some degree or not by their current state of illness. So the spectrum idea is one that we are very supportive of, the difficulty arises in our area mostly because of the fluctuating nature of a person's capacity, and then at any particular point in time their capacity about one set of decisions may be impaired but their capacity with regards to other sets of decisions may not be impaired.

So that differential issue—what the decision is about—may be critical. So a rather arbitrary black or white "yes" or "no", you have got capacity or you do not, does not tend to work and with regards to all sets of decisions it does not necessarily work. There may be issues related to finance or health care options which are quite different in a particular instance. So a person may have a retained capacity in one area, may require assistance in some particular areas, but in another area be quite impaired in terms of their decision making.

CHAIR: That may change in time?

Professor HICKIE: Exactly, so that may change day-to-day, certainly week-to-week, certainly month-to-month. So it is a fluctuating level with regards to each of those sets of area. So intrinsically people in the areas in which I am working need greater flexibility in those areas, and certainly a capacity with that that is reviewed, and it is reviewed in relation to the specific sets of decisions that are at stake at different points in time. Universal decisions about capacity do not tend to work very well either.

The Hon. MICHAEL VEITCH: Who makes the decision that you either have or have not capacity?

Professor HICKIE: The trouble is for what set of decisions is it being made? If it is being made in the health care system with regards to consent to procedures, it tends to have a rather black and white kind of notion currently with regards to most mental health laws. That tends to be the situation internationally that you either do or do not have the capacity to make a decision about your own health care.

The Hon. MICHAEL VEITCH: Does that include medication orders?

Professor HICKIE: It may include, yes, medication orders, continuing treatment orders but as a consequence of that then often other decision making is assumed to be impaired. So at one level you may be seeking an order, or assistance with decision making about health care options, but once that comes into place traditionally in our systems, it is then effected and assumed that you cannot make decisions about your financial situation or where you may wish to live or interaction with your relatives, or a whole range of other issues. It is then being applied in a rather blanket way as if your decision-make capacity is impaired in all domains, not just in the health care domain. So in the health care sector it tends to be in those sets of issues.

In other issues in regard to brain-related conditions it may be in relation to obviously financial, or assets at a particular period of time, or management of those assets on an ongoing basis. So we tended to have the health care options, somewhat as the primary set of issues with secondary effects on those others. At times when there are significant assets or financial issues at stake people tended to use guardianship type arrangements, assuming, of course, that there is a fixed incapacity, or at least that that incapacity is fixed for a considerable period of time.

But again a particular issue that comes into play in our area, that most mental health problems have their onset in the teenage or early adults years and decisions at that point about assets or financial resources are likely to have a life-long implications. Even though a person's capacity may be impaired for some significant period—months or even years at that point—that may not be the case down the track. If there are issues like inheritance at stake or inherited assets or the key issues that need to be made, they may have life-long implications. So they are quite different usually to in other areas of impaired capacity associated with dementia whether at the end of life and another generation is going to be affected, or for children who are born with incapacity where life-long decisions are often being made.

The decisions affecting people with mental health are often being made at a critical period of their life when the future implications of key decisions are not clear-cut. And the extent that the person may well be able to participate again at another point, not too far down the track, in those decisions needs to be taken into account. So the whole issue of spectrums in time, the time problem plus the spectrum of capacity making, all argues for more flexible systems in the mental health area. Greater assistance, as you are alluding to, that spectrum not just of decision making but assistance in decision making, and greater sophistication about what sorts of decisions is a person being asked about. Is it a simple health care option? Is it a simple medication issue? Or is it a more complex set of interactions affecting critical issues like financial assets or housing or other areas of a person's life?

The Hon. MICHAEL VEITCH: Professor McCallum couched a lot of those issues in the concept of what he called the social model of disability, which is apparently one of the underpinning principles of the United Nations convention.

Professor HICKIE: This whole assumption that people are going to live in society and have social rights or expectations, therefore, we, as a society, should actually have processes that assist people to participate rather than intrinsically have tended to exclude people and then they have had to bring some kind of rights-based action is that the social systems that we have designed should be enhancing a person's capacity to continuously participate. So that model which, I think, is fundamental to the current United Nations approach, is seen in our area as being extremely assistive. I know that, for example, the Federal Attorney General has taken on this particular issue and sees mental health as one of those areas that is critical.

It really does reflect the change over the past 40 years in approach to mental health worldwide, the acceptance that living in the community is the norm, even with severe mental illness, and expectation about social participation, and therefore all of our financial, employment, education and health systems all should have a socially progressive, or inclusive approach. They should make it easier for people to participate or have an expectation of participation rather than an expectation of exclusion.

The Hon. MICHAEL VEITCH: Professor you talked about flexibility in the system. Earlier the Chair and I talked about the reviewability of the financial or guardianship orders and the frequency of the reviews so they are not infinite or permanent orders. Obviously with the episodic nature of people with a mental illness, the fluctuation of their condition and circumstance, it would appear to me to be an extremely important element to have reviews. Our conundrum is the timing of the reviews, and how the framework would be legislated.

CHAIR: Unfortunately we cannot ignore the vital issue of the amount of resources involved.

Professor HICKIE: It is a critical issue so that flexibility is the issue and the expectation that the system will change rather than the situation will be permanent needs to underpin any approach to the issues. In terms of the feasibility or practicality of running these systems, in the health care system with regards to consent, for example, usually in the health care system the issues are having a medication or a treatment, then we have set in places expectations of once the decision is made of a reasonable period of review. Now in terms of response and treatments in our areas that has therefore tended to run in series of weeks and months sets of issues; that degrees of incapacity do not tend to disappear overnight. They are not the situation where you make a decision to provide a treatment, it is unlikely that you would need to review that the next day or often for the more serious situations into next week.

The periods that have usually been affected here just for health care decision making have usually been at least in the weeks, and then once treatment is established in terms of particularly brain recovery in these areas, we are usually talking months, not weeks. The practicality I think in our area of periodic reviews, or setting the periods of those reviews, need not be such that you would result in a completely silly system of reviewing decisions on a daily basis or twice-weekly or any of that kind of nature. But having entered into a serious discussion about capacity, a serious set of decisions, most of the treatments that we would currently have available would have expectations that they would achieve their effect over weeks or months. If you were actually taking the decision away from a person, and making the decision for them, you would reasonably expect that you would be looking at weeks or months to see the full effect of that treatment.

One of the criticisms of the very flexible systems that we have is that treatment is often withdrawn before it has its full effect, certainly on a person's cognitive function, their capacity. This is one of the most critical areas in my area at the moment; the difference between overt symptoms and actually more sophisticated cognitive capacity. To give you some specific examples of that. For example, you may be hearing voices, or you may have a particular set of beliefs, or you may be particularly severely depressed, which may settle down quite quickly in relation to treatment but in terms of restoration of normal cognitive function, actually being able to make more sophisticated decisions, and weigh up the pros or cons of particular sets of issues, that typically takes considerably longer. The timeframe for the full return of recovery, particularly from a brain point of view in the way we now understand it, is in the weeks to months category.

So if you got to point of having assumed that the person was unable to make a decision for themselves in the critical area of health care, and you therefore went down the path of requiring a treatment, it would be in nobody's interest for that treatment to be very short term—days—before being reviewed. Because what you would end up with is exposing a person to treatment with little chance of real benefit. In terms of real decision-making the timeframes would be weeks and months.

The Hon. MICHAEL VEITCH: Correct me if I am wrong but what I am hearing you say is that rather than predetermined timeframes, you are talking about a set of accepted trigger points upon which you would then review?

Professor HICKIE: Yes. I think what you would want is evidence of the effectiveness.

The Hon. MICHAEL VEITCH: Evidence-based triggers as opposed to say three months, six months or 12 months?

Professor HICKIE: Yes. I think in most review mechanisms people go for time rather than the capacity they are looking for. In the current environment, the more modern environment, particularly making use of things like neuropsychological measurement in more sophisticated ways, one can document what the situation is when a person is unwell and whether that situation has substantially changed requiring a review by an appropriate body. A way of dealing with that is to have evidence of improved capacity, having people undertake the appropriate testing, et cetera, which would then potentially trigger a review, demonstrating that a person had resumed reasonable capacity for the style and the decisions you are talking about.

The Hon. MICHAEL VEITCH: In a different area, the Public Guardian as recommended that section 21A of the Guardianship Act 1987, allowing the Public Guardian to authorise members of the New South Wales Police Force to move a person under a guardianship order from one place of residence to another, be amended to specify that the police may use all reasonable force. I would like to your comments and views on this proposal?

Professor HICKIE: I am not sure of the context of the proposal. But I guess the issue is, going back to the United Nations issue you are raising, we would expect a person to be able to participate in decisions about such issues in a reasonable way, particularly about their housing. Housing and stability of housing for all of us, a sense of home, is one of the most important things we have to retain our mental health. Pretty much having a home, a family and a job are the three things we orientate ourselves around. So, arbitrarily shifting people—people become very attached to the home, wherever that may be, and having a strong sense of stability is important. In this general set of rights, we would expect a person, unless their capacity making is extremely impaired, to be involved in critical decisions about their housing, their preference of housing and the reasons why. So, in any sense that were removed from a person and if force was then used to impose that decision you expect, from a mental health point of view, this to be extremely detrimental. You would have to have the situation where you could show clear benefits as to the appropriateness of that set of decisions as to why that was taking place in the individual case.

We have situations in mental health that require the assistance of the police, to protect people or public safety. There are specific instances where we require the physical assistance of the police in the individual person's own interest and in the community interest, but they are extremely unusual situations. For me, the simple issue of housing or changing housing when nothing else was at stake, would be a very unusual set of circumstances. You would need to demonstrate that the person's capacity to make decisions was extremely impaired.

The Hon. MICHAEL VEITCH: In the event that was to happen, do you see the need for some sort of post-event analysis or evaluation, so there is an accountability mechanism as to why that action would take place?

Professor HICKIE: I would like to see a pre-event analysis, coming back to our earlier question about reviews. I would like to see evidence that a person's capacity to make those decisions was extremely impaired to justify this level of intervention and imposition on a person's individual rights, given this is such a fundamental issue. It is something the rest of society would value and it should be valued just as much for people with mental health problems—in fact, we would argue in some ways it is even more critical. People with mental health problems tend to run very disorganised courses in the community. One of the problems that is putting such pressure on our public hospital system is instability in the housing sector and the extent to which people are easily moved on in the private housing sector or elsewhere and are not stabilised in the community. I would want to see evidence before such action was taken of the reasoning with regard to capacity for the need to take that decision and then I would agree with you about the post-event analysis.

The Hon. MICHAEL VEITCH: In one of our previous inquiries someone made a great comment that it is not a house; it is a home.

Professor HICKIE: I think the home is the key issue here.

The Hon. MICHAEL VEITCH: It is the community and social structures around the physical building as well?

Professor HICKIE: Much of the chaos we see in the mental health system—when you develop a mental health problem you tend to lose social connections. As a consequence of that the community tends to take less care of you as well. To do well in the community, you need both. You need to be connected with the community around you and you need the community you are part of to assist you to function, like the rest of us do—to know people, to be familiar with people, to be able to interact with the local shopping system, the local transport system, the local health system—and to frequently move people, the people to become very transient, and all those social systems breakdown. The end result is a great deal of instability, people back in our hospital system, in our prison system and back in other systems as a result of instability in housing.

So, one of the most important movements—and New South Wales has done this in recent times, and Queensland has—is to focus on housing or a home as the centre of a person's life, and that services should wrap themselves around that home. Not that a person with a mental health problem or limited capacity should try to figure out our terribly complicated systems of social support. So, to move a person represents a tremendous change in our capacity to provide appropriate social services. I think within this United Nations perspective where social services were proactive and supportive of inclusion, moving persons' homes arbitrarily would be one of the worst things you could do—without extremely good reasons. There are at times good reasons, but

you want to see a great deal of accountability about the decision-making in those areas. Typically police do not want to become involved in those situations unless there is a great deal of evidence that it is for the public's and the person's good.

CHAIR: So, you are saying it is rare that occasions occur where the ability to connect with the rest of the community is there and a person had to be moved because of their inability to connect irrespective of their capacities? Whether they have full capacity or not, you say there are occasions when the person cannot connect and the community dictates they need to be moved? You say those occasions are extremely rare?

Professor HICKIE: Yes. They have to involve real personal or public safety issues. What we usually see is a failure of social services. We lose people and they are unable to sustain themselves in the particular sets of issues. It is a change in the way public housing is organised, putting much greater emphasis on the way people are able to connect within communities, that people are able to join communities, that people are housed in functional communities where those communities can provide support in particular ways. So, the whole way in which housing is established for people with mental health problems, the way social services support those issues, done well, overcomes many of these problems. Often it is not a personal failure, it is a social system failure, in the way housing has been organised and supported, and it fails to support a person to live appropriately in the community. We have seen in some very good examples here in New South Wales and other States, where health services have got it together with accommodation services, people can live much more productively and stay within the community sector.

The Hon. MICHAEL VEITCH: One last question is significant and it is in two parts. First of all, I would like to hear your comments about the significance of the convention on the rights of persons with disabilities and the optional protocol to the people in New South Wales? Secondly, that document talks about capacity and incapacity. Could you just outlined for the Committee what you see as the move towards determining capacity as opposed to incapacity?

Professor HICKIE: Perhaps I will take the second one first. I think the capacity argument as opposed to incapacity is a much better argument. We are much better able to document with neuropsychological testing, with clinical evaluation, what capacities people have and therefore they are able to make decisions or judgements in appropriate sets of ways. I think that issue of continuously assessing people's capacity is a much more helpful one and allows us to interact much more productively with the education system, the employment systems, and other social support systems in various ways by highlighting what people can do. Therefore, in those areas with appropriate supports, that is what they would be reasonably expected to do rather than constantly judging incapacity, requiring somebody else to come in and take over in some aspect of your life. I think that whole movement towards capacity assessment rather than incapacity is a very productive one. The incapacity ones I think are based in legalistic and biomedical notions that belong to past centuries. That is a very good shift.

