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REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON SOCIAL ISSUES

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

At Sydney on Tuesday 29 September 2009

The Committee met at 9.15 a.m.

PRESENT

The Hon. I. W. West (Chair)

The Hon. G. J. Donnelly
The Hon. M. A. Ficarra
Dr J. Kaye
The Hon. T. J. Khan
The Hon. M. S. Veitch

CHAIR: Welcome to the second public hearing of the Standing Committee on Social Issues inquiry into substitute decision-making for people lacking capacity. Today we will be hearing from various peak bodies and advocacy groups involved with people with disabilities who may require substitute decision-making. We will also be hearing from representatives from Blake Dawson lawyers and Legal Aid New South Wales. 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 relating to provisions for substitute decision-making and, in particular, consider whether any legislative amendments are required to improve those provisions.

The Committee will not focus on individual cases and I therefore request witnesses to avoid the mention of individuals or details that may identify individuals or families, unless it is absolutely necessary to address the terms of reference. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of public proceedings and the requirements in regard to broadcasting guidelines apply. Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. I also advise 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 the Committee or any person.

I refer, next, to in-camera deliberations. 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 everyone to leave the room for a short period. I welcome our first witnesses, Ms Anne Cregan and Mr Sam Indyk from Blake Dawson lawyers.

ANNE ELIZABETH CREGAN, Pro Bono Partner, Blake Dawson lawyers, Level 36, 225 George Street, Sydney, and

SAMUEL JUERS INDYK, Lawyer, Blake Dawson lawyers, affirmed and examined, Level 36, 225 George Street, Sydney, affirmed and examined:

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms CREGAN: I am aware of the terms of the terms of reference of this inquiry.

Mr INDYK: I am conversant with the Committee's terms of reference.

CHAIR: Are there any documents that you want to present that you want only Committee members to see, or any evidence that you wish to give that you want only Committee members to hear?

Ms CREGAN: No, thank you.

CHAIR: Would you like to make any opening comments before we ask questions?

Ms CREGAN: Thank you for the opportunity of appearing before the Committee today. As you are all well aware, people who are limited in their ability to make legally binding decisions are among the most vulnerable people in our community. Providing for substitute decision-making for people with impaired capacity is an extremely difficult task. It is difficult for a number of reasons. One of those reasons is the range of abilities of people who have difficulty in making a decision—that is, among people as a group and even for individuals. For example, an individual with a mental illness may, at times, have full capacity to make decisions and at other times lack capacity to a large degree, or entirely, to make his or her own decisions.

A person with a cognitive impairment may have an ability to make some decisions and not other decisions. There is real tension in practice—something that we find as lawyers—between a number of the principles and the principles that we would support. But the sorts of principles that cause difficulty for people practising as lawyers assisting people with impaired capacity are things such as a presumption of capacity. A presumption of capacity is in line with our obligations under the United Nations Convention on the Rights of Persons with Disabilities, and it is in line with the principles sets out in the Guardianship Act and the Trustee and Guardian Act. It is also something that we would uphold as being important for a person to be able to maintain his or her autonomy.

Against that, in practice we see that principle butting up against the need to protect people with impaired capacity from exploitation. In practice that is a difficult balancing act. Equally, we strongly uphold the desirability of informal decision-making and the fact that there does not need to be substitute decision-making where informal decision-making is working well. We also support assisted decision-making as preferable to substitute decision-making. Again, in practice, we see numerous incidents where what is allegedly informal decision-making is taking place for a person who does not have the capacity to consent to the informal decisions that are being made on his or her behalf.

In practice, with assisted decision-making, the will of the person assisting the person to make decisions is the decision that is being made, rather than it being the will of the person who is assisted to make a decision. There is no easy resolution to that. As you would be extremely well aware, with the great responsibility of recommending legislation in this area, there are no neat legislative solutions to any of these dilemmas.

As you may see from our submissions, we have made 13 recommendations. We would fully support all those recommendations. However, if we were to prioritise those recommendations, there are probably five we feel most strongly about. They are very much lawyers' recommendations. As you would appreciate, we see the pointy end where things are going wrong. There are lots of instances where the legislation is working fantastically well for people and it is supporting families and carers to assist a person with limited capacity to make decisions. At that pointy end the five things we would like to see changing would be to introduce an automatic review of financial management orders every three or five years. It does seem unjustified and inconsistent to us that guardianship orders are reviewed and have a maximum term and financial management orders do not.

In that review we would like to see considered whether or not there is a continuing need for financial management or whether some parts of a person's estate can in fact be returned to the person to manage because, for example, there is better assistance for them to make their own decisions. The second thing we would like to see in that review is a review of the performance of the financial manager against certain criteria. Those criteria can include the degree to which the financial manager has involved the person with limited capacity in decision-making, the degree to which they have assisted them to live as normal a life as possible, as is set out in the principles in both of the Acts, and the degree to which they have assisted them to make their own decisions. The review of the performance of the financial manager also, in our opinion, would overcome some of the difficulties with financial management that have been identified in a number of the submissions to the Committee.

