

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

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

Dear Sir/ Madam

### **Inquiry into substitute decision-making for people lacking capacity**

The NSW Ombudsman plays a key role in relation to people with disabilities, including:

- handling and investigating complaints about disability services, the Office of the Public Guardian (OPG), and the NSW Trustee and Guardian;
- inquiring into major issues affecting people with disabilities and disability service providers;
- reviewing the care, circumstances and deaths of people with disabilities in care;
- coordinating Official Community Visitors in their visits to licensed boarding houses and supported accommodation; and
- monitoring, reviewing and setting standards for the delivery of disability services.

In our view, the Inquiry into substitute decision-making for people lacking capacity ('the Inquiry'), provides a valuable opportunity to improve support, reduce restrictions, and strengthen safeguards for people with disabilities in NSW. It also provides the means to amend relevant legislation to reflect the United Nations Convention on the Rights of Persons with Disabilities, ratified by the Australian Government in July 2008.

As a general observation, in our view it would be preferable to change the title of the NSW Trustee and Guardian, and the related legislation. Inclusion of the word 'guardian' in the title has the potential to confuse the public, given the separate role of the Public Guardian.

### **Substitute decision-making as a last resort**

The OPG undertakes important work for, and with, people lacking decision-making capacity, with the fundamental and critical role of making substitute decisions in relation to specified functions, such as accommodation and health care.

In addition, the OPG is, at times, appointed to pursue better options for individuals, through, for example, advocacy and mobilisation of appropriate services to meet the person's needs. While this is an important role, under the current legislation the OPG can only assist an individual in this capacity if it has been appointed as their guardian.

Guardianship of people with disabilities is important to protect certain individuals from abuse, neglect and exploitation, and to ensure that decisions are made in the best interests of the person. However, guardianship is also highly intrusive and restrictive, with considerable impost on an individual's privacy and autonomy.

In our view, consideration should be given to amending the *Guardianship Act 1987* to allow for the OPG to advocate on behalf of individuals lacking decision-making capacity, without the need for a guardianship order.

Our work in handling complaints has consistently highlighted improved outcomes for vulnerable individuals where there is an emphasis on resolving problems or emerging concerns at the local level, informally and quickly. We consider that amendment of the *Guardianship Act* to enable the OPG to provide decision-making assistance to individuals with diminished capacity without a guardianship order would strengthen the safeguards, reduce restrictions and bolster the support for vulnerable people.

Amendment of the legislation to emphasise assisted decision-making, with substitute decision-making as a last resort is also consistent with the UN Convention on the Rights of Persons with Disabilities.

We consider that the role of the Public Advocate in Victoria may provide a useful template for reform of guardianship legislation in NSW and the role of the OPG. In Victoria, the powers and duties of the Public Advocate include the capacity to:

- seek assistance in the best interests of any person with a disability from any government department, institution, welfare organisation or service provider;
- make representations on behalf of or act for a person with a disability; and
- investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship.

Amending the *Guardianship Act* to enable the OPG to have a similar role would strengthen support for people with diminished decision-making capacity without imposing unnecessary restrictions. Such amendments would also provide a valuable link and enhancement to the functions of the NSW Ombudsman and the work of Official Community Visitors.

### **Community guardians**

We support the proposal of the OPG regarding community guardians, noting that community guardianship programs currently operate in other Australian jurisdictions, including Victoria. In our view, there is considerable benefit in a community guardianship program, provided that adequate safeguards are in place, including probity checks, training and oversight of the volunteers.

A community guardianship program may provide the means to improve links between people in NSW who lack decision-making capacity and their local community, improve community understanding about people with disabilities, enhance compatibility between the person under guardianship and the substitute decision-maker, and, in the long term, reduce the need for formal guardianship.

In addition, introducing a community guardianship program in NSW may enable the OPG to dedicate its guardianship responsibilities to matters that require the expertise of its officers, including those that are contentious, complex, or significant.

### **Estate management**

Section 39 of the *NSW Trustee and Guardian Act 2009* sets out general principals to be applied when making decisions in relation to someone under a financial management order. These include giving paramount consideration to the welfare and interests of clients, encouraging clients to live a normal life in the community and encouraging self reliance.

We are aware from our complaint handling work with the NSW Trustee and Guardian, and more particularly the former Office of the Protective Commissioner, that a client is often in need of a case worker (especially when they have no support network) but the current interpretation of the financial manager's role prevents this type of involvement. Staff regularly deal with the expectation of the general public that a vulnerable person will now be protected in all aspects of their lives. It is not always easy to distinguish where financial management ends and a case work role begins. There is no system, or expectation, that clients will be routinely monitored regarding their financial affairs unless an issue is brought to the attention of the financial manager. The limited availability of case management services in the community means that while a management order may offer protection from financial exploitation, other aspects of a client's everyday life remain difficult.

While such broad policy issues may be beyond the scope of this inquiry, greater clarity about the NSW Trustee and Guardian's role in providing systemic advocacy about issues affecting protected persons could offer some assistance. The following are offered by way of illustration:

- **Bank fees**

We are aware that at least some of the NSW Trustee and Guardian's clients are paying significant bank fees because they overdraw their account regularly. They forget they have withdrawn their daily allowance, make multiple withdrawals using other banks ATMs and so on. For clients on very low incomes this can have a significant impact on their ability to buy food and other essentials. There is currently no system for monitoring individual bank accounts as in many cases the statements are sent directly to the individuals and, therefore, there is no trigger for knowing that some clients may be in severe hardship.

Solving this problem is not easy. It involves the national banking system and a client group which is unlikely to be a priority for banks. While a number of banks have recently announced some fee reductions, there are still significant challenges. It requires clarity about the extent to which it is appropriate for the NSW Trustee and Guardian to recommend particular types of bank accounts to clients. Effective resolution requires concerted systemic advocacy by the NSW Trustee and Guardian.

- **Fines**

Clients with mental health and other issues can incur multiple fines in circumstances where the SDRO may be able to review them. Before this can happen, the SDRO needs a request and supporting evidence. Currently it seems identification and pursuit of such matters is largely left to a protected person's family or other advocate. There is potential for enhanced interagency cooperation at a systemic level between the NSW Trustee and Guardian and the SDRO about such issues, to proactively identify multiple fines and explore the reasons they were incurred.

The NSW Trustee and Guardian is clearly the only organisation in a position to monitor and gather information on systemic issues that are faced by clients under a financial order. More effective systemic advocacy in relation to broad issues affecting clients under financial management would not address the unmet case management needs of some clients. However, it may ameliorate some of the common challenges faced by clients of the NSW Trustee and Guardian.

Should you require further information, or wish to discuss this letter, please contact Kathryn McKenzie, Principal Projects Officer, Disability, on 9286 0984 or email [kmckenzie@ombo.nsw.gov.au](mailto:kmckenzie@ombo.nsw.gov.au).

Yours sincerely



Bruce Barbour  
NSW Ombudsman

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