I think we have the tools increasingly to assist us in those areas. I think the only issue is, when you are applying that you need to be careful what you are applying it to, what sorts of decisions you are applying it to in different areas. Like all of us, different people have different illnesses and have different strengths intrinsically in certain areas and may better understand certain financial issues or better understand certain social issues, et cetera, so there is a degree of individual variation as well.

The Hon. MICHAEL VEITCH: The significance of that position the United Nations has come to and the States of Australia have ratified, what is the significance of that to people with disabilities in Australia?

Professor HICKIE: I think the potential significance—again, I should clarify that I am a member of the national advisory council of Minister Roxon on mental health and we have met with the Attorney-General's department about this particular issue. We see it as a fantastic opportunity for Australia to change the way it sees many of its social systems and its obligations. It shifts really the emphasis into what do governments like ours do for people with disabilities and what are their reasonable responsibilities under those systems—rather than having to run a different kind of discrimination rights-based analysis of the situation. So, potentially across all of our wider social systems, Australia's ratification of that United Nations protocol we see as potentially important. We doubt that most social services understand the implications of it, where it would take us in shifting, as you are alluding to, this notion of incapacity and what we might have to do for the most disabled at certain points, to what we really should be expecting our social services to do for most people across a wider spectrum of disability. So, in the mental health area in particular we see it as potentially an extremely useful way of going forward where, in the past, we have had to rely on a much more blunt, discrimination type.

I have done a lot of work with the insurance industry and other areas and exemptions in human rights and various areas, which have not worked very well with various different industries in the private sector or with public sector industries. I think at this stage most people in the fields I am in see it as potentially extremely useful. Exactly how it will play out through our systems is less clear at this stage because of the high-level nature of the United Nations position and therefore how it interacts at national level and then the State jurisdictional perspective. How it plays out in our federated system people are less sure but the intellectual and theoretical basis of it we see as one that is extremely enabling and we hope will force many of our systems to change to be consistent with it. To put it the other way around, many of our legal systems at the moment are inconsistent with the general direction of the new approach.

CHAIR: How do you see it playing out?

Professor HICKIE: What will happen in our area, people involved in mental health advocacy and patients and their carers and families will be seeking to use that instrument to take up with all the various services that we have that they are failing to meet many of their obligations. That will then be sheeted home to the governments responsible for those sets of issues. This will happen in the employment area, it will happen in the education area, it will happen in the housing area and it will happen in other social service areas in terms of entitlements. One of the ones being discussed openly, the one I was involved in, had to do with entitlements to health care. Given that we have gross underservicing, lack of access to mental health, we could put an argument that mental health is—you could never put an argument that mental health is discriminated against in terms of health funding and health services, but it is clearly treated unfairly historically and culturally relative to other areas.

We have had an overt discussion in this area that this could be presented as highly problematic under this arrangement, that our lack of spending and lack of investment is not consistent with the principles outlined here and this may well engage health departments and governments as to how they intend to correct that. Whereas, at the moment there is no legal pressure to correct; there is only social pressure that says we should do better in this particular area as distinct from moving into an area where we would be in breach if we continue in this fashion.

So, we see it as a very important instrument to bring into areas that traditionally we have had no legal mechanism for dealing with the inequity in healthcare spending, for example, or inequities in housing allocation or inequities in employment placement or employment support systems. We see it as potentially introducing another legal mechanism to get correction of what we would see as inequities in these particular areas. Because it would not be consistent with the principles outlined if we continued with many of the current practices in health care, employment and education as it affects mental health.

Dr JOHN KAYE: Thank you for your time in attending today. It is excellent to have someone with your reputation and expertise to give the Committee advice and evidence. In response to a question asked by the Hon. Michael Veitch you spoke about phases of certain mental health issues, whether there is, if you like, an acute phase in which they hear voices. That is, if you like, they are in a symptomatic phase, and then the patient will move into a phase in which they will not have full capacity in decision-making, but will not display that?

Professor HICKIE: Correct.

Dr JOHN KAYE: I want to examine what happens during that period in the context of both the United Nations convention, and also other things you have said today. I am sure there are cases where a patient is in the recovery phase, partly because of medication, and then rejects that medication?

Professor HICKIE: Yes.

Dr JOHN KAYE: The patient says he does not want to do this anymore, and walks away from medication. At what point do you say that that person is not capable of making a correct decision?

Professor HICKIE: These are the practical problems that we run into all the time, because we respect people's rights to reject medical treatment for a whole set of issues. Although the interaction between their capacity is also similar to other medical situations, in other ways it is profoundly different.

Dr JOHN KAYE: It is very different because in that case their capacity to make sound decisions is being improved by medication, is it not?

Professor HICKIE: Exactly. The practical concern is that we believe our current systems frequently allow people to reject treatment very early in the course of recovery. If you look at those situations, as we now can, from a brain recovery point of view, in terms of the way in which brain cell connections are changing over time, et cetera, you get this disconnection between symptomatic improvement and obvious improvement in a person's behaviour, without necessarily a real improvement in their more complex cognitive capacities. So, from a very simplistic point of view, a person is not so agitated or not so symptomatic and appears to be improving. If you were to document their more sophisticated reasoning you would see far less improvement in that.

What tends to happen at the moment is that overt symptoms are used as the judge of capacity. The moment a person's symptoms settle down it is assumed their capacity has returned. At the moment, a lot of neuro-psychological testing shows that that is often not the case. Often those illnesses are associated with capacity problems to start with, before people become acutely symptomatic and then during the recovery phase people do not recover their capacity nearly as quickly as the current treatments cause their symptoms to settle down. So, having made the decision that a person's capacity was so impaired that the right to decision-making is removed, we would generally think you would need to look at a longer period of that treatment being continued until you have evidence of return of their capacity, not just reduction in their symptoms.

At the moment we think that a rather legalistic notion from the rest of medicine is a little too easily applied: that the moment a person appears to be okay from a symptomatic point of view, the assumption is made that they can therefore resume decision-making over all those issues. If you take a longitudinal perspective, there is a key set of decisions at a point that you make a decision that you are going to overturn the person's own right to make decisions, having made that we think you have to be clear that if you are making that, it is likely that the period you will need to look at will be longer rather than shorter. Certainly that is in the weeks to months, not days to weeks.

Dr JOHN KAYE: In every other field of medicine, we would respect the right of an individual to reject medical treatment.

Professor HICKIE: Of course.

Dr JOHN KAYE: Chemotherapy, surgical intervention—

Professor HICKIE: In every other area of medicine in which their capacity is preserved. In fact, in other areas of medicine when people are not, when their capacity is not preserved, we do not. When they are confused, when their level of consciousness is reduced, if they have dementia, there are sets of situations when people's capacity is impaired in the rest of medicine and they do not have an enduring psychiatric illness, that we do respect the right that someone else will need to make decisions, whether that is under a guardianship framework or an assumed consent framework. We do recognise that right across medicine, but your general point is true: we separate out the decision-making capacity from their ill health.

Dr JOHN KAYE: For the record, I am on your side in this debate. I am trying to get information on the record. Do not assume otherwise, and I think you are doing the right thing and I support you. The Committee has heard from a lot of witnesses that this is all about respect, trying to capture what people want, trying to capture the genuine aspirations of individuals.

Professor HICKIE: Yes.

Dr JOHN KAYE: Yet, we are saying that patients in the recovery phase look okay but are not, and we have to keep treating them.

Professor HICKIE: We need to document that. We need to move to greater documentation of that. We tend to have this "all or none" approach. The all or none phenomenon has created the problem. It is a very black and white situation. At some point we totally remove a person's capacity, and at another point we totally restore that capacity. That way, in which the law has operated in these areas of health-care decision-making, has not been helpful in our area.

Dr JOHN KAYE: That is an overriding message from every single witness. In one way or another, they have expressed that. Some call it "proportionality". Even the protocol says that it "shall be proportional to the degree to which such measures affect the person's rights", so there is a proportionality principle coming through?

Professor HICKIE: Yes.

Dr JOHN KAYE: But even within that proportionality, which I think is very sensible, there comes a point at which you have to say that you are going to insist that the person keeps taking medication, and that you will force-medicate the person?

Professor HICKIE: Yes.

Dr JOHN KAYE: That is even though the person is telling you, as loudly and as coherently as they possibly can, that they do not want it, that they do not like what the medicine is doing to them, and they do not like where it is taking them?

Professor HICKIE: Correct.

Dr JOHN KAYE: That is particularly so with some medicines that you would prescribe that would have side effects and which people might find quite odious or changing to their personality, and not liking what it does to their personality?

Professor HICKIE: Yes.

Dr JOHN KAYE: Surely there comes a point at which this is a value judgement? The value judgement is that you will continue to medicate.

Professor HICKIE: I think that is where we need to move out of, as much as we can, individual sets of values and try to move to some metrics, or some measurement system, where we can agree that we can demonstrate a person's decision-making capacity for a number of issues is impaired or is recovering. We have not done that. We have tended to rely on a very acute symptomatic idea, because our overarching concern has been, generally speaking, not to override people's rights in that particular situation, particularly the right to refuse treatment. Equally running in the mental health area, and I might say world-wide, is the issue about rights to treatment.

I was alluding to that. World-wide there is a gross underprovision of appropriate services to support people to be well. Interestingly, for example, in the United States you will see a very elaborate argument continuously between rights to refuse treatment and rights to obtain treatment. For people whose mental capacity is clearly impaired, for a civilised society to not provide treatment or not provide pathways to care may infringe that person's rights as well. We expect there to be a care system available for an impaired person.

Dr JOHN KAYE: Sure.

Professor HICKIE: The issue becomes trying to document continuously a person's capacity. One of the problems for us in the mental health area is the lack of examination studying how well people are between episodes of illness and the recovery of illness.

Dr JOHN KAYE: Between episodes of symptoms do you mean?

Professor HICKIE: Yes, in terms of the overt symptoms that might force them into a situation in which their own capacity to decide on care might be changed, yes. I am saying "episodes of illness" as a consequence of an illness. If you take an episode of illness that might last six months or a year, certain parts of the illness, like very overt symptoms, might settle down in weeks. Other things like the return of real cognitive function, might take six months or a year, and then they are back to normal. So the whole episode of illness might be a year, but the episode of very disturbed behaviour requiring the involvement of police, emergency services or acute hospitals might be only two weeks. But the person is not well—certainly from a brain point of view and a cognitive function point of view, in two weeks the person has not returned to their full mental capacity, in which making complex decisions and value judgements for the person about the relative benefit of care arose.

So we see many situations in which persons have fully recovered six or 12 months later, and at that point they would say very clearly, "If this happens to me again, I want to be treated. I want to be treated for three months, or six months, and I want to be really well. I do not want to stop the treatment after two weeks and be discharged in a particular set of issue". That could be issues around people giving directives around care, trying to say what that would be. We tend to have insufficient monitoring and measurement of people right through recovery in between periods of illness to know what we are actually comparing and whether the person has really got to the stage of being able to resume totally that decision-making capacity.

Dr JOHN KAYE: That is a great answer. Does the law let you down in your functions? Or, to put it the other way around, does the law adequately support you in making those decisions?

Professor HICKIE: No. The fundamental is the black and white system, so that you have either lost your capacity or you have your capacity back totally, at some particular point in time. In our system that tends to be too short, relative to the length of illness. From a human rights point of view we obviously see it as a major problem to treat people against their will.

Dr JOHN KAYE: There is a proportionality element that allows you to set separate thresholds for different degrees of capacity, which would allow you to keep people under partial-instructed care, as it were, for longer periods?

Professor HICKIE: And also for different issues. The issue you raised about refusing treatment may be one, but a person may be able, for example, to balance their financial affairs or some other aspect of their life. They may be much more able to participate in that discussion, or one on where they live, rather than necessarily just the decision about medicines or no medicines.

Dr JOHN KAYE: I take that as totally on proportionality, both in depth and scope?

Professor HICKIE: Yes.

Dr JOHN KAYE: That makes perfect sense. Are there other aspects of the law that let down the psychiatric profession at the point of making these sorts of decisions?

Professor HICKIE: It is the extent to which we on our side let the law down. It is about evidence, the nature of the evidence, that is presented. Much of this is contested in acute care settings in very difficult situations and contested in a short set of ways. There are other sets of testing; for example, neuro-psychological testing, having evidence of a person's wellbeing between episodes of care, longer term discussion of those issues where greater documentation and evidence about the nature of the person's life, the nature of their capacity, the extent to which that has changed and is impaired right now, is not provided to the relevant tribunals and settings that we have. It is not built in because we have a simplistic notion of capacity, that is insight into the situation. At the moment we tend to have a very short-term set of goals, which are usually the ones you have highlighted—to treat or not to treat, against the person's will now, rather than the wider ramifications. These really belong to the asylum era. They belong to a period of time when these issues about living in society in a productive way in the long term, were not the critical issues.

Dr JOHN KAYE: Sure. Is that a matter of professional practice or a matter of government policy?

Professor HICKIE: Different government policies around the world drive this, because different tribunals require different evidence. The standards you set up for what is required to be presented to you to make a decision, have an enormous impact on what those health systems do or do not do.

Dr JOHN KAYE: Are there things that the New South Wales Department of Health could do, for example, in setting the standards on the required information?

Professor HICKIE: Most human services, such as Health, respond to whatever the legal framework is. If the law requires you to present to a tribunal a neuro-psychological assessment, a social assessment, a housing assessment, a family assessment, before you make a decision, that is what will happen. If the law does not require that, it will not happen. If the law requires only a clinical opinion at that time, or one or two psychiatrists or whatever combination, that is what happens. Returning to your earlier question on why we see the United Nations convention as so important, is in changing the frameworks. In this case the law will drive the services.

Dr JOHN KAYE: Therefore you recommend to the Committee that the law should require a more holistic approach—

Professor HICKIE: A twenty-first century assessment.

Dr JOHN KAYE: Yes, and that includes a full range of assessments?

Professor HICKIE: Exactly.

Dr JOHN KAYE: And includes neuro-psychological assessments?

Professor HICKIE: Yes, and the important thing about that is that neuro-psychological assessment is, again, a continuous history. It is not a one-off thing. A lot of people say that it is expensive and difficult, but that is not the case. It is actually extremely valuable, it is just not provided on a regular basis. It needs to be assessed at critical points along the way. Only limited assessment of a person's neuro-psychological capacity, for example, can happen at the most acute phase of illness, but four weeks or six weeks later, a much more sophisticated assessment can take place.