The second recommendation we would like to see adopted in particular is to empower or require a government authority to investigate the need for and to apply for a financial management order and potentially a guardianship order in circumstances where there is nobody else is able or willing to apply. In our experience, acting particularly for people with mental illness, this would significantly increase the ability of a lawyer to assist a person with mental illness that is episodic to have a good outcome in their legal matter. It is possible—again as we stated in our submission, and I do not intend to restate those—for a lawyer to make such application, but it is highly undesirable. For us to have a place that we could go to and say, "This is the person's situation as we see it. This is the dilemma the person is in and this is the need", and for that organisation then to make its own decision as to whether or not the application should be made and apply would greatly assist us to assist people with mental illness.

The third is to require tribunals and the Supreme Court, when considering whether or not to make a financial management order, instead of looking at the whole of the estate and then deciding which parts to exclude, to reverse the decision and to say, "We have decided this person has a limit to their ability to make decisions. What part or parts of their estate do they need assistance with or do they need assistance with the whole of their estate?" You are effectively reversing from the starting point the whole of the estate to consideration of which parts of the estate need to be managed. While it sounds like tinkering around the edges and a pedantic, semantic change, I think it would change the way those decisions are made and would increase the autonomy of people who need some assistance with decision-making.

The fourth is to require registration of powers of attorney. That is a submission we would make and it is also a submission that I know parents and carers are supportive of. We did some training in Dubbo just two weeks ago. One of the strong messages from the parents and carers at that meeting was that they would like to see powers of attorney registered. That assists all of the groups. It assists the person who is giving the power of attorney to avoid situations of fraud. It does not absolutely guard against that but it does provide increased protection against fraud. It protects the attorneys because they then can go to a register to assist them to prove that they are in fact the attorneys. It assists third parties to have some assurance that the power of attorney is still valid and in operation.

The final thing would be to clarify that a financial management order can be made in circumstances where a person with assistance can manage their day-to-day financial affairs. For example, it is common for a person to have Centrelink payments made where their rent is taken out and utilities are paid automatically from their bank account. That side of things is fine, but they do need assistance with managing more complex matters or managing a large sum of money. That would be the final thing we would like to see changed, if we were to have a wish list of five.

CHAIR: Do you wish to make any comment, Mr Indyk?

Mr INDYK: No.

The Hon. MICHAEL VEITCH: Thank you for coming and spending time with us. I want to address a couple of matters that arose during yesterday's testimony, one in particular I am still not clear about in my mind. You are probably the better people to pose this question to. We heard yesterday that, say, in my situation I could put in place an enduring power of attorney. In a couple of years' time my cognitive capacity could be impaired in some way and I find myself before the tribunal. Once the tribunal imposes an order, the arrangements I had in place with my power of attorney cease and whatever the tribunal put in place would become the new order. Is that correct?

Ms CREGAN: Yes and no. Your power of attorney would be suspended. However—and I can see the reason behind this, but it is somewhat inconsistent—the decisions your attorney made would still be valid under the Guardianship Act as regards third parties. The power of attorney would be suspended. The Guardianship Tribunal or the Supreme Court also could make an order upholding the power of attorney, in effect, or if parts of your estate were being managed, then the power of attorney would be suspended for those parts of the estate and continue for the balance of your estate.

The Hon. MICHAEL VEITCH: Does this inconsistency need tidying up?

Ms CREGAN: It does, but it is a difficult thing to tidy. The reason it is difficult is because there is a need for certainty in dealings with third parties. On the one hand, it is inconsistent and it does put a person in a position of vulnerability. On the other hand, from the third party's perspective, if somebody turns up with a power of attorney query they need to rely on it. It may be that it is easy to tidy up if powers of attorney are registered and therefore on that register comes a marking that the power of attorney is suspended because of a financial management order.

The Hon. MICHAEL VEITCH: In your opening comments you spoke about a preference to have powers of attorney registered. We heard yesterday that, I think, Tasmania is the only jurisdiction that does that at the moment. We heard reasons for and against the registration of powers of attorney. In your view, what would be the strongest reason for us to recommend the registration of powers of attorney?

Ms CREGAN: To avoid the fraudulent exercise of power of attorney. If the power of attorney is registered, it is very easy to check whether or not it is still in force. It would then impose, I suspect, just as a matter of general law, a higher duty on somebody, depending on the power of attorney, for that decision. And I think it would provide additional protection. Again this is something that parents and carers raise with us, it also gives them some ease of use of the power of attorney if they can say to the bank, I am the person's attorney, it is registered, it is register number X. We have parents and carers for whom that would make things easier.

The Hon. MICHAEL VEITCH: Can you explain the difference between prescribed, enduring and irrevocable powers of attorney?

Ms CREGAN: A prescribed power of attorney essentially is the general power of attorney. That is the basic power of attorney that is lawfully made under the Powers of Attorney Act. An enduring power of attorney is a power of attorney that continues after a person loses capacity, but the important thing about an enduring power of attorney is that it can be made so that it starts at the time you sign it or on a particular date. It does not just come into effect at the time you lose capacity; it continues after you lose capacity. An irrevocable power of attorney is a power of attorney that cannot be revoked. That is very rare. It tends to be used mostly in commercial dealings where somebody enters into an agreement with another person that requires that other person to do certain things. So, valuable consideration is given. The person giving the power of attorney receives something of value for giving their irrevocable power of attorney and in return they, in effect, give the power to the person who has given them the thing of value to act in their stead to complete the agreement. That is the usual circumstance of an irrevocable power of attorney.