CHAIR: However, during roundtable discussions about twenty-first century world's best practice systems, as we have today, the Committee has to take into account and assess the bean counting, the resources required, to implement twenty-first century world's best practice?

Professor HICKIE: Yes.

CHAIR: You alluded to the issue of dollars and cents?

Professor HICKIE: Yes.

CHAIR: Has there been any assessment that you are aware of as to the value-for-dollar or the cost effectiveness or the actual cost of a twenty-first century best practice?

Professor HICKIE: Yes. If you get the best mental health practice—and there are good examples of this—of better-provided community services earlier in the course of illness then there are two things: out of hospital but also earlier in the course of illness are more cost effective than the current systems. The current systems are actually very expensive. Once you get hospitalised, once you are involved in high levels of care you have entered a sort of intensive care-like environment, and the poor use of those resources and the continuing poor use of those resources—in fact, I have given evidence about this to the current national Health and Hospital Reform Commission—are the most cost-inefficient systems and they are the most human rights-abusing, if you like, and least in the patient's interest to repeatedly have to use acute-care systems involving these other legal mechanisms.

I think it depends on what you count as the total cost. What tends to bedevil the health care debate is to see the cost as only being in the health care system, whereas the real costs of these systems are much wider in society. Mental health is the most costly area but it is the one in which we have the least service provision. So when you get into total government cost or, even more importantly, total societal costs, then there are many good examples of best mental health practice being actually very cost-efficient, the reason being we are not very high technology, we are not very high-cost medicine, we are not, like a lot of cancer care and a lot of heart care, very expensive in terms of the actual care we provide, but we are small. So the constraints that we rarely run into have not so much been dollar-based, they have been capacity-based in terms of growth in this area.

If you look at what grows in this area often what has been legally mandated is the bit that has grown because it has become the law in various areas. So around various of our tribunals, around various of our forensic systems and whatever, they have grown because someone has changed the law in the area. Health itself responds to a whole lot of other different issues. In terms of health cost effectiveness, mental health can be very cost-effective when delivered and it is more cost-effective when delivered in community settings. That comes into the critical issue you are raising, because there is no doubt that one of the critical aspects of surviving in the community for many people is continuing access to treatment, and that means literally the service systems are proactive but it may include the necessity to provide treatment over longer periods against a person's express wishes.

Dr JOHN KAYE: Is the following statement true: Neuropsychological testing is uniformly accepted by the profession?

Professor HICKIE: It depends for what purpose.

Dr JOHN KAYE: As a valid metric of capacity for decision-making?

Professor HICKIE: Not on its own. Like all testing—blood test or x-ray or a clinical examination—it has a context. So what we tend to rely on is the convergence of evidence from a number of different areas. What I am saying is that the one area of formal neuropsychological testing has been grossly underutilised relative to its benefit in this area, as have a number of other social assessments and other sets of issues that are relevant, to try and make an overall determination for key issues like deciding one's own health care.

CHAIR: Is there a 30-second answer to what is neuropsychological testing?

Dr JOHN KAYE: It is psychological testing that draws its basis from the physical structure of the brain.

Professor HICKIE: There are standardised measurements systems that we use to test different brain functions—memory, concentration, but, more importantly in these areas, is what is called executive function or decision-making, planning for the future, understanding the consequences of one's actions. So there are standardised tests that have been used right across the population to tell you where you fit normally—so what your normal capacity is but, more importantly, if you do it yourself over periods of time is it changing? For example, in the areas of diagnosing dementia, Alzheimer's disease and other areas, you can document in various ways a decline in various aspects of memory over time but also of decision-making over time. The same sets of tests vary in people with a mental illness. So they are not the same as saying does the person hear voices, does the person see things, is the person depressed; they tell you about the brain's capacity to process information, part of which includes complex decision-making, and there are standardised measures of that.

Importantly, they can be applied to the same individual over time as a measure of how well their brain is working and how much is affected by illness or, in this particular example, how much it is responding to treatment. We now have other measures—brain imaging measures, et cetera—which suggest changes in the physical structure in the brain which are accompanied by those neuropsychological changes. The brain imaging test cannot be used in the way I am talking about the neuropsychological test can be used at the moment. The neuropsychological tests are the most independent but on their own they are not a measure of capacity, you still need the other clinical and social context in which you are using that information.

Dr JOHN KAYE: And presumably the problems that were traditionally associated with neuropsychological testing, including issues of ethnicity, level of education, they are all now corrected for?

Professor HICKIE: They all need to continue to be considered. So any sophisticated neuropsychologist does not just produce your spit-out a bunch of test scores; they say it is depending on the person's behaviour today, taking account of their prior education, those sorts of issues. Language and then conceptual understanding do matter—not just language but degrees of prior education in different cultures. So the more sophisticated the neuropsychological report, somebody—the sophisticated neuropsychologist—is interpreting the context of those test scores and the extent to which they are consistent with or not consistent with the question you were asking.

In this situation we would typically be asking the question about the return of the person's capacity for complex decision-making, which may be severely impaired at a certain stage of their illness but can be documented to be recovering. Or, in the way I am answering your question, to say it is slower to recover often in acute behavioural symptoms. So that the period of time of continuing treatment may in certain situations need to be longer to really get a genuine return to being able to make that critical decision about their own health care.

The Hon. MICHAEL VEITCH: We have been hearing a lot of evidence about the need for a public advocate in New South Wales. Are you aware of other models in other Australian jurisdictions of a public advocate and how do you see that playing out for people with mental illness?

Professor HICKIE: I think we have had a lack of formalised modes of advocacy, and I think that is a criticism of the systems that we have had. We have a lot of discussion previously with the national Human Rights and Equal Opportunities Commission about periodic inquiries, lack of formal processes to take these kinds of issues forward. I think there is a general movement towards wanting to have a more established mechanism to raise these issues rather than relying on periodic inquiries, and a way in which that might operate at the individual case level. So I think the aspiration is understandable, that we have had a lack of that kind of particular issue.

I am not aware of the extent to which in practice it has really worked or not worked, because, as in many of these situations, you get into the realities of on-the-ground caseloads, the feasibility of actually delivering these kinds of sets of issues. So again I think in an aspirational sense a lot of people see that we do not have a proactive way of taking these issues forward and we have relied too much on ad hoc inquiries in specific kinds of areas and not had a more continuously progressive approach to sorting this out, particularly with the agencies that we were talking about, like health care, and continuously raising those issues, and particularly raising them on an individual case basis.

So I support the general notion but I think this is one where the reality would depend absolutely on the capacity—how much resource you put into the issue. I say that in the sense that we have seen lots of what I would call token movements in our areas, that on the ground have not delivered what people are really looking for: the degree of individual case engagement to resolve complex issues and housing departments, health services, those sorts of issues. Having said that, the systems I have worked in, like large public health systems, suddenly become more responsive once somebody else, a public official, is pursuing the individual case.

I often make public comment about them. Many people are critical of the legal systems. Legal systems tend to focus on individuals; things like health systems tend to focus on groups of people. They are often very bad with the individual case because they tend to talk about the last 100 people they looked after in general terms, that they did a good job with 70 of those people, whereas more public advocacy and more legalistically minded tend to go, "I don't care about the 100 people you looked after, are you doing a good job with this particular person?" For example, I was involved in a review of a system run by the Adelaide Magistrates Court in the centre of Adelaide where the individual magistrate was requiring the health system to report back on people who had appeared before him. He had no power or jurisdiction to actually change what the health system did, but the change of those particular people who had to be reported back to the court on a six monthly basis remarkably improved. The health system was under no legal obligation to do any better, but they did know that every six months that person was being reviewed by the magistrate; they would have to publicly account for the individual case, as distinct from their overall statistics.

The knock-on effect of that within health systems is also large. Once somebody is receiving demonstrably better care that is a real problem for us. So there are knock-on effects in the way in which health systems behave and I would suggest other social systems through these public advocacies, and the benefit therefore is not just to the individual case they pursue but to other people in the same services. So I am a person who thinks it is a good idea as long as it is done well and it is resourced.

The Hon. MICHAEL VEITCH: There are two types of advocacy—this is the bit I am struggling with with the public advocate—where you have the systemic advocacy or you have the individual advocacy. I guess I am trying to tease out the role of the public advocate. There seems to be a fair degree of consent that we need a public advocate, but trying to work out what the public advocate would do is a little bit more difficult and I think it is an area that needs a bit more teasing out. I would see the role as just trying to work through the systemic advocacy issues. But I get a feeling from a lot of people they want somebody to be acting, as you say, on that one case and forget the 100—what do you do for this one case?

Professor HICKIE: If you excuse me, I am a little bit cynical about system advocacy. There is a need for system dialogue and I think one of the things in mental health, just to put it in context, I think the system discussions around mental health these days are much more productive. So, again, through the national advisory council I am associated with, we do discuss with employment and education, with housing, with many other government departments—Federal and State—the general issues around mental health at what might be assistive in changes in various programs in various kinds of levels.

Given that there is a wider social discourse about those issues these days, I think what has not happened is translating that into the individual person's journey through many of those systems. So it is very easy to get the director general of X to say, "Our system has become responsive to these particular issues", but it has very

low accountability at the individual person level for movement through those systems. I think what many of us are looking for is more that the individual case will drive a greater level of accountability and highlight the real problems that people run into as they move through the system.

I think we have moved to a situation where many of our larger public social services are now considerably more responsive to mental health issues but do not have much of an idea of what to do on the ground and the gaps that people realistically fall into. The reason I raise that individual issue is new programs are invented all the time by different departments and what is often not known is the way in which they do not connect for individuals in those particular issues or you may get into one but are excluded from another, and you need more of an individual case tracking to highlight the extent to which one system is being inclusive but at the same time you are being excluded from another kind of entitlement or a particular kind of system.

Personally I think you would get much better bang for your buck out of some systems that were not quite so systemic but tracked individual cases in key areas to actually see in support of an individual person what is actually happening. I think it is much more instructive to many people who work in those systems that are not aware of the extent to which by doing one thing means the potential exclusion of a person from another or the way in which a government department has now introduced another new program that is causing a problem, it is actually letting people out; how people come to meet and fail to meet certain inclusion or exclusion criteria for this government program or that program and this one invented by Housing and that one invented by Health. I think if you want to continuously look at how public policy is actually playing out you need more of that individual case-based approach. It is the same with the Adelaide Magistrates Court example earlier on: it drives change in a different way within those systems.

The Hon. MICHAEL VEITCH: With regard to the Convention—going back to our earlier conversation about this and how you see it playing out—certainly in New South Wales and probably Australia, someone has got to take the lead on making this happen. How do you see that taking place? Who should it be?

Professor HICKIE: I think in our federated system there is a need for leadership at both levels. So I think there are issues that affect the Federal level, which we would hope—and our discussion with the Attorney General is a very similar discussion, because they would hope that within health or within employment or within those other areas that are affected by this that there would be leadership in that area. Myself and the people I am associated with, like the Mental Health Council of Australia, we are very sceptical about that.

We think we need the Attorney General's Department to say, "This is an obligation now on Australia", and to affect all those individual areas so that it is pushed much more towards compliance with the actual convention. I think the danger is that it will be ignored. It will be ignored at the Federal level because it is too hard and it will be ignored at the State level because the resource implications are too hard. So, we would like to see leadership at both levels. I think that with our system the way it is currently—and health would be a very good example—you would need to see leadership at both levels to see any real change. I think it affects State issues like the ones we were just discussing around capacity, and the way health decisions are made on an individual basis will continue to be made at a State level. I am thinking of State housing et cetera. Others, entitlements to health services or employment services, will really be played out at the national level.

I think there is a concern in our area that many of the social services, because of issues of how much it would cost and whether we have the capacity to respond, would prefer at the moment to hope that nobody takes it too literally right now. So I think there is absolutely a need to say we have signed up to this and this is where we intend to go and this is what the implications would be across all our various system. I am very glad to see New South Wales taking it so seriously.

CHAIR: Thank you. We may have some questions that we would like to send you, if that is okay. Thank you very much for being with us.

(The witness withdrew)

(Luncheon adjournment)

ROBERT GONCALVES, Legal Officer, Land and Property Management Authority, 1 Prince Albert Road, Queens Square, Sydney, sworn and examined:

CHAIR: In what capacity are you appearing today before the Committee?

Mr GONCALVES: As a legal officer with the Land and Property Management Authority.

CHAIR: Would you like to make some opening comments before we proceed to questions?

Mr GONCALVES: No. I will just go straight to questions.

The Hon. MICHAEL VEITCH: Can you clarify the role of the Land and Property Management Authority [LPMA] with regard to substitute decision-making?

Mr GONCALVES: The Minister for Lands is the Minister responsible for the administration of the Powers of Attorney Act 2003. The Land and Property Management Authority is the authority that basically registers powers of attorney. Any power of attorney can be registered, but mainly we only see powers of attorney that deal with land registered at our office because in order to deal with land under a power of attorney it must be registered. Essentially that is what we do.

The Hon. MICHAEL VEITCH: The Minister for Lands has responsibility for the Powers of Attorney Act?

Mr GONCALVES: Yes.

The Hon. MICHAEL VEITCH: That Act currently is undergoing a review, is that right?

Mr GONCALVES: Yes, that is right. The review has only recently concluded. The Land and Property Management Authority [LPMA] has put together a report of that review. That is currently with the Minister, as I understand it, this week. His office will look through it. It is to be tabled in Parliament.

The Hon. MICHAEL VEITCH: Are you able to tell us the scope of the review?

Mr GONCALVES: Yes. Section 57 of the Powers of Attorney Act requires that a review of the objectives of the Act be undertaken. It came time where we needed to comply with that section. In October last year we formed a working group with representatives from the Attorney General's Department, the Guardianship Tribunal and the Law Society to discuss the issues regarding powers of attorney. There were quite a few known issues since the operation of the Act. We had several meetings and as a result we prepared an issues paper, which compiled a list of the known issues affecting powers of attorney. Included in the issues paper were suggestions and proposals. That was circulated throughout the State for public comment in August this year. We received over 30 submissions commenting on the issues and also providing other issues that were not covered in the paper, which we invited the public to do.

The Hon. MICHAEL VEITCH: What were some of the issues, particularly those that relate to this inquiry into substituted decision-making?

Mr GONCALVES: The main concern was what measures can we do to reduce fraud or attorneys acting outside their authority. That has always been a concern since I suppose the early century when powers of attorney came in. We came up with a few issues and proposals. We felt that the main proposal that will alleviate a lot of fraud or attorneys acting outside their power is education. If attorneys knew what they can and cannot do, maybe a lot of that stuff would not be happening. It is not that there is a lot of fraud out there, but there may be attorneys out there who just do not know what they can and cannot do without wilfully trying—

The Hon. MICHAEL VEITCH: Not doing something intentionally?

Mr GONCALVES: Yes. It is just probably through lack of experience that they do not know how to handle financial matters of other people and are seen to be doing the wrong thing. We felt that one of the measures to implement is some type of campaign to make people aware and also to make changes to the

prescribed form to give more information to a principal, who is the donor, of the power they are giving over to an attorney.

The Hon. MICHAEL VEITCH: Are powers of attorney registered in New South Wales?

Mr GONCALVES: All powers of attorney can be registered, but the only powers of attorney that we see registered are those that deal with land, only because there is a requirement that they must be registered if they want to deal with land. One of the proposals in the issues paper was whether we should make it compulsory for all powers of attorney to be registered. The submissions we received were not in favour of that mainly because of cost and privacy concerns with powers of attorney that do not deal with land. To someone going overseas for two weeks giving a power of attorney to deal with their banking requirements and then coming back, the $91 to register it would seem to be a bit too much.

The Hon. MICHAEL VEITCH: Cost and privacy were the main factors?

Mr GONCALVES: The issue of cost was one of the concerns of compulsory registering all powers of attorney. I do not think there was an issue about the cost we charged to register a power of attorney that deals with land. It is just that if people make a power of attorney and it does not deal with land, they just do not see the benefit of registering, and also the cost.

The Hon. MICHAEL VEITCH: Does the issues paper canvass the benefits of registration?

Mr GONCALVES: Yes. It was basically proposed that powers of attorney are on record and anyone can look at the record because it is a public register to see, firstly, the scope of the power and also I suppose it is more of a confidence thing that third parties can deal with an attorney and at the same time it may dissuade an attorney from going outside his powers because he or she knows that their power can be inspected by the public at any time, irrespective of whether it deals with land.

The Hon. MICHAEL VEITCH: What qualifications are required to take up a power of attorney?

Mr GONCALVES: I think it is just simply that you have to be over 18, you are not a bankrupt and you are not mentally incapacitated.

The Hon. MICHAEL VEITCH: That is a pretty broad base you would have to empower and educate, would you not think? There is a range of abilities within that criteria.

Mr GONCALVES: Sorry, I do not understand.

The Hon. MICHAEL VEITCH: Being over the age of 18 years and not having been a bankrupt basically means anyone?

Mr GONCALVES: Yes.

The Hon. MICHAEL VEITCH: You will have to tailor an education program?

Mr GONCALVES: Yes. The education program recommended to the Minister is a collaboration between government and non-government agencies. Most concerns of solicitors and legal officers are put through the Law Society. They have put in a submission and the issues they have identified affect their operations. That is mainly in the form. There was a suggestion that a toolkit can be produced in collaboration with maybe the Attorney General's Department. We have not gone into the exact details of it.

The Hon. MICHAEL VEITCH: Just to clarify, currently powers of attorney that relate to land are registered?

Mr GONCALVES: Yes.

The Hon. MICHAEL VEITCH: But not all powers of attorney are registered?

Mr GONCALVES: No. But if I had a power of attorney that did not deal with land, I could still register it.

The Hon. MICHAEL VEITCH: They can be registered voluntarily?

Mr GONCALVES: We do not knock back any powers of attorney, subject to if it is an enduring power of attorney. If there is no witness statement, we will not register it. Strictly speaking, you can register a power of attorney from anywhere, from Greece.

The Hon. MICHAEL VEITCH: In relation to this inquiry, what happens to registered powers of attorney with a guardianship order being placed on an individual who may actually be under a power of attorney?

Mr GONCALVES: I would not have any knowledge about that. We register them and put them on the public record. That is the extent of our role.

The Hon. MICHAEL VEITCH: That is your role?

Mr GONCALVES: That is it. Whether they are affected by a guardianship order, I suppose it is the duty of the Guardian or the attorney to ensure that if it is required, the power is revoked.

The Hon. MICHAEL VEITCH: How big is your unit within LPMA? Do you have a legal team?

Mr GONCALVES: Yes, we have about 18 solicitors. Powers of attorney really do not take up much of our work, only because we simply register them. We do not have the same obligations they would have under the Real Property Act. All the provisions relating to powers of attorney came from the Conveyancing Act, which basically came from the common law and it all got put into the Powers of Attorney Act. That is basically it.

CHAIR: Are you able to tell the Committee what recommendations may arise from the review that will impact on the areas of substitute decision-making?

Mr GONCALVES: I can say at the outset that none of the recommendations has a significant impact. Essentially the recommendations are designed to assist the principal and the attorney, and to make it a bit more flexible.

CHAIR: Can you explain to the Committee the difference between prescribed power of attorney, enduring power of attorney and irrevocable power of attorney?

Mr GONCALVES: A prescribed power of attorney is the form in the Act. The Act has a schedule that has what they call the prescribed form, and if a power of attorney is in that form then it has the benefits that the Powers of Attorney Act gives it. If it is in that form then it can become either a general power of attorney or an enduring power of attorney. So an enduring power of attorney is under a prescribed power of attorney. An enduring power of attorney must be in a prescribed form. I do not know if I am explaining it clearly, but all powers of attorney under the Powers of Attorney Act must be in a prescribed form, and from there you can have it as a general or an enduring power of attorney. Strictly speaking, a general power of attorney simply means that it comes to an end if the principal loses capacity, and enduring continues to operate if the principal loses capacity. Irrevocable powers of attorney are not a prescribed form. Basically the Act states that any instrument that creates a power of attorney that says it is irrevocable, and it is for valuable consideration, becomes an irrevocable power of attorney, which means that the principal cannot revoke the attorney's appointment.

The Hon. TREVOR KHAN: An irrevocable power of attorney could arise, for instance, under a mortgage.

Mr GONCALVES: We only see irrevocable powers of attorney in a mortgage or commercial transactions. It is highly unlikely that an ordinary person would use an irrevocable power of attorney unless it is involved in some type of commercial transaction.

The Hon. TREVOR KHAN: That is, it gives the mortgagee, the bank or finance company, the authority to do certain acts in the position of the mortgagor if there is default under the terms of the mortgage?

Mr GONCALVES: That is right.

CHAIR: How does a change to the register occur and who is notified of that?

Mr GONCALVES: The powers of attorney are registered in what we call the general register. Strictly speaking, you could register anything in the general register—it is just set up as a public record. A power of attorney will get a number: say book 4,000, number 200, which evidences that that power of attorney is registered. Now, as far as I know, we just send notice to the lodging party, whoever lodged it. We take a copy and give them back the original with a stamp on it, and possibly a short letter—I am not exactly sure on the practise in the registration area. As far as I know the principal does not get any notice. As part of the recommendations in the papers, we are proposing to send a notice to the principal also to say that the power of attorney has been registered and that they are the principal; to give an opportunity on the off chance that the power of attorney was registered fraudulently or that the principal never signed it.

CHAIR: Under section 19 of the Powers of Attorney Act there are certain safeguards that ensure that a person appointing an enduring power of attorney understands the effects of that decision. However, when making an irrevocable power of attorney under section 15 and 16 of the Powers of Attorney Act no such safeguards are provided. Is it intended that the safeguards under section 19 will apply under section 15 and section 16 of the Act?

Mr GONCALVES: No.

CHAIR: Do you believe that lack of safeguards leaves the irrevocable powers of attorney open to abuse?

Mr GONCALVES: I think it would not make it any less susceptible than a registered or a general or an enduring power of attorney. Because the power of attorney is essentially a document to allow it to deal with third parties, so if a third party in good faith deals with the attorney, whether they have been validly appointed or not, it really would not matter. To answer the question, I do not think that the safeguards provided for in section 19 would help or stop any abuse of an irrevocable power of attorney. But I suppose the safeguards are already inbuilt in the irrevocable powers of attorney because there needs to be valuable consideration. So someone would basically have to pay for the privilege to act for someone.

CHAIR: So in practice how is it determined that a person appears to understand?

Mr GONCALVES: We rely on the certificate given by the prescribed witness that they understand. We do not check whether they have understood—that is basically the job of the prescribed witness. But there are guidelines out there for prescribed witnesses and, essentially, the prescribed witness is encouraged to ask questions to ensure that the principal understands what is being told and understands the power and the scope of a power of attorney.

CHAIR: How does a party to a registered power of attorney know or find out if it is terminated or superseded?

Mr GONCALVES: Unless the power of attorney was registered and the revocation was registered a third party would not know. But a third party is protected under the Act if they deal in good faith and they have no knowledge of the revocation.

CHAIR: How is the register updated?

Mr GONCALVES: Well, it is put in the register book so if I register a power of attorney and then I later revoke it and that revocation is recorded then there would be a sub-notification under the power of attorney register, in the general register, and people can see that it has been revoked. But in practice it rarely happens—it rarely happens that someone registers a revocation. The idea of a revocation was to make it easy for a principal to revoke it at any time without incurring expense. So it basically relies on the knowledge of the attorney that his power has been revoked and if he continues to act knowing that his power has been revoked then he is subject to offences under the Powers of Attorney Act.

The Hon. MICHAEL VEITCH: But you would not know that?

Mr GONCALVES: We would not know that but, again, we only register it—we do not monitor. It is essentially up to the third parties and the attorney to ensure that.

The Hon. MICHAEL VEITCH: Basically the register could be full of revoked powers that you are not aware of? There could be redundant registrations?

Mr GONCALVES: Yes, there could. Unless, like I said, if the power of attorney was registered then people would know that there is a registered power of attorney, if later a revocation comes in and is registered then people would know that it is revoked. If they registered the power of attorney but did not register the revocation, you are correct, third parties would not know unless they were told or had knowledge of it. Can I just say that part of the review identified that and we suggested compulsory registration of all revocations; the problem is that not all powers of attorney are registered. There may also be a fear that third parties will not deal with attorneys because there may be an obligation for them to check the register first before dealing with attorneys, and if they do not do that they may be liable because they might be negligent.

CHAIR: If you want to know whether a power of attorney exists are you the right people to go to?

Mr GONCALVES: It is not quite that simple because, like I said, not all powers of attorney are registered. I might have a power of attorney that I do not register but it is in affect because the Act has deemed it to be.

The Hon. TREVOR KHAN: You do not really know how many powers of attorney are executed, do you?

Mr GONCALVES: No.

The Hon. TREVOR KHAN: If I suggested to you that the vast majority of powers of attorney simply lie in the offices of solicitors awaiting some event to occur that might trigger the use of the powers of attorney, I take it you would agree with that proposition?

Mr GONCALVES: Yes.

The Hon. TREVOR KHAN: Indeed, the only time that the registration may be affected is just prior to a property transaction occurring?

Mr GONCALVES: That is right, yes.

The Hon. TREVOR KHAN: I take it that the power of attorney may be lodged for registration at the same time as a transfer is lodged? Would that be right or does it have to be registered beforehand?

Mr GONCALVES: An attorney cannot sign a transfer or a mortgage until that power of attorney is registered. It might all come in at the same time with instructions to register the power of attorney first, so then they can put the registration number on the transfer.

The Hon. TREVOR KHAN: One of the great dangers of these powers of attorney is the actual existence of the document itself, is it not?

Mr GONCALVES: Yes.

The Hon. TREVOR KHAN: For instance, if they are lodged in a solicitor's office, which would be the most common circumstance, and they are uplifted by a person, the danger is of that person wandering around with the power of attorney whether or not it is registered?

Mr GONCALVES: Yes. Well, the document contains the conditions, the limitations and the powers given to the attorney, so the document itself is an essential piece, yes.

The Hon. TREVOR KHAN: Would not the most common form of power of attorney be typically the enduring power of attorney where the husband executes it in favour of his wife and the wife executes it in favour of her husband?

Mr GONCALVES: Yes.

The Hon. TREVOR KHAN: That would be the most common?

Mr GONCALVES: Yes.

The Hon. TREVOR KHAN: It anticipates the event of the husband or the wife becoming incapacitated?

Mr GONCALVES: Yes. I am only talking about the ones that are registered with us.

The Hon. TREVOR KHAN: There are the only samples that you look at?

Mr GONCALVES: That is right.

The Hon. TREVOR KHAN: Whilst we talk about enduring powers of attorney as some sort of subspecies of the general power of attorney, they are the most common form of power of attorney that exist, are they not?

Mr GONCALVES: I cannot say that with any authority.

The Hon. TREVOR KHAN: You have not actually looked at the register to see the nature of the powers of attorney that have been lodged?

Mr GONCALVES: What I have looked at is the breakdown and it is about 50-50. But, I mean, enduring powers of attorney are as common as general powers of attorney.

The Hon. TREVOR KHAN: Do you not see it as somewhat strange that there needs to be a prescribed witness for an enduring power of attorney, which deals with the common circumstance of a husband or wife being hit by a car or having a stroke or whatever else, but you do not need a prescribed witnessed to grant a general power of attorney per se? So, in essence, on your figures half of the people who execute powers of attorney could find themselves in a circumstance where they have not been given the Latin mass of advice that a solicitor gives to a client who is executing an enduring power of attorney.

Mr GONCALVES: Well, the purpose of the prescribed form is to ensure that the principal understands that it will continue on even after they lose capacity. In that they also explain the power and what an attorney can and cannot do.

The Hon. TREVOR KHAN: That is an enduring power of attorney.

Mr GONCALVES: For an enduring power of attorney so, yes, that is not required under a general power of attorney.