The Hon. MICHAEL VEITCH: Yesterday Ms Dodds, from the Office of the Public Trustee and Guardian, told us that her preference was for the Act to be amended so that it was clearly stated that the Public Trustee was the financial manager of last resort. What is your view about that?

Ms CREGAN: I can see merit in that argument. That would need to be balanced against the best interests of the person because it may be that there is somebody prepared to be the attorney who is not the appropriate person to be the attorney. How you would weigh the fact of somebody being there who is perhaps not entirely suitable against the Public Guardian being the guardian or the financial manager of last resort would need to be resolved in the legislation. But subject to resolving that and subject to the primacy of the best interests of the person, I would agree with that being included in the Act.

The Hon. MICHAEL VEITCH: In your opening remarks you spoke about a move towards assisted decision making as opposed to substituted decision making, which is one of the principles of the United Nations convention. How could we encompass that in the legislation or move towards that process?

Ms CREGAN: That is a really difficult issue. The best way, in our view, of being able to incorporate assisted decision making is for the Guardianship Tribunal, the Supreme Court and the Mental Health Review

Tribunal to consider whether or not that, with assistance, a person can make their own decisions and there is no need for a substitute decision maker. It is difficult to legislate for assisted decision making as such because, effectively, what a court or tribunal is doing or what the law is doing is deciding how much of a person's own ability to make decisions is taken away from them. The essence of assisted decision making is that it is the person's own decision. I think on that basis it is quite hard to legislate for. The other concern I have about that is that while I absolutely support assisted decision making, I see in practice that it is in fact the decision of another person rather than the decision of the person being assisted. I am sorry, that is a very long, rambling answer, but I think coming down to the crux of it, the best way the legislation could operate to support assisted decision making is to require that that be considered in determining what part or parts of a person's estate need to be managed.

The Hon. MICHAEL VEITCH: Yesterday we heard also that at the moment in New South Wales you are either under guardianship or you are not—that was actually the phrase used—and that a move towards assisted decision making would, in some way, provide some room in the middle for people who may have capacity to make some decisions but not others, for instance?

Ms CREGAN: I think that is true. I should say that we have less experience with guardianship than with financial managing just because people tend to come to lawyers more on financial issues. I am not convinced as a matter of practice that that gives you that room in the middle. I think where you get that room in the middle is to have a guardian appointed over some functions or some decisions and not other decisions for a person, as can happen with a financial management order. That is a more effective and workable way of achieving that middle ground. Rather than a person being under guardianship or not under guardianship, a person is appointed to make lifestyle decisions or a person is appointed to make accommodation and lifestyle or medical decisions, or whatever it happens to be rather than the middle ground of assisted decision making. As I say, any legislative imposition of assisted decision making is, by its nature, taking some of the power away from the person who is being assisted.

The Hon. MARIE FICARRA: Continuing with the issue of powers of attorney, section 19 of the Powers of Attorney Act has certain safeguards to ensure that the person appointing an enduring power of attorney understands the effect of the decision. However, when making an irrevocable power of attorney under sections 15 and 16 of the Act no safeguards are provided. Is it intended that the safeguards under section 19 will apply also under sections 15 and 16? How does it operate? How do we determine that the person actually understands what powers they are giving away?

Ms CREGAN: My legal opinion is that the section 19 safeguards do not apply to irrevocable power of attorney. Part of the reason for that is just the way the statute is constructed in that section 19 falls after sections 15 and 16 and it is stated to apply to enduring powers of attorney. So I do not think they do apply. I suspect the reason for that is that there was quite a lot of consideration given to the safeguards needed for a power of attorney that continues after a person has lost capacity. Until I saw the question and went back and looked at the Act, I had not actually considered the fact that an irrevocable power of attorney continues after a person loses capacity as well. I think that could be an area for legislative reform, to ensure that there are safeguards when entering into an irrevocable power of attorney. It could be used as a backdoor method to make what is in effect an enduring power of attorney without that safeguard.

The Hon. MARIE FICARRA: What mechanisms are in place to allow for the abuse of a power of attorney to be reported? What steps are taken if the abuse of power of attorney is reported? What mechanisms are available?

Ms CREGAN: The hard truth is that there is no system for reporting abuse. There is no one place you go to to report abuse of power of attorney. If a power of attorney has been abused, there are a number of things that might happen. The first thing that you would hope would happen is that that power of attorney would be terminated. In terminating the power of attorney you would then need to notify the usual places the power of attorney would be used—for example, the person's bank, Centrelink if the person is on a disability support pension, the land and property information office, those sorts of places—that the power of attorney had been revoked. Certainly if it had been registered, you would need to register the revocation. What happens at that point depends a bit on the nature of the abuse. If the person has continued to act after the termination of a power of attorney, that is actually an offence and you could report it to the police and ask the police to intervene. In my experience, more broadly, police are very reluctant to intervene in what they see as a civil law matter. I suspect that if you went down to your local police station, they would say "Civil law, nothing to do with us. Go and see your solicitor." If the abuse of the power of attorney was exceeding the authority of the attorney, the person who has given the power of attorney is then left, in effect, suing their attorney. Now, that works if the attorney has property. If the attorney does not have property, the person can sue and be successful, but they do not get any compensation.