The Hon. TREVOR KHAN: If we assume a power of attorney is executed, let us say, and granted in favour of a son or daughter, and it is produced for the purposes of husband and wife going off on an extended holiday, let us say, to Greece and it is in general form granting all powers to the son or daughter—no advices have to be given to those clients in those circumstances, and certainly no prescribed witness has to exist, does it?

Mr GONCALVES: No.

The Hon. TREVOR KHAN: And yet whilst they are off in Greece, the son or daughter could lodge for registration and effect a transfer and/or mortgage of all real estate those parties may hold in New South Wales?

Mr GONCALVES: Yes, that is true. The enduring power of attorney is explained because once a person loses capacity they do not have the chance to revoke it whereas under a general power of attorney they can revoke it at any time. If they think that something is happening they can serve a revocation—same with enduring, if they have got capacity they can revoke it at any time but they will not have that opportunity when they lose capacity. A lot of enduring powers of attorney, I suspect, are done by older people; they want to give their children power to look after them or to deal with their finances because they are getting old and they want to ensure that someone is there to assist them in their financial matters and, I suppose they are at that age when they could lose capacity very quickly.

The Hon. TREVOR KHAN: I suggest that you might talk to the Law Society about the experience of lawyers that when wills are executed for a husband and wife recently married, part of the package of documents that clients are offered and encouraged to sign—and these are people in their twenties—are powers of attorney and powers of enduring guardianship. They are not dealing with 50 or 60 years olds, but people who are in their twenties.

CHAIR: I will take that as an offer rather than a question.

The Hon. MICHAEL VEITCH: If a couple go to Greece and the kids transfer the land and then when the couple are in Greece they find out about the transfer and want to revoke the attorney, can it be done with retrospectivity? Can you say, "I want to nullify the decisions already made".

Mr GONCALVES: No, once the transfer has gone through, it has gone. They would have to take their case to the Supreme Court normally.

The Hon. TREVOR KHAN: That is indefeasibility of title.

Mr GONCALVES: Yes.

CHAIR: Does that occur often?

Mr GONCALVES: Of people doing fraud by a power of attorney?

CHAIR: Yes.

Mr GONCALVES: There are. I think a recent case was the Perpetual Trustees v. Spine. The Real Property Act precludes claims of fraud done by an attorney because there are other avenues that the principal can take to recover monies.

CHAIR: If the committee has some further questions for which we need your assistance it will send them to you in the next seven days.

(The witness withdrew)

GREGORY REGINALD JAMES, President of the Mental Health Review Tribunal, 40 Digby Road, Gladesville, and

MARIA MERCEDES BISOGNI, Deputy President of the Mental Health Review Tribunal, 40 Digby Road, Gladesville, sworn and examined:

CHAIR: In what capacity are you appearing today?

Mr JAMES: I am a former judge of the Supreme Court of New South Wales and South Australian royal commissioner, one of the law reform commissioners for New South Wales, currently the president of the Mental Health Review Tribunal of New South Wales, and recently reported to the Government of New South Wales in respect of forensic patients and the forensic mental health system in New South Wales, currently concerned to implement the new forensic mental health provisions legislation in New South Wales.

My civil team leader, Maria Bisogni, has brought with her documentation, including the written material in answer to the additional requests made by the standing committee in response to our original submission. I appear, both in my personal capacity as a former Queen's Counsel and also in the tribunal capacity. As will become apparent, this does not mean that the two capacities do not conflict on one issue with which I am in some degree of disagreement with other members of the tribunal. That area is whether or not the tribunal should have any role in dealing with the guardianship of people with disabilities at all.

The Mental Health Review Tribunal has 100 professional members—one-third psychiatrists, one-third lawyers and the other third suitably qualified coming from the caring professions. Its primary role is to determine the care, detention and treatment of all patients in mental health facilities or in the community of New South Wales who need to be treated involuntarily. It has no direct expertise in financial management, investigation of estates and investigation of effects on estates. It acquired a role under the former legislation historically in that in the in the Kings parens patriae jurisdiction in the Royal prerogative the description was "fools, lunatics and idiots, both their bodies and their property, were in the royal control." This history is set out in some of the cases referred to in the written material my deputy president, who handles our civil section. Will produce.

There are a series of cases, particularly those by Justice Powell, when he sat as the protective judge in New South Wales, which outlines that history. Essentially, if you had a florid outburst of mental illness you became more or less painted as though for all purposes for the future you had no ability to handle your own affairs and your affairs were placed in the control of a gentleman under whom I worked when at about the age of 18 I first went into the equity office and found myself working for a man then named Edward Narson Dawes, who was referred to as the Master in Lunacy. It was his task to control all the financial affairs and administration of the assets of persons who had become mentally ill. On admission to hospital certain statutory regimes were put into place where, for instance, you would pay for your care out of your estate and the hospital would deduct moneys and apply it to such things as the hospital library, welfare and accommodation and sometimes welfare and accommodation of doctors as well.

After qualifying I was asked to do an inquiry into the administration of mental health hospitals, in particular the Morisset Hospital for the State Government as counsel assisting the then Registrar General. We discovered that a deal of the moneys was going off to patients' amenities, which were providing amenities not just simply for the patients. The Protected Estates Act was set up to prevent exploitation of persons who might be incapable of managing their own affairs and that overlapped with the mental health legislation. Justice Powell administered it. He looked at the history and at what incapable of managing one's own affairs amounted to. It does not mean a temporary status arising from one florid outburst of mental illness. It requires there to be some degree of a more extended incapacity associated with it.

Since Justice Powell's days in the 1980s the Attorney General's Department has produced a capacity toolkit, which refers to the more modern law which involves the idea of incapacities for individual transactions. So, you get, for instance, under the Children's Court legislation a Guardian Ad Litem for persons who for whatever reason lacked the ability to give proper instructions. The Guardian Ad Litem handles that particular piece of litigation. They are there only for that dispute and they assist with giving legal instruction to the lawyers in lieu of the person who is suffering from the disability. You get the general disability position where you might have, for instance, a guardian or a committee appointed to handle all the financial affairs. Since the passing of the new Act, orders can be tailored to suit the individual situation. It might be that the individual does

not have to handle all of their affairs through a guardian. It might be that the guardian can be used for some things but not others.

Of course, we in the administration of the Mental Health Review Tribunal's jurisdiction frequently come up against situations in which somebody can be totally incapacitated except for the purpose of managing their pension inside a hospital institution for the purpose of what they call in jail buy-ups—toothpaste, talcum powder, chocolates and so forth—and they are fully able to handle that for themselves with the assistance of the social worker. There is no need for an order in those situations. No-one is going to exploit their estate, yet the old law that because they were being admitted as involuntary patients to hospital we had to make an order. The onus was on the patient, who had no ability to stand in the way of an order or get an accountant or lawyers to assist, to show why an order should not be made. That was preposterous, and that has been reversed under the new legislation.

But what expertise do we have? We are dealing with medical treatment. My tribunal and staff are firmly of the view that we should retain the jurisdiction to make the orders particularly interim orders, on the basis that although the Guardianship Tribunal has the investigatory staff and resources, it cannot move quickly, whereas we have to move fairly quickly after the patient has been admitted to hospital to determine whether they should be retained in the hospital. In that regard, I should add something to the written material that is about to be produced to you.

CHAIR: I am taking this as opening comments before we go to questions.

Mr JAMES: Sure.

CHAIR: I am more than happy for you to take as long as you need.

Mr JAMES: Go for me on any topic at any time. Interrupt, hit me, it is your inquiry. I will do whatever I can.

CHAIR: We want to go to questions but we are happy to hear your comprehensive introductory comments.

Mr JAMES: We are about to get a new jurisdiction in the Mental Health Review Tribunal. We currently service 42 hospitals. We deal with patients who have been admitted, scheduled, and are assessable persons who have been examined by magistrates, who have not been discharged and who might be detained as involuntary patients or released on community treatment orders. But our new jurisdiction involves us taking over the magistrates' work. We will be asked as soon as reasonably practicable to conduct, after their admission, some 12,500 hearings per annum in lieu of the magistrates as to whether people have been admitted should continue to be detained for treatment, discharged or discharged on community treatment orders. That will mean the tribunals will have the whole role in relation to involuntary patients in New South Wales.

We are not getting additional resources for that purpose. If what we are going to be able to do is short form protected estates type orders, financial management orders, particularly of an interim kind, and so we can refer them to a body that has the facility to do the investigations and to see whether the person should be effectively permanently or on a long-term basis deprived of the administration of their own estates, we would be very worried indeed unless it is only on an interim basis and we could refer it. The written submissions we are providing refer specifically to this and the specific questions we have been asked by the Committee, including the sources of the historical material, and we provide also, in addition to that document, various attachments which set out how we handle free and informed consent, what the current health department policy is on it and what our policy and administration is of the requirements under the Act for informed consent and the process for determining it for a electroconvulsive therapy.

That should answer much of what the Committee has raised with us but we are not only free today but by a phone call or email, as expeditiously or otherwise, whether on notice or not, to assist the Committee in any way we can. I should indicate that although I am expected to have an eye operation tomorrow, that is not expected to affect either my brain or my ears and I will be available on the phone. Maria is always available on the phone, and my other deputy, John Fennelly, formerly deputy director general of the Attorney Generals Department, is there to handle the legal side of things.

CHAIR: We greatly appreciate your offer and no doubt will take it up. We appreciate the tendering of those documents. Ms Bisogni, would you like to make any opening comment before we go to questions?

Ms BISOGNI: Other than to say that the matters we have canvassed in our submission are matters we support, and I strongly support the President's view in terms of the tribunal retaining the power to make interim orders. But certainly the opportunity should be given to persons who have complex estates and wish to have the appointment of a private manager, it should be available to them to go to the Guardianship Tribunal, which has a large investigatory unit, and is able to make the necessary checks of persons and proposed managers to be able to put enough probative information before the tribunals so it can make an informed decision.

Mr JAMES: Can I add to that that we are really a health body, and that is our ministry. Whereas the Department of Disability, Ageing and Home Care is responsible for the Guardianship Tribunal, and really what we are talking about here is a disability service.

The Hon. TREVOR KHAN: If I could go to the issue you raised about taking over the powers of the magistrates. If we deal with circumstances close to my home, Banksia House at Tamworth is one of the facilities you will be taking a closer interest in.

Mr JAMES: No closer, just earlier.

The Hon. TREVOR KHAN: At the present time the magistrate would attend there I think once a week and undertake informal hearings with various patients. That is generally the procedure that is adopted?

Mr JAMES: Yes.

The Hon. TREVOR KHAN: If you receive no more resources, how will you look after patients at Banksia House, Tamworth, or at any other country institutions?

Mr JAMES: That leads me to that wonderful line: with difficulty! No. Firstly, we will use video link with all these installations. Secondly, we will be required under the Act to do it as soon as reasonably practicable after the patient has been admitted. Until now the magistrates have been coming out on Magistrates Day. That has not necessarily been as soon as reasonably practicable after the particular patient has been admitted. Sometimes "as soon as reasonably practicable" is weeks away, because the patient has to stabilise and assessed, and get medication before the review of the patient's circumstance has any value for anyone at all. At other times that can be done almost immediately. Video link will let us do it that way.

The hospital will be in a position where it can contact us by phone daily. In fact, we are on the phone 24-hours a day anyway. We are available 24-hours a day for electro-convulsive treatment [ECT] or any emergency. In addition, we have a position where, if the material is available to assess the patient, we can happily try to get the local community mental health facility to give the patient the opportunity for a community treatment order. Where the agency is capable of administering a proper community order, we can have a panel there to look at the appropriateness of the order, by video link, almost immediately. That is something the magistrates could not do.

The vast majority of magistrates' hearings have been adjournments, because nothing was in order. We are going to try to avoid all that; hopefully our hearings will be better value, conducted at a time when they can be useful to the patient, and will involve much less mucking around, which is a waste of everyone's time, including the patient's time, producing a useful outcome. We can monitor the patient all the time in the unit. Presently every patient in New South Wales has the right to appeal to the Mental Health Review Tribunal, a full panel of three, from the refusal of the medical superintendent to discharge them. That means that theoretically we could be doing the same function as the magistrate, but with three of us doing it.

In fact, very few patients ever exercise that right. It is a matter for speculation as to how often they are told that they can. This time, at least, the tribunal will be on tap and available to them with at least a single member of the tribunal, a lawyer member such as a magistrate, who is quite capable of referring it to a full hearing before the full bench. We expect to give a better, faster service at the end of the prospect. That does not mean that we will be coming around on every Magistrates Day.

The Hon. TREVOR KHAN: I am not suggesting that it is necessarily a common circumstance, but some people with a mental illness will be of the view that some things are coming out of the television. How will you deal with patients who are suffering from various forms of delusion?

Mr JAMES: Would you believe that initially, when I came from the court to the tribunal four years ago, I thought that we would come up against that. We have not come up against it once. Even with patients who do believe that there are voices speaking to them from the television, when we tell them "This is a meeting of the Mental Health Review Tribunal. My name is Greg James, I am the president of the tribunal. This is Dr Allnutt, this is psychiatrist Mr Bloggs. We are here to see whether you need to stay in the hospital. What would you like to tell us?" No question of voices from the television ever arises. Indeed, interestingly, for me it has been the other way round. The Act provides that on hearings before the magistrate or the tribunal, the patient should be brought before the panel, dressed in street clothes.

Some patients get very upset at the idea that their unit is forcing them to get compulsorily dressed. And they can be very distressed by that, particularly some of the patients I have seen who need ECT. We try to produce the least formality and the most effective involvement of the patient, which often means that I spend a deal of time in a hearing, two or three minutes, talking rugby union or rugby league with male patients from New Zealand, to establish a rapport. And it works.

We go to a lot of trouble to make the hearings patient-oriented, to hear what patients have to say. But really they are not hearings that cause us to examine what the patient is doing or how the patient is; it is what the treating teams are doing and how they are treating the patient that we are interested in. We audit treating teams; and sometimes they do not like it. On that topic, we also take calls and inquiries generally, and we are happy to assist with the local area at Banksia House, with the victims organisations, with families or with any non-government organisations, as to anything we are doing.

The Hon. MICHAEL VEITCH: I will touch on a question on notice. First, in the tribunal hearings do you ever come across the need to give consideration to powers of attorney or enduring powers?

Mr JAMES: Almost never, because when we are dealing with protected estates matters, if someone has been well enough to give a power of attorney and the attorney is acting for them, we take into consideration whether they need to have an order. Often that would mean not at all. Where that sort of thing has happened, if there is any risk that the attorney might be not acting appropriately, we have no facilities to inquire at all. It is the sort of complex issue that should go to the Guardianship Tribunal rather than us, or the Supreme Court, if you get a big enough brawl. We can only revoke orders in very limited circumstances. So if we make an order, the patient can be stuck with it for a fairly long while.

The Hon. MICHAEL VEITCH: Regarding the appointment of private managers—

Mr JAMES: We cannot do that at all presently.

The Hon. MICHAEL VEITCH: No, but in your submission you recommend that the Mental Health Review Team have a referral power to the Guardianship Tribunal in cases where it is sought to appoint a private financial manager.

Mr JAMES: Yes. They can look at whether the person is competent.

The Hon. MICHAEL VEITCH: I guess the Committee can draw from your submission that the sentiment of the Mental Health Review Team is that you would oppose any proposition that the Guardianship Act be amended to allow your tribunal to appoint a private manager?

Mr JAMES: I think we would. In principle we do not oppose the idea of there being private managers, it is really more a matter that we do not have the capacity to work out something. I remember that poor, unfortunate movie star who received an appalling head injury, and received an enormous Supreme Court settlement—

The Hon. TREVOR KHAN: A young fellow from Victoria.

Mr JAMES: Yes, and there was a massive battle here over the administration of his estate, and who should be appointed as manager, and so forth. We have no capacity to do that whatsoever. But on the face of the

Act as it presently stands, we have no way to decline. We cannot say, "Go to the Supreme Court", or "Go to the Guardianship Tribunal", and we cannot hand them over, as it were, to those bodies unless they are willing to accept the person. That means that the system is remarkably inflexible. Whatever virtues there are in the Mental Health Review Tribunal doing protected estates orders, they exist only in relation to small estates, easy factual circumstances for the making of orders, and people who are mentally ill. Regarding the idea of us having a jurisdiction further beyond that, or perhaps also for the unfit-for-trial forensic patients—and there are only a dozen of them that we need to worry about—really, we have no capacity to do the financial investigations.

The Hon. MICHAEL VEITCH: If the Committee were to make a recommendation to amend the legislation to assist you to refer, and to remove the impediments you mentioned, what are some of the words we should consider using?

Mr JAMES: Ah! We would help you with the drafting, make the recommendation in substance. The Department of Health lawyers, in particular Ms Leanne O'Shannessy, who heads the legal panel, and Ms Gemma Broderick, who is on the legal panel of the Department of Health, are particularly competent. We would happily work with them. Maria Bisogni can work with them and so can I. And we can produce a draft bill very effectively to meet the intent that you might include in your recommendations. Of course, that is with the assistance of the parliamentary draftsperson.

CHAIR: Is that "Yes"?

Mr JAMES: Yes, and we will help.

The Hon. MICHAEL VEITCH: Relating to consent to medical treatment, on page five of your submission you raised concerns regarding the provisions in section 84 of the Mental Health Act for a medical officer to authorise treatment for involuntary patients entering a mental health facility. Can you elaborate on your concerns?

Mr JAMES: There are different capacities of patient. There is the involuntary patient under the Mental Health Act 2007. A person becomes an involuntary patient in a hospital after they have been scheduled, admitted to the hospital, and they are considered an assessable person until the magistrate makes the order that they be detained as an involuntary patient, and thereafter the tribunal assesses them. It is a complicated, overly complex system until we take over the magistrates' inquiries. And it is done on the basis of individual hearings rather than continued monitoring. The assessable person, and Maria will correct me if I get it wrong, is not an involuntary patient for the purpose of us making a determination that they require special surgical treatment.

When the person is found on the street mentally ill, they have often damaged themselves, or other people have damaged them. They require mental health care, surgical care, medical care and often diet and various other problems to be attended to, and often on an emergency basis. The usual situation is that they are picked up by police and taken to the hospital outpatients, or emergency, department. We have found that overall the police are far and away the most compassionate and competent authority for taking them to hospital. The police stay with them in the emergency department until they are admitted, which may mean that the police are there for hours—and the police object to that, no end!

The hospital does not take over the person's care until they are admitted. There are difficulties with the staff at the reception desk, not surprisingly. When the person has been seen by the two psychiatrists, or the two doctors, and scheduled and are eventually taken off to a ward, the police go home, and they are in a limbo situation in which there are difficulties to work out who can give them surgical and medical treatment and, from the point of view of estates, what is to happen to their estate and so forth, until the magistrate has had the inquiry and determined that they should be an involuntary patient.

Really there should be clear power for the tribunal to authorise a surgical or medical procedure, or special procedure, during that time when necessary. There are Common Law powers for doctors to treat people in emergencies, but doctors are not familiar with them, they are not happy to rely on a Common Law entitlement. They like to see something in an Act, which they feel will mean that they are protected and their insurers are protected and they have an appropriate immunity from being sued.

The relevant case on that is *Rogers v Whittaker*, which involved a man about to have an eye operation. The allegation was that the surgeon had not adequately explained within his understanding the risk that he might lose the sight of his other eye. There is no way that most of the people with mental health problems can be given

anything like an opportunity to understand sufficiently, to enable them to give free and informed consent, just as there is no free and informed consent from the up to 1,000 or so prisoners who are presently detained in the Metropolitan Remand and Reception Centre [MRRC] screening unit or the women's screening unit at Silverwater to medication that they are receiving. Of course, it can be given to them if they were in hospital. If the MRRC or the women's screening unit were declared to be mental health clinical facilities, they could be given involuntary medication.

At present they are being given medication relying on the fact that they are in jail and they better accept it. We would like to see that brought into line with the law, too. Those people also have estates, they also need surgical treatment. Presently the tribunal has no power to do it, not unless they become a forensic patient in respect of whom they receive a "not guilty by reason of mental illness" type verdict, for us to get that.

The Hon. MICHAEL VEITCH: The Committee has heard a fair bit of testimony around the need for a public advocate in New South Wales.

Mr JAMES: Great idea.

The Hon. MICHAEL VEITCH: Can I garner your learned views about how that would work?

The Hon. TREVOR KHAN: I think you just got it, in two words.

Mr JAMES: I went from the Master in Lunacy to the Legal Aid Commission. I shared an office with the present Administrator of the Northern Territory, Tom Pauling. A number of us acted de facto as public advocates in those days. The Legal Aid Commission has a body called the Mental Health Advocacy Service that supplies solicitors to come to some of the matters before us. I think those solicitors also go to the matters before the Guardianship Tribunal that involve property. We would be greatly assisted if we got proper assistance from advocates with full powers and full opportunity. The Mental Health Advocacy Service works very hard, takes instructions the day before, and does individual matters. Sometimes they stay on the matter on a long-term basis, but it is rather equivalent to the duty solicitor. A public advocate's office is something that the Public Interest Advocacy Centre [PIAC], the Law Reform Commission and other bodies have advocated for many years. We would see it as immensely useful.

I wax enthusiastic about the idea of better mental health care and better care for the disadvantaged in jail and so forth. However, at present the Mental Health Review Tribunal has staff that are working like crazy to tell the hospitals and community mental health facilities how to get the material together to give to the tribunal so that we can make orders for them to give appropriate treatments. We should not have to be doing that. We publish the material on the Internet, we publish it on hard copy and we send it to one and all saying, "This is what you should be doing." Health is starting to prescribe standards for various kinds of treatment, including ECT.

We see our role under the law is to review what they are doing, not to tell them how to do it in every individual case. That is what we are presently doing. With special surgical procedures, with ECT, we will literally have staff telling the psychiatrist who rings up, "You have to get the tribunal's approval. Here is the document. It is on your website. This is what you should put in your report. Here is what you should look to for clinical standards. This is the sort of thing we are interested in. Yes, if the patient has had it before you need a report from the previous doctor. We need to know what the effect of the ECT will be." It is a dramatic treatment. On the other hand, ECT is far and away the least invasive treatment currently available by comparison with antipsychotic drugs. ECT can work miracles for patients suffering from acute depression with a downside of often having no more than a short period of memory lapse, which, frankly, if you are that depressed, you need anyway.

If you want to look at ECT we would be happy to try to organise for the same sort of demonstration that has been given to our members by the foremost practitioner at the Northside Clinic, who will bring in his slides, dummy and pictures and show you how it is administered and, if you want to try it, let you try it! The antipsychotics can be terrible but they can preserve you from causing a tragedy. ECT can do that without the side effects.

Dr JOHN KAYE: This morning we heard evidence from Professor Ian Hickie, who is the Executive Director of the Brain and Mind Research Institute, University of Sydney. To paraphrase and possibly verbal Professor Hickie, his evidence led us to believe that one of the issues we are confronting at the moment is the

all-or-nothing declaration of capacity or incapacity. The second key piece of evidence that he put forward was that we live in a world where we just do not get enough information into the system. He was advocating for broader assessment of patients, including evidence from social workers, community care workers and his own particular brand of neuropsychological analysis. His suggestion to us was that there needed to be a change to the law, which would drive a situation in which all this evidence was presented to people such as you. Could you comment on that?

Mr JAMES: The second of the two propositions is entirely mistaken. We take all that evidence already. We take evidence from every source we can get it from and, whether we should or should not, we go out actively and dig it up if we do not get it from the parties. We say to the solicitors from the Mental Health Advocacy Service, "What has his aunt got to say about that? She treated him for some time." Most recently, in one case we had to say, "I understand he was a chorister at St Mary's. Would running a choir in the new forensic hospital help him? Could you give us some information on that?" It turned out to be a wonderful thing. We go about that entirely proactively.

Dr JOHN KAYE: Just to be clear for the record, that includes social workers—

Mr JAMES: Social workers, accountants, case managers, caseworkers, nurses in the various hospitals, nurses in the community mental health facilities, friends, carers—not just primary carers, but carers generally—and sometimes next-door neighbours. We will go for that thoroughly and completely every time. We do not need a change in the law for the tribunal to do that. In theory you can do it with financial management orders. In practice we do not have the capacity to run those sorts of massive hearings that the Supreme Court has, nor does the Mental Health Advocacy Service have the capacity to go out and produce the range of evidence. What we are doing is asking for what we think might help in a given case.

Professor Hickie's first point is perfectly—forgive me—sane, sensible and much to be admired. Capacity exists—and the law has long recognised this in case after case; *Holton v. the Protective Commissioner* is one of the cases we cite as a perfect example of it—in relation to a particular transaction, whether it be the making of the will, the driving of a car, or whatever. There can be people who have no capacity for anything whatever. They are extremely rare and they are invariably in an institution. We had one patient, about 120 kilograms of lean muscle, detained at Morisset, who has no capacity for anything beyond about the capacity of a five-year-old child and who is very violent. There is a terrible difficulty in trying to make sure he has any quality of life whatsoever.

But most people lack capacity beyond certain levels for financial management. They are perfectly all right when they go to the shop to buy milk, but there is no way they could make a rational, competent judgement about instructing Queen's Counsel for an application to the Land and Environment Court over the tree that has been obsessing them for years that is growing from the neighbour's property next door. The courts try to grapple with that when they come across someone they regard as a vexatious litigant. Some years ago in Tamworth, if I recall correctly, there was a lady and her daughter who kept chickens.

The Hon. TREVOR KHAN: I remember it very well.

Mr JAMES: From that bloomed an enormous performance where the obsession surrounding the keeping of chickens went berserk. That took a long while in the courts and ended up with a stabbed policeman and someone who became one of our patients. If that could have been dealt with at the outset, it would have made life a lot better. The Attorney General's capacity tool kit may well help.

CHAIR: Thank you very much. Your evidence has been extremely valuable.

Mr JAMES: If we can help you in any other way with refining submissions, refining documents or preparing drafts or suggesting something for an amendment, we will be delighted to do so.

(The witnesses withdrew)

(Short adjournment)

IMELDA DODDS, Acting Chief Executive Officer, NSW Trustee and Guardian, 160 Marsden Street, Parramatta, on former affirmation; and

PAUL MARSHALL, Manager, Quality Service and Community Relations, NSW Trustee and Guardian, 160 Marsden Street, Parramatta, on former oath:

CHAIR: Thank you for attending today. The Committee notes that you each are on your former oath and affirmation. Before proceeding to questions do you have any opening comments to make?

Ms DODDS: Thank you. I note that I have been asked whether I would like to make any comments on any matters raised in evidence during the inquiry to date. My answer is no. I think it is more appropriate that I take questions from the Committee as you see them appropriate arising from anyone's comments. I reiterate comments I made in evidence at the previous hearing that I know the Committee understands and appreciates that we are not at liberty, obviously, to talk about specific issues. I am also conscious of the fact that you have another hearing day and questions may arise from that. Of course, we remain available to the Committee to answer those questions on notice.

The Hon. MICHAEL VEITCH: Ms Dodds, since the last occasion the Committee has received a fair amount of evidence around the Convention on the Rights of Persons with Disabilities and the optional protocol from the United Nations convention. Has your organisation had a chance to look at that document and determine how it may give consideration to it?

Ms DODDS: At a very high level we have. Obviously, through the executive in discussion and also in preparation for the submissions to this inquiry reference is made to it, although not in great detail, in my submissions for reasons that were outlined. Yes, we have had an opportunity to consider that. It is also a topic under discussion at a national level amongst tribunals, public advocates, guardians and trustees through the Australian Guardian and Administration Council [AGAC]. The passing of the Australian Government's decision to sign the convention and the optional protocol has been a very important landmark and it is the subject of ongoing discussion about how we actually integrate those principles into practice. It is always difficult to remember what one said in evidence, what you wrote and what you have said to people outside this room, so forgive me if I am repeating myself but they are complex issues and are not easily or quickly resolved, particularly one of the important issues, which is the assisted versus substituted decision-making concept that is being thought through across the nation from all perspectives and, indeed, in other parts of the world. Yes, it is under discussion at high level.