The Hon. MARIE FICARRA: Should there be a better system—a streamlining, a central place with responsibility?

Ms CREGAN: It would be very useful to have something to which you could report an abuse of a power of attorney. That place would need to have the power to prosecute when the person who continued to act after the power of attorney had been terminated. It would also be interesting to explore—and this is something I have not thought through—whether or not the prosecution powers can extend to an abuse of the power of attorney, so extend beyond merely continue to operate as an attorney after the power of attorney has been abused. The other thing I think that would be useful is if a power of attorney was registered and it had then been terminated, and that termination was on the register. That would put third parties on notice. Then the person would have recourse against the third party whereas, unless the third party is on the register, if the power is being revoked, they are entitled to rely on the power of attorney.

The Hon. MARIE FICARRA: So that is another advantage of registering.

Ms CREGAN: Another advantage of registering, yes.

The Hon. MARIE FICARRA: How does a person who has been nominated as having a power of attorney determine at what time incapacity in the person occurs and substitute decision-making powers arise? Are there any guidelines in place for any of these?

Ms CREGAN: Initially it is the observation of the attorney. That is really where it starts. We always recommend that a person who is an attorney seek medical opinion to back up their opinion that a person is losing capacity or does not have capacity in a particular area. The problem with that, of course, is that the doctor has an obligation of privacy to the person who has given a power of attorney. It is difficult in some ways to get that backing for your own opinion that the person is losing capacity. There are no guidelines under the law, no legislative guidelines, as to when that happens.

There are some guidelines, for example, for solicitors. The New South Wales Law Society has issued guidelines in determining a person's capacity. There is also the New South Wales Attorney General's capacity tool kit, which provides some guidelines for lay people, caseworkers and so on as to how they might determine capacity. But ultimately there are no set guidelines for when a person loses capacity.

The Hon. MARIE FICARRA: I can imagine, if it was a medical opinion, there are varying degrees of capacity, even in medical opinion. It is a very vexed issue, is it not?

Ms CREGAN: Yes. It is a difficult issue.

The Hon. MARIE FICARRA: And it can be abused. It is probably an area that needs to have some guidelines put into it. Where do you go to get a medical opinion on capacity? Do you go to your normal GP, who often is not trained in these sorts of things? Do you think there should be better guidelines put in place?

Ms CREGAN: Guidelines would be useful, yes, to determine when a person is losing capacity. That would protect a person, but would also protect the attorney, and again that is something that parents and carers raised with us. On the one hand, as I say, it does protect the person who has given the power of attorney, and on the other hand it protects the parents and carers. Sam, is there anything you want to add?

Mr INDYK: No.

CHAIR: But the capacity booklet that you refer to that has been put out by the Attorney General's Department, what is your view as to the capacity of that document?

The Hon. MARIE FICARRA: How useful is it?

CHAIR: In terms of defining capacity, how much further can you possibly go than that document?

Ms CREGAN: In the absence of a consistent test for capacity, it is very difficult to have guidelines that are beyond that document. Part of the nub of this issue is that there is a different test for capacity in different types of decisions, which complicates things even further. For example, for a medical decision, the test for capacity is: Do you understand the nature and effect of the Act? For a person with impaired capacity to make a will, there is, in effect, a five-part test that is set up by the legislation as to whether or not a person has capacity to make a will. They are just two examples in law. As I say, in answer to your question, in the absence of a consistent test for capacity, the capacity tool kit does provide good guidelines.

CHAIR: Yesterday we were given advice that capacity in terms of case law had been dealt with in quite an amount of detail in Supreme Court decisions.

Ms CREGAN: It has, but again the test is different for different sorts of decisions. In some areas it has been dealt with thoroughly; in other areas, it has not been dealt with as thoroughly.

CHAIR: Can you define "areas" for me?

Ms CREGAN: Capacity to instruct a solicitor, for example, in criminal proceedings is very well defined. It has been the subject of a lot of consideration by high courts. The capacity to make a will is quite well defined. The capacity to manage a person's affairs is well defined in a Supreme Court test. The problem with the test, though, is that the test says that a person has to be incapable of managing their day-to-day affairs. One of the things that we find, and one of the things that we have made submissions on, is that is quite problematic for a person who can manage their day-to-day affairs with assistance, but cannot, for example, instruct in a complex legal matter or cannot manage a larger sum of money. That is an instance in which there is quite a well-defined test, but the test in practice does not always assist.

CHAIR: However, we are trying to find an answer to all those questions you have just raised. Can you give us some assistance in a test that has some enduring capacity?

Ms CREGAN: I do not think any of the tests that are available now is the test that would apply if you were to make one test. There is a test that we really like which is based on a number of tests that are in other jurisdictions.

The Hon. GREG DONNELLY: Is this in your submission?

Ms CREGAN: No, it is not, as it turns out, because I think we had not thought that it had gone that far. But the test that we would favour is the test that says that capacity may be defined as the ability to understand the information relevant to making the decision; use and weigh that information as part of the decision-making process; appreciate the reasonably foreseeable consequences of making a decision and of not making any decision; to make the decision voluntarily, and to communicate the decision whether through speech, writing, sign language or other means; and decision includes a single decision or the decisions required by the transaction, matter or function for which it is proposed an alternative decision maker will be appointed. That is the test that we consider would be applicable across the different decisions a person needs to make legally.

CHAIR: And the origins of that test?

Ms CREGAN: The origins of that test are the parts that we have plucked from a number of other tests. We have looked at a range of tests and tried to determine the areas that we think would be most useful from that test.

CHAIR: It is the Blake Dawson test.

Ms CREGAN: It is the Blake Dawson-People with Disability Australia test. We did a joint submission some time ago to another inquiry with People with Disability Australia. It is that test, but it is based on the tests that are in legislation in a number of areas.

The Hon. GREG DONNELLY: It is a composite definition really.

Ms CREGAN: It is, yes.

The Hon. MARIE FICARRA: Can we have that tabled? Can you provide a copy of that to the Committee?

Ms CREGAN: Yes, certainly.

Document tabled.

The Hon. GREG DONNELLY: I acknowledge and congratulate you on the work that the pro bono team does at Blake Dawson for people who are not in a position to present and argue matters in these difficult issues. My question goes to your submission on page 13. You discuss the test in *PY v RJS* and your discussion goes over to page 14. I have not had an opportunity to read the decision. The submission was given to us yesterday. Are you familiar with that particular matter? Do you have recollection of the fact of the matter, broadly speaking?

Ms CREGAN: No. I am very familiar with the test, but less familiar with the facts.

The Hon. GREG DONNELLY: Let us explore that. The test is enunciated in the quote at the bottom of page 13. Is that the case?

Ms CREGAN: Yes.

The Hon. GREG DONNELLY: I love the way they do it:

> … a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:

I am sure there is another way of writing that which might be a little bit more straightforward. In any event, it lists (a) and (b) and then the discussion goes over the page. It states:

> In our experience in acting for people with impaired capacity, the difficulty with the test is that some clients will have the ability to deal in a reasonably competent fashion with day-to-day matters, for example, managing their pension and paying their bills. They require assistance, though, to instruct in a complex legal matter which is not before a court (so a tutor cannot make decisions on the person's behalf) or to manage a larger sum of money received in settlement. Some examples of this are shown in Case Studies A and D. In such circumstances, the clients would not fall within the test in *PY v RJS*.

I am not sure of the term "tutor" and what it precisely means. Can you give the Committee an explanation of what "tutor" means and how it fits into the whole discussion?

Ms CREGAN: A tutor is another form of substitute decision-making that occurs when a person is before a court or a tribunal, mostly in civil law matters and in those matters where it is shown that a person is unable to instruct. There are complicated tests and they depend a little on the jurisdiction. In effect, if a person cannot instruct a solicitor, a court can appoint a tutor to make decisions for that person and to act as if they were that person in the conduct of that litigation.

The Hon. GREG DONNELLY: So it is a court-appointed person. I refer you to the passage at the top of page 14, which states:

> In our experience in acting for people with impaired capacity, the difficulty with the test is that some clients will have the ability to deal in a reasonably competent fashion with day-to-day matters, for example, managing their pension and paying their bills. They require assistance, though, to instruct in a complex legal matter which is not before a court (so a tutor cannot make decisions on the person's behalf) or to manage a larger sum of money received in settlement.

Is that the best way to explain it in terms of trying to discern the continuum or spectrum? There are the complex issues that people could not grapple with and the ones they probably could grapple with. What about the ongoing issue where people initially might be able to deal with complex issues but over time their capacity is reduced? This is okay for a point in time when you are looking at a person's circumstances, but with some people those circumstances change.

Ms CREGAN: That is certainly the case.

The Hon. GREG DONNELLY: In those circumstances there is probably a need for ongoing vigilance about their capacity.

Ms CREGAN: That is definitely the case, particularly with dementia. People will have full capacity and that capacity diminishes. I had not thought about it in reverse. If a financial management order is made initially for complex decisions and is then reviewed, that would allow that circumstance to be taken into account as well.

The Hon. GREG DONNELLY: Recommendation No. 12 states:

> That the TGA and Guardianship Act be amended to include an inclusive definition of "capable of managing his or her affairs" which enables a limited financial management order to made in circumstances where a person can manage their day-to-day affairs but not a particular aspect of their estate.

I want to be absolutely clear about the current position, which is picked up in the paragraph two above that. What is the position that is leading you to make that recommendation?

Ms CREGAN: The current position is that the court or tribunal needs to decide whether a person is capable of managing their affairs before they can appoint a substitute decision-maker. In determining what it means for a person to be incapable of managing their affairs, they are required to look at the Supreme Court test, which is set out in that case. That case requires that they are incapable of dealing with the ordinary routine affairs of man—that is the way it is expressed—and because of that lack of competence they will suffer some harm. In terms of dealing with the ordinary affairs of man, that is interpreted to mean a person is incapable of dealing with their affairs on a day-to-day basis.