The Hon. MICHAEL VEITCH: This morning the Committee heard that one of the underpinning principles for the convention is the Social Model on Disability. Even before there was assisted decision-making and substituted decision-making there was the concept of supported decision-making. As we are teasing this out we are finding that continuum of decision-making is broadening.

Ms DODDS: Yes.

The Hon. MICHAEL VEITCH: Another item that has been raised in evidence is the treatment of the power of attorney and enduring powers of attorney. How does the New South Wales Trustee treat those instruments?

Ms DODDS: With enduring power of attorney, that being a financial instrument, the NSW Trustee and Guardian office has now a broad focus. There is the financial management side of the organisation that manages the finances of people that have been found to lack capacity by a court or tribunal. Then there is the trustee and will-making side of the organisation that is responsible for the making of wills for people who seek to do so, and also acting as the executor and trustee where a trust has been established. In that role the organisation is responsible also for and in its former incarnation as the Public Trustee has done over a number of years a great deal towards promoting the use of enduring powers of attorney, an enduring instrument. When someone comes to the office and enquires about making a will and/or makes a will, the question of making a power of attorney is always raised. Both the making of a will and the making of a power of attorney are elective things; we elect to do that or not and we have to have the capacity to do that.

There is a lot of promotion of those instruments as a preplanning mechanism. The former Public Trustee also has always talked about the possibility of enduring guardianship, however, for witnessing reasons was unable to witness those instruments but would talk about the intent, the nature of the instrument, give information and allow people to consider whether they wished to proceed with that. In terms of promoting those instruments, that is a very important part of our work and certainly going forward I think an even more important part of our work is that we know we have an ageing population. We know that we are going to have a mushroom effect in our population at around the year 2030. People taking control of their lives and making choices about who they want to make decisions for themselves were they unable to do so I think is fundamentally important.

That having been said, both those instruments to differing degrees have some issues and limitations around them. An enduring power of attorney can be misused. If it is the subject of misuse then, as I imagine all of you know already, an application can be made to the Guardianship Tribunal to have that instrument reviewed and the power of attorney replaced, if that is necessary. Actually, technically the power of attorney is suspended although another attorney can be put in their place. There is a range of safeguards that are out there. I am aware also through various debates and discussions—I think you are aware that there is a review of that very document currently underway—that the question of elder abuse often is raised as well as misuse and what protective mechanisms can be put in place. There is always the possibility to look at new ways of trying to strengthen instruments like a power of attorney to reduce the risk of abuse of an instrument like that.

Can we ever stamp out abuse, neglect or exploitation? I doubt that very much. We can just do as much as we possibly can to have a safety net that is relevant to it. Of course, enduring guardianship is a different instrument under a different piece of legislation. I think my colleague the Public Guardian already has commented on some of those issues. As I have indicated previously, I am merely confining my comments more to the financial area with the exception of saying that in my time as the titular Public Guardian, for want of a better term—I really held the title but the work was being done on separation of roles issues by the director, for good reasons—I did observe some issues with that instrument as well, which could do with some clarification.

The Hon. MICHAEL VEITCH: This morning the Committee heard evidence from Trustee Corporations Association of Australia about how it is moving to come under the Australian Securities and Investments Commission [ASIC] for regulatory processes. Is the NSW Trustee and Guardian moving across as well as part of that whole reform process or is it somehow outside the ASIC regulation?

Ms DODDS: That is actually an extremely complex question and coming, as I did, from the former Office of the Protective Commissioner side it was not an area that we were directly involved in as the former Public Trustee was involved in. But the former Public Trustee, and now in the one organisation, was certainly actively involved in those discussions as a member of the Trustee Corporations Association of Australia. The question of whether the State bodies come under the direct jurisdiction of the Australian Securities and Investments Commission is one that, as I understand it, is yet to be determined, and that has to do with the relationship decisions at Attorney General level about whether we would come under that regulatory framework. It is probable not, but that does not mean that we would be immune from the principles there.

Dr JOHN KAYE: I want to ask you about some evidence we received this morning from various financial trustee corporations in respect of what I think is a conflict of interests. If I am a trustee corporation and I am making an investment decision on behalf someone who has a diminished capacity or no capacity in this regard, I am making trade-off decisions about investment security versus rate of return, I am making decisions about capital gains versus income, I am making a variety of different decisions, which each of us in our own lives make on a fairly subjective basis; in making those decisions, whichever way you bias that decision, there may be ways in which I can advantage the corporation I am working for. Yet it seems to me that those decisions are made in a relatively unregulated fashion; they are made on a lot of subjective analysis by the individual investment adviser or investment maker and without appropriate oversight. Would you agree with that proposition?

Ms DODDS: Let me be clear that I understand this question correctly. Was the point being put that the trustee companies are making those decisions?

Dr JOHN KAYE: Correct.

Ms DODDS: Without oversight?

Dr JOHN KAYE: I am asking you if you think there is adequate oversight when they make those decisions, given the capacity for a trustee company to make a decision that would advantage their bottom line possibly at the expense of one of their clients?

Ms DODDS: I can say that the trustee companies, like all other private managers, are subject to the oversight of the New South Wales Trustee and Guardian and there has been some discussion over a number of years about whether that is appropriate, fair and reasonable. I am certainly aware of examples, in my relatively short time of two and a bit years, where the proposals of trustee companies have been rejected because they have not met the principles that are generally to be applied. For example, the expenditure of over 60 per cent of the principal, without taking the need for an ongoing investment of a stream of income for the person into account. So their plans and proposals are subject to the same scrutiny as any other member of the community putting up their plan. Could that be detected? It should be detected if there was an imprudent proposal put. I am certainly aware of a matter recently decided in Queensland, I think, where the tribunal called to account a trust company about their actual management of a client's finances and the appropriateness of what they were intending to do. I think it is a matter of degree that we are talking about here, because the oversight is there. But if what is being suggested is a third party review to a high level of detail about those proposals, then that is quite resource intensive and costly.

Dr JOHN KAYE: I wish to ask you two questions. Firstly, does your organisation look at each individual decision being made by a private investment company and assess it against a set of criteria? Secondly, do you look at the total balance sheets of a private investment organisation, rather than look at it on a case-by-case basis, to see what those series of decisions means for the organisation?

Ms DODDS: On each individual decision, no, but—and the "but" is—the organisation must put its proposal to the New South Wales Trustee and Guardian, which indicates what they are planning to do with the client's money, in terms of investment payments and so forth, before they get the directions and authorities to act, in the same way as any other private manager. So they do have to put a proposal, which describes what they will be doing. If the question is when it comes down to a daily basis and they decide to do X do they come back for directions and authorities? It does depend on what X is. If X is a major expenditure within the order then, particularly the sale or purchase of property, they do require separate authorities to do that. I am afraid it is not an absolute answer. On some occasions they will and on other occasions they will not, just the same as any private manager. We certainly, by the way, check the fees. When the accounts come in on an annual basis they are checked to see that they are in line—that is done in the passing of accounts. If your second question was do we then go to look at the overall income of the organisation, the aggregated income from clients who are under financial management, the answer is no—I am not sure that it would be easy to get that data out either.

Dr JOHN KAYE: So no independent body ever looks at the aggregated income of the private managers from their actions of private management?

Ms DODDS: Not that I am aware of, if I understand that question correctly.

CHAIR: Just to clarify, the New South Wales Trustee and Guardian is a member of the Trustee Corporations Association of Australia?

Ms DODDS: We are, yes.

CHAIR: In that capacity there may be some conflict of interest or difficulty in you overseeing the questions that are being asked—do I understand that correctly?

Ms DODDS: I was not putting that point. I mean various data is collected no doubt around the number of wills made, et cetera, but Dr Kaye is actually asking for the fees that are derived from a particular area of work.

Dr JOHN KAYE: Fees and other benefits, yes.

Ms DODDS: Yes.

Dr JOHN KAYE: That data is not known?

Ms DODDS: I am not aware of it but I would be happy to take that question on notice and put it to my colleagues in the Trustee Corporations Association of Australia.

Dr JOHN KAYE: Are there cases reported where there have been specific attempts to make decisions specifically to benefit the private trustee companies?

Ms DODDS: Not that has been brought to my attention.

Dr JOHN KAYE: You are not aware of that?

Ms DODDS: I am not aware of that. I will just check with Paul, who has a greater historical knowledge than I have.

Mr MARSHALL: Certainly there have been a number of instances where the New South Wales Trustee and Guardian, or formerly the Protective Commissioner, was concerned about an investment strategy being proposed by a trustee acting as a private manager. To say that that meant they were actually making that decision in their own best interests, or in the best interests of their organisation, rather than of their client is not something that I have been aware of. I think some of the difficulties the trustee companies have, and private managers generally, is to understand exactly what their role is. Sometimes a trustee organisation might think that their primary role is to maximise the returns of the estate, which is not their sole responsibility: it is to make decisions in the overall best interests of the person, and that can be different. If you do not have expertise in that area that can sometimes be problematic for a trustee who is used to acting in the best interests of the financial returns of the estate, not necessarily the best interests of the person. That can be further complicated if the trustees are being contacted regularly, which is not infrequent, by family members who may have competing ideas about what is in the best interests of the person and the estate if they are ultimately going to be beneficiaries of the estate.

The Hon. TREVOR KHAN: I am interested to take that point further. If there is a trustee company, which is under these, in a sense, competing expectations as to what they are going to do, what is their legal position if they take a conservative approach to investment that results in a poor rate of return of the monies invested, albeit a safe investment strategy?

Mr MARSHALL: My understanding of it is as long as the trustee complies with its obligations under the Trustee Act and the prudent person principle then I do not think there is any legal ramifications for them. If, however, they are shown to have acted outside of those principles and that has resulted in a loss for a person then there would be legal ramifications. The difficulty always is, of course, it is not apparent perhaps until some years down the track whether or not a particular investment strategy was appropriate. The reality is that in a very similar way to the way our superannuation funds are invested, the trustee funds, as we do also, follow a very similar model based on a person's age, their life expectancy, the amount of capital they have got, et cetera. So the models are fairly similar. There is, however, room for, I suppose, tinkering based on other advice that may not be applicable to you or I for a person with impaired decision-making abilities. I do not think, unless a trustee acts outside the prudent person principle or the Trustee Act, that they would suffer any legal consequences.

CHAIR: Where would the consequences be heard?

Mr MARSHALL: Not by us.

The Hon. TREVOR KHAN: Potentially it could be an action in the Supreme Court.

Ms DODDS: Potentially it could be but all financial managers are obliged to act within those principles so we are all responsible for it in the same way as if NSW Trustee and Guardian had acted those principles in making decisions.

The Hon. TREVOR KHAN: In terms of the fee structures of the individual trustee companies, do you compare the relative cost or fees that they charge?

Ms DODDS: The issue of fees and comparisons across the trustee companies is one that has been difficult because they are all calculated somewhat differently and there are additional fees sometimes that are not so evidence on first blush. The NSW Trustee and Guardian is frequently asked to submit a fee proposal to

the court when the court is considering its determination and that may be considered alongside of fee proposals from other trustee companies who may also be open for appointment as the financial manager.

The Hon. TREVOR KHAN: Would you explain that a little further?

Ms DODDS: Basically when someone's personal injury claim is being finalised, if the court is determining that there needs to be a manager appointed, then the question arises who that manager might be—that includes the NSW Trustee and Guardian. The person and their family may have views about a private financial manager—that might be another trustee company—then a proposal is required to be submitted to the court. The court may also request a counter proposal from the NSW Trustee and Guardian for comparative purposes. Now because there is not a uniform way of developing fee schedules, it is not necessarily so easy for the court. They are not necessarily looking at apples and apples, it is often quite the other way. So the NSW Trustee and Guardian in financial management charges a percentage fee but other trust companies may have a different fee arrangement which may more be on an activity based costing arrangements.

The Hon. TREVOR KHAN: I looked at your structure in your submission —again I am not being critical—and it is very difficult to work out how it would compare. I suppose the question is that yours is not an activity based arrangement, is it?

Ms DODDS: No.

The Hon. TREVOR KHAN: So potentially if the asset were in a form that required little management on month-by-month or year-by-year basis one could describe it as almost money for jam, could one not, in terms of the fee?

Ms DODDS: Except that there are significant caps on the maximum fee. When I joined the organisation those caps were $50,000 in direct management and that has, on the back of an Independent Pricing and Regulatory Tribunal review in two fees just been reduced to $15,000. So that is the maximum fee that is paid in direct management and there is a cap in private management now as well which has been reduced to $2,000.

Mr MARSHALL: One of the difficulties, as Ms Dodds was saying, is comparing apples with apples. There is no requirement on a trustee organisation, for example, who has a fund that says "We return an X-percentage interest rate" to actually declare how much they are taking out of that particular fund in terms of fees. You would have to go and look at the annual report. You will often see financial institutions advertising to all of us a "no-fee account". The reality is that they are taking out a fee that we are not aware of from that account. They are saying, "We provide you with 6 per cent interest for a fixed period" but they might be earning 8 per cent interest on that which is, in effect, a 2 per cent fee that they are taking but that fee is hidden. That can make it very difficult to compare like with like.

Our fees are up-front. We have got the 1.1 per cent management fee and 0.5 per cent investment fee which attracts too. Now not all trustee organisations would declare the fees in that way. They would say, "Okay we have got administration fees" but they are not going to declare necessarily the percentage that they are taking out of each of the funds as their fee. You would have to actually look at their own statements for the whole organisation to see what they are actually doing there. What some trustee organisations will do also is if there is a large personal injury award, for example, of in excess of $10 million they might be very keen to negotiate on their fees with that because they are just going to plonk into an existing fund. So it is a difficult area.

As I understand it there are moved to have the way in which fees are advertised, I supposed, standardised so that we all know when we put our money into a bank or a financial institutions, this is the fee structure, this is how it is worked out. At this stage, however, that does not exist. We have a situation often when clients, and family members of clients, are quite distressed about the fact that they say, "Well, I can put money in the bank and there are no fees for this". We have to explain to them, "Well, there are fees, they are just not fees in the way that we charge them."

The Hon. TREVOR KHAN: If there is a personal injury settlement—for instance, the case in the last couple of days that went to appeal of a lad from Tamworth or thereabouts who got caught in a drain where I think the award was some $9.6 million—and you get an award of monies to that extent, do you take those funds and charge a fee for managing them? Is that right?