In practice we often find that with somebody's assistance or with things in place like automatic deductions from their bank account for bills a person can manage those affairs. In that case they fail that part of the test and they are therefore not considered incapable of managing their affairs and they do not fall within the legislation. However, in practice that person may not be able to instruct in a complex matter or manage a large sum of money. So the test is excluding people who need financial assistance. The test was devised for a very good reason—so that people are not placed under management when by and large they are doing okay. However, in practice it has inhibited people getting assistance when they need it. It is also against the principles set out in the Act, which provide that some parts of an estate can be excluded and consideration must be given to whether it is necessary to manage the entire estate or part of the estate. That is inconsistent with a test that requires them, in effect, not to be able to manage their finances at all.

The Hon. GREG DONNELLY: So it is acknowledging a more nuanced consideration of the circumstances in which a person finds himself.

Ms CREGAN: It is, and it is acknowledging that there is some capacity to make a limited financial management order over part of a person's estate.

The Hon. GREG DONNELLY: The best interest test has been referred to on numerous occasions. I am generally aware of the test as it applies to children in the context of family law. In the context of the issues that we are considering and examining, can you explain whether there is some precision about the nature of "best interest"? Is it set out in case law or common law? I find the concept a bit fuzzy.

Ms CREGAN: Can I take that question on notice? As far as I am aware there is no legislative guidance on best interest, but I would like to have another look at that.

The Hon. GREG DONNELLY: That would be good.

CHAIR: The word "proportionality" was used a number of times yesterday by a witness with great expertise in the area. Are you familiar with the term?

Ms CREGAN: I am not sure of the context in which it was used.

Dr JOHN KAYE: It related to the degree of incapacity. The degree of intervention is proportionate to the lack of capacity.

CHAIR: I am sure that is an area of the law that is familiar to lawyers. I am interested in this particular area of the law and whether it has resonance or is irrelevant.

Ms CREGAN: It does have resonance. I have not heard it expressed that way before. It has resonance in the sense that if you are providing for substitute decision-making in line with the principle of the less restrictive alternative that requires you to look at a person's ability and the areas in which they should maintain their power to make their own decisions and in which their capacity is impaired and then determine in which areas they need assistance or a substitute decision-maker. I think the legislation allows for that because on the one hand the New South Wales Trustee and Guardian Act refers to whether a financial management order should be made over the whole or part of a person's estate and the Guardianship Act refers to whether part of a person's estate should be excluded. That is the legislative effect of the concept of proportionality in that sense; that is, you look at the person's ability and which parts of the estate need to be managed. But I think the test could be better framed to make that exercise occur in practice.

Dr JOHN KAYE: Rosemary Kayess, the Associate Director, Community and Development at the Disability Studies and Research Centre at the University of New South Wales appeared before the committee yesterday. Her point was that you were in guardianship or not or under a financial management order or not. She was advocating that there should be a more graded response so that people might be partially in guardianship and partially not, not just in terms of the scope. Your response to Mr West's question was in terms of the scope of the order. I think she was also talking about the strength of the order. There could be partial guidance as against complete guidance.

Ms CREGAN: Was her point that if part of your estate is managed then you are excluded from making decisions about that part of your estate?

The Hon. MICHAEL VEITCH: It is the part under management.

Dr JOHN KAYE: I think there is a discussion about three dimensions: a time dimension—how long an order lasts; a scope dimension—what it covers; and the strength of the order. How directive is that order? How much control does it exert? I think she was talking about that third dimension.

CHAIR: Even if she was not, and we do not want to verbal her, it is a good question.

Ms CREGAN: That is a good point. If you are managing part of a person's estate, to what degree does the substitute decision making take over for that part of the estate? I think it is difficult to formulate legislation that will enable the substitute decision making. I will withdraw that. I think the best way of formulating legislation that would enable a person's residual capacity to make decisions in the part of the estate that is being managed would be to require the substitute decision maker to take into account the person's capacity and to support the person to have the capacity to make the decisions in that area to the degree that they can. I think that is the best way legislatively that you could achieve that. I think it would be difficult to legislate to say that assisted decision making is required in circumstances where you are saying a person does not have capacity to make a decision over that part of their estate, but you can retain their residual decision-making capacity by requiring the person assisting the person to make decisions to support the person to express their views and to take those views into account. I am not sure whether that answers your question.

CHAIR: If you are starting from the point of view that the person has capacity and you are then layering from there, you do not have to have the black letter or the words. You can have a philosophy which assists.

Ms CREGAN: That is right.

The Hon. MICHAEL VEITCH: We also heard yesterday that there are some issues around the inter-use of the words "intellectual disability" or "intellectual impairment", "mental impairment", and "cognitive impairment". The definitions that are used even between State agencies and the Commonwealth jurisdiction and the State's jurisdiction are all different. We heard yesterday afternoon from, I think, the Disability Council, where they said that is an irrelevant argument, that if we get the definition of "capacity" and the tools around defining "capacity" all that becomes irrelevant. Can I get your view on that?

Ms CREGAN: We are probably not in the best position to comment on how that interacts with the definitions in the particular agencies because that is something that we do not generally deal with. But if you have an overall definition of "capacity", the reason that the person's capacity to make decisions is limited does not matter; it is whether or not they have the capacity. So to that degree that is absolutely true. Whether or not that solves the problem with different agencies using different definitions, that is something we are probably not in a position to comment on.

The Hon. MARIE FICARRA: A few witnesses yesterday were stressing that we needed to have a public advocate in New South Wales to carry out duties similar to an ombudsman and that other jurisdictions in Australia have a successful operation of a public advocacy system. What is your opinion of this?

Ms CREGAN: That is something we have not looked into closely. The limited information I have read about that—I have also read some of the submissions of others before the inquiry—I would support it for the reasons that they have set out, but it is not something that we have looked at in detail.

(The witness withdrew)

ANNE-MARIE ELIAS, Policy and Communications Manager, New South Wales Council on the Ageing, Level 4, 280 Pitt Street, Sydney, sworn and examined:

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

Ms ELIAS: I am representing the Council on the Ageing.

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

Ms ELIAS: I would like to thank you for this inquiry. Needless to say, it is extremely timely, given population ageing and the recently released Access Economics report on the prevalence and incidence of dementia in New South Wales but also obviously Australia. People lacking capacity can be subject to abuse and therefore we welcome any measures to increase autonomy of people lacking capacity to make their own decisions and also to protect the rights of people lacking decision-making capacity. The only other thing I would like to say is that it is advance care directives without the D. The correct term is "advance care directives", not "advanced" because the directives are made in advance.

Dr JOHN KAYE: I take you to the dot points on what is effectively the second page of your submissions—and we are talking here about the tribunal—where you say, "there should be an automatic right for every party to have legal representation including the party subject to the application". Are you suggesting that such right does not currently exist?

Ms ELIAS: I believe that it perhaps does exist but it is not consistent and it is not enshrined. Therefore we believe that it should be enshrined.

Dr JOHN KAYE: Should it be enshrined in the law, enshrined as a practice note of the tribunal or enshrined as a practice of the tribunal?

Ms ELIAS: It should be enshrined as a practice.

Dr JOHN KAYE: We were told yesterday, I think by the chair of the tribunal, that every party to the tribunal has access to whatever representation, legal or otherwise. Are you saying there are cases where that does not happen?

Ms ELIAS: I believe so. I need to preface anything that I say is that I am not a lawyer and we are not a legal organisation or entity. We are here to represent consumers, so I am only speaking from what we have heard from our members and older people who have come into our contact.

Dr JOHN KAYE: So has it been your experience that people have gone before the tribunal, particularly parties who are subject to the application, who have not received or not felt able to access legal representation?

Ms ELIAS: We have been advised of that, yes.

Dr JOHN KAYE: That is an interesting point and thank you for raising it. I take you to another point and that is the issue of the hierarchy of people who are considered as a "person responsible". Under the New South Wales arrangements, we understand that there is more than one person and there is a hierarchy; in fact, you can have more than one person who can equally be considered as the person responsible. Do you think there are any advantages in having more than one person qualified as being the person responsible?

Ms ELIAS: Yes. I believe that this only usually applies in the final category of person responsible, that is, close friend or relative. I think in most cases it can be determined who has been providing the most care, who has had the most care of the person in question. It would be difficult to provide an order of friend or relative, particularly for some groups in the community, for example, gay, lesbian, transgender and bisexual people, who perhaps do not have very close relations with their relatives but perhaps their friends know a lot more about their interests and their lives. That is why it is necessary to have more than one person.

Dr JOHN KAYE: It has been put to us that we should amend it to have only one person. Would you oppose that?

Ms ELIAS: I think it would cause more complications.

Dr JOHN KAYE: Do complications arise in the current situation where you have two people who are persons responsible, or each a person responsible, and who are co-equal persons responsible? Are there situations, in your knowledge, of conflict or confusion arising from that?

Ms ELIAS: I am not able to answer that, but I am imagining there would be.

Dr JOHN KAYE: You are saying that that confusion is worth bearing because of the benefits of a broader definition?

Ms ELIAS: Yes, that is right.

The Hon. MARIE FICARRA: You mentioned the Access Economics report on the proposed number of dementia patients, citizens with dementia, in the future. Do you believe that the area of substitute decision-making or assisted decision-making will become far more important given the incredible tsunami of dementia we will be facing? Do you believe there is enough awareness currently of the problems involved in decision-making for Australians suffering from dementia and Alzheimer's?

Ms ELIAS: No, I do not believe there is enough information out there, both for consumers and for professionals to understand the complexities of the disease that is called dementia. With any mental capacity there is a spectrum, and I think it becomes extremely blurred in the incidence of dementia and that is something all of our solicitors and health professionals, as well as carers, are going to have to be a lot more well versed in in the future.

The Hon. MARIE FICARRA: From the experience you have had with consumers under your umbrella group, what level of understanding is there of the progression of dementia, where you can say a person has decision-making hampered? Is there something that clients or your workers within the Council on the Ageing have battled with? Exactly how do you say to a person, "You have a level of dementia now which is impairing your decision-making?" It must be very hard to come to terms with.

Ms ELIAS: It is. As a manager within my organisation, one of the things I am looking forward to is getting some training for our staff because we answer telephones, we answer a lot of consumer inquiries, and we are not well versed in understanding people's relative inability to make decisions or their forgetfulness and to make concerted decisions about what assistance they may need. I think it is going to be an enormous challenge to all organisations and service providers in the future. Having said that, I stress that substitute decision-making is a last resort. We would be more inclined to support assisted decision-making where the person in question is enabled as far as possible and where we can provide the right conditions for them to make their decisions as far as they can.