Mr MARSHALL: Yes.

The Hon. TREVOR KHAN: Obviously you do not put it all in the bank—you may put a portion in the bank—but you would then apply some of the monies to a variety of funds, is that not right?

Ms DODDS: Yes, that is correct.

The Hon. TREVOR KHAN: Those funds themselves would charge a fee for managing that portion of the monies that you apply to that fund, would they not?

Ms DODDS: That happens but that is the management expense ratio, often called MER—and that in the NSW Trustee and Guardian is 0.5 per cent to which Mr Marshall referred to, is the fee on the money that is invested. So let us take that $9 million or thereabouts. A very sizeable amount of that would be held in the common fund which has eight different areas of investment and it is spread through that fund according to the individual needs of the person, their age, what their future is. Now the 0.5 per cent fee includes the fee to the NSW Trustee and Guardian and the fee to the financial institutions managing those investments and overseeing it as master custodian. So that is all included. There are no other fees on top of that.

The Hon. TREVOR KHAN: So that I am clear, that means—

Ms DODDS: That is on the investment, I should say.

The Hon. TREVOR KHAN: If there is $9 million invested that 0.5 per cent is essentially divvied up between your own management fee, if I describe it, for your own labours and part of it also goes to the various subsidiary managers of the monies?

Ms DODDS: In this instance State Street managers the common fund from the former OPC, and P & B Parry are the master custodians. So the fees of those three organisations are in that 0.5 per cent.

The Hon. MICHAEL VEITCH: In the submission to this inquiry the Aged Care Rights Services notes a common complaint from its clients is that when the NSW Trustee and Guardian is appointed as a financial manager there is little or no dialogue with the protected person and that there is no legislative obligation for the NSW Trustee and Guardian to consult with the protected person. In practise, what level of dialogue and consultation actually takes place?

Ms DODDS: I turn to the legislation, first and foremost, that has been remedied with the passing of the NSW Trustee and Guardian Act. The principles of the Guardianship Act were not replicated in the former Protective Estates Act but they are now in section 39 of the NSW Trustee and Guardian Act and that specifically requires consultation with the person themselves and with key people in their life. So that legislative anomaly has been addressed. In practise staff were expected to observe the principles of the Guardianship Act and liaise with the person and with family members. We have in the past 12 months introduced a new budgeting program for clients under direct management. That budgeting program requires that every year the person's budget is reviewed and it has to be reviewed with them if they are able to participate in that process—obviously some people cannot—and the key people in their life to determine what their needs are going to be in the outgoing year, what is affordable and draw up the budget accordingly.

So that is an absolute given expectation that that consultation does occur. Can I put my hand on my heart and say that with 9,000 clients under direct management that there will not be occasions when that has not occurred. I think we would all be very surprised if I said absolutely that could never have happened but it is not the practise standard and it is not the expectation nor is it my expectation of what staff should be doing.

The Hon. TREVOR KHAN: How is the review undertaken taking into account that you have got clients, if you can cell them that, all over the State?

Ms DODDS: It is done mainly as most of the contact is at the moment from the Parramatta office by phone. At the moment there is not a huge amount of personal contact. Now that is set to change in the coming year and following years when we look to devolve a lot of the services that are currently delivered by the phone through the office branch network that we have. That includes offices around the State, including a new office that will be opened up in the first quarter of next year at Bathurst. Other candidates where there are moderate-sized offices that spring to mind immediately are Lismore, Newcastle, Wollongong and Gosford. This has all

come about because of the merging of the former office of the Protective Commissioner and the former Public Trustee, the latter having that branch office network and the former not having any branch office except one in the city.

The Hon. TREVOR KHAN: How was Bathurst chosen above all other regional centres in New South Wales?

Ms DODDS: In all truth I cannot answer that question because it is a decision that was part of the former Public Trustee. I was not the Public Trustee at the time.

The Hon. MICHAEL VEITCH: Is there any circumstance at all under the current legislation where a protected person's property could be sold without them being consulted or informed?

Ms DODDS: That is most certainly not supposed to happen. That is part of the practice standard. Provided they are able to comment, bearing in mind very often we are dealing with people with advanced dementia and they will not be able to make a comment, but if there are family or key stakeholders involved they are supposed to be contacted. That is a major decision. Major decisions are made and reasons for decision given in writing, and that is an appealable decision, a reviewable and appealable decision. So, the process should be that key people would get a copy of that decision. They would be able to seek an internal review in the organisation, which is conducted by a senior officer, more senior than the person who made the original decision, and who has had no previous involvement in the decision. They make their decision, which can be to affirm the original decision, vary it or set it aside and make a new decision. If people remain unhappy with that they can appeal the whole decision to the Administrative Decisions Tribunal.

Mr MARSHALL: I am aware of this, again in my unique position of getting to see most of what comes through the organisation that people are unhappy about, and it was an unusual one because a decision was made to sell this property without consulting.

The Hon. MICHAEL VEITCH: So, it has happened?

Mr MARSHALL: It did happen, yes. I am not going to deny it. I am only aware of one instance where it happened. What happened was, in the process of making the decision the office notified the person and gave them the reason why the decision had been made to sell the property. That then alerted the person to the fact that this decision had been made and they had not been consulted about it, which enabled the review process to take place. In those rare instances where consultation does not occur, the process then to implement a decision requires a reason for decision letter that then goes to the person and is a safeguard on it. We had a lot of soul-searching about how that occurred. It really was a bit of a wake-up call, I suppose for the two areas involved. I think we have improved in that area.

In terms of consultation generally, there are often claims made in complaints that people were not consulted. When you look at the file notes and the correspondence that has gone out, you can see there has been consultation. The officers ask people for their views. We have obtained the views, the people have told us that they do not agree with the decision that we are proposing to make for a variety of reasons, and we then go ahead and make the decision. The perception is the consultation did not take place because if it had taken place we would not have made the decision. So it comes down to that sort of an issue rather than there not having been any consultation.

Perhaps what we need to continue to work on, we have worked on it a lot, is to say to people as part of our decision-making process we need to consult with you. We are now consulting with you to seek your views in relation to this decision. Again, it depends on the capacity of the person, how able they are, to understand that concept and what assistance we might try to get from people involved in that person's life to help them to understand the office is in a consultation process and it is trying to seek the person's views in relation to a decision that is going to be made about their property or whatever.

The Hon. MICHAEL VEITCH: The consultation process, that comes up just about in every aspect of government. But a lot of the issue is how the consultation takes place and at what level the consultation is aimed. So when you talk about consultation, are you talking about telephone calls, roundtable meetings or letters?

Mr MARSHALL: It would depend on the decision being made and who is involved in the person's life. If we take a decision regarding, as is already on the table, the sale or the purchase of a property, that would ordinarily involve the person and people significant in that person's life. Depending on the amount of conflict that exists around that decision, we will pretty quickly get a sense of whether or not there is concern about this decision—as soon as we throw it out there that we are seeking to make a decision about a property. If lots of competing views come back about the decision, it may mean we are required to have a telephone conference. It may mean, if people are in Sydney we can have a meeting at the office. Sometimes it involves people going out and getting their own independent legal advice, family members, and those people being involved in the consultation process.

However, what we have to be careful not to do, which we get criticised for sometimes, is allowing the consultation process to take so long that we end up not making a decision for too long a period of time. We have to draw a line at some point and say we have taken into account the views of the different parties and we now believe we are in a position to make a decision. We know that whatever decision we make someone is not going to be happy with it. There is, however, a review process that can be followed, otherwise you can end up in a situation where the decision goes on indefinitely because the consultation process never ends.

The Hon. MICHAEL VEITCH: Can I move on to another item? In his submission to the inquiry the New South Wales Ombudsman identified certain areas of concern regarding clients of the New South Wales Trustee and Guardian primarily relating to the need of some clients for a caseworker, whereas the current interpretation of a financial manager's role prevents this type of involvement. Some examples the Ombudsman gave include clients paying significant bank fees through inadvertently overdrawing their accounts and making a lot of withdrawals from other banks' ATMs and clients incurring multiple fines, which could be reviewed by the State Debt Recovery Office with involvement from the New South Wales Trustee and Guardian. I would like to hear your comments about the Ombudsman's statements?

Ms DODDS: Both of those issues are something we have been discussing with the Ombudsman in this most recent period. If I can talk first about the bank fees issue and separate them out. The issue of bank fees has come up over a number of years, I understand, with my predecessors, and various approaches have been made to banks to seek their support to ameliorate this problem. Because a person has a decision-making disability, very often one of the things that brings them to an order in the first instance is their incapacity to deal with a bank account, often getting a number of lines of credit which they cannot afford and then that wonderful invention, the hole in the wall. Every time you put something in it and it does not give you what you want but it gives you something else you do not want, which is an additional fee. How does that hole in the wall determine that I am a person that lacks ability and I do not understand that concept and Mr Marshall does? It has been a perennial issue.

From time to time there has been some success, with a bank that was considering some fee issues, but this is something that really requires a consolidated approach to the financial institutions. That is something I have spoken with the Ombudsman about. We cannot do it on our own. When I say we, I am talking collectively across Australia, because this does not just happen in New South Wales and banks go across borders, and they are very big and powerful. So, this is a long haul systemic advocacy issue that I have agreed with the Ombudsman is one that we are willing to pick up again and go back into the fray.

On an individual basis we sometimes have success with banks. However, that goes back to the issue of the notion of a case manager. Case managers we never have been. That might be reflecting my biases and experience in the concept of case management, which is far broader than just financial management alone and can take on a much greater range of activities that our staff is, frankly, not necessarily appropriately trained for. Some might be by virtue of their background training but not by selection because that is what we do. So, it is about working with others to assist clients to the best possible degree.

The issue of is there enough case management service in the community for people with a disability is a much broader question and frequently my staff say this person needs a case manager, but we cannot fill that role. When it comes to the issue of State debt recovery and debts, again on a case-by-case basis we have been successful. There has also been some systemic work done in that area in looking at people who amass large fines with the State Debt Recovery Office, and the capacity to offset those fines upon application. But there are some issues around that too, because my understanding of this is if the State Debt Recovery Office sets aside that set of debts and fines, if the person reoffends in a certain period of time it just comes straight back on to the books. That is still a perennial issue.

For any number of years that I have been practising in this field, either in my current role or in previous roles, I would like a dollar for every person with an intellectual disability or other form of cognitive impairment who has had great difficulty in understanding those fines. An instance not under our management but an instance described to me in the past two years that I think encapsulates it is about a gentleman who paid his train fare religiously but he could not get the fact that he needed a separate docket for his bicycle. He was just getting clipped each time. He paid his train fare but he did not pay the rest of it and, bang, he has a State Debt Recovery Office fine. That is a long-haul systemic issue as well, one we have to pick up.

Mr MARSHALL: I think they are both issues for society generally. The issue of bank withdrawal fees and ATM fees does not only affect our clients. I was involved—and I will not name the bank involved because it is probably a bit unfair—but we got to a reasonable point with one particular bank who had at the time, and probably still does, a disability friendly policy. It wanted to show that it was, and initially it was, quite interested in doing something in this area. When it became apparent to it what this could actually mean, the interest waned and we really did not get anywhere. You have a situation with people who are not only under financial management orders who will go to an ATM—it is not even their own bank's machine, so they are incurring those fees as well—and they are just continually checking to see whether money is in their account. Each time they do it they are incurring a charge. Whether it is appropriate for a bank to just be able to profit from that type of behaviour arguably falls into the same category as someone who goes into a casino or a poker machine establishment and puts all their money through and is successful at challenging. But that is a broader issue, I suppose, than our organisation can deal with.

Ms DODDS: We should say also that on some occasions we do have successes. In this instance I have to name the particular bank, and perhaps they will not mind that because (a) it was a public issue, and (b) they came to the party. You may recall about 18 months ago that Westpac had what I would call a five to midnight-five past midnight experience. They ran the payments at five to midnight, and then the computer ran it again at five minutes past midnight. What happened for many clients was that they went to the bank the next day and instead of $50 that should have been there, $100 was there. There is a reason why we are managing, and they do not necessarily understand the nuances of why that would be or the complexities, but it looked like Christmas had arrived.

They took the money, many did, and, of course, Westpac reversed that at about nine o'clock the next morning. That affected all manner of people, maybe many people in this room as well. Their mortgage was taken out twice, all sorts of things happened. A lot of our clients went immediately into overdraft and overdraft fees. We worked with Westpac on that and they cancelled all of those fees. They recognised that the issue and problem was theirs, and they worked very hard on that issue. You can have successes, but it is a big industry.

The Hon. MICHAEL VEITCH: Regarding people who are clients under your control with orders, from time to time the State Government will run a press release about large sums of unclaimed money from lotteries, et cetera. Does the New South Wales Trustee and Guardian check the website? Do you actually check that on behalf of your clients to see whether they have amounts of unclaimed money?

Ms DODDS: We check a range. We have to do a check on possible entitlements for people when they come in under management. We check in a number of areas. Mr Marshall may know the answer to that specifically in terms of a detailed tick off.

The Hon. MICHAEL VEITCH: Do you check superannuation as well?

Ms DODDS: Superannuation we do check, because superannuation is an area in which people have been in a number of funds and one issue that arises is that they may be entitled to the disability insurance component under that fund. A check is done on people's employment history: have they been in paid employment since post-early 1990s, that is the kick-over date when that applied. I will happily check about the unclaimed lotteries.

The Hon. MICHAEL VEITCH: Thousands of people would be involved.

Mr MARSHALL: The difficulty is if their name is on the lottery ticket. I do not know how that system works. If they have the name of the person, yes. If there is just a number, I am not sure. Many of our clients believe that they have $15 million in lottery tickets that are not being claimed.

The Hon. MICHAEL VEITCH: I get those emails all the time.

Ms DODDS: I am sure there is one out there for me, too.

CHAIR: Thank you for giving your time this afternoon, it is greatly appreciated. The Committee may forward questions to you and would appreciate your assistance in giving answers.

(The witnesses withdrew)

(The Committee adjourned at 4.20 p.m.)