The Hon. MARIE FICARRA: Do you have any view or does the Council on the Ageing have any view on the establishment of a Public Advocate? At the moment we have the Public Guardian, the Public Trustee. There is confusion as to who does what and what rights are there for citizens. The Public Advocate is operational in some other Australian jurisdictions. Do you think that is of value?

Ms ELIAS: I do. I looked at both the Victorian and Queensland Public Advocate. I guess the sense I got is that it is probably best to emulate the Queensland model. Insofar as the Queensland model has a Public Advocate, it also has an Adult Guardian. It raised some questions for me that perhaps the role of the Public Guardian in New South Wales should be extended to reflect the Adult Guardian in Queensland.

The Hon. MARIE FICARRA: Were there any reasons for that that you advocated? Do you have any feedback that it operates better in Queensland or is it just your reading of the legislation?

Ms ELIAS: It is just my reading of it. We convene a legal response working group, which has representatives including Sue Field, who is the Fellow in Elder Law. She is the chair of the committee. We also have representatives from a range of organisations. I guess the view is that there are good practice models occurring elsewhere, and we would be crazy not to take a leaf out of those books. I guess what endeared me to the Adult Guardian is that it is an independent statutory authority. It might obtain a warrant. So, it has greater powers than the Guardian has at this point in time. If it feels that somebody is in danger it can act, whereas at the moment that is not possible within the jurisdiction of the Public Guardian in New South Wales.

The Hon. MARIE FICARRA: The Public Guardian has recommended that consideration be given to expanding the legal authority of the person responsible for another person under the Guardianship Act, so that in addition to making decisions regarding medical care, the person responsible can also make decisions relating to accessing services or deciding where to live. Could you comment on this proposal?

Ms ELIAS: Sorry, it is relating to one of the additional questions?

The Hon. MARIE FICARRA: Yes, it was question 3. So, an expansion of the legal authority of that person responsible for another person to go beyond just medical care and be responsible for making decisions about where that person lives and what services they may access. If you have no—

Ms ELIAS: No, we believe it is an excellent suggestion and it is more in line with the Queensland legislation, which we regard as good practice.

The Hon. GREG DONNELLY: We had a submission from Alzheimer's Australia—I am not sure, but you may have had an opportunity to read it—and I want to ask you a question about a particular point they raise. I want to relate it back to one of the points you make in your submission about capacity. (Witness shown submission)

Ms ELIAS: Yes.

The Hon. GREG DONNELLY: I will give you an opportunity to read that, and the paragraph below it.

Ms ELIAS: Yes.

The Hon. GREG DONNELLY: The comment in the first sentence states—and these are their words, not mine:

> Often older people are pressured into handing over their decision making power to a substitute decision maker well before they have lost their full capacity to do so.

Is that a statement that you would, through your experience and your organisation's experience, agree with or disagree with?

Ms ELIAS: We would agree with it, definitely, and that is why we welcome a consistent definition and tool—I am not saying the capacity toolkit but an assessment tool which can indicate capacity. What I was reading about is that there are formal capacity assessments, and that is what I would err towards if in doubt at any level of a person's capacity to make a decision on a particular issue, that a formal capacity assessment is investigated. That is where you would get a medical professional with experience in assessing cognitive capacity to deliver a final verdict as to whether a person has lost capacity or not.

The Hon. GREG DONNELLY: I take you to your submission now, and I am looking at the first page, where you say:

> COTA NSW recommends
>
> - that the Committee note the definition of **capacity** in Schedule 4 of the QLD Guardianship and Administration Act 2000,
>
>   **capacity**, for a person for a matter, means the person is capable of—

I will not read it all out, but I take you to paragraph (b):

> freely and voluntarily making decisions about the matter;

Then there is a paragraph (c), and that is the definition. Is there a particular reason why you have put forward the Queensland example as the best way to define "capacity"?

Ms ELIAS: Only in the sense that it really is erring on the side of the person's wishes and the person voluntarily making a decision. I think the tenant of it is very self-directed.

The Hon. GREG DONNELLY: The submission from Alzheimer's says often people are pressured into handing over their decision-making power to a substitute decision-maker—and you have agreed, as I understand?

Ms ELIAS: It does happen—

The Hon. GREG DONNELLY: I think it was higher than that. I got the impression it happens quite often. This is not a trick question, I am trying to discern how to match that reality with the definition of "freely and voluntarily" in your definition that you are putting forward. How do you reconcile those two?

Ms ELIAS: Because if they are coerced then it is not really freely and voluntarily.

The Hon. GREG DONNELLY: I understand that.

Ms ELIAS: The question of abuse is people being coerced into something, so they are not freely and voluntarily making a decision, they feel obliged to, particularly older people where a relative or one of their children is making those decisions. It makes it very difficult if they feel they are going to lose that relationship. So to me I actually see a very clear difference, it is either coercion or voluntary.

The Hon. GREG DONNELLY: How does a third person looking at the circumstances come to the conclusion that it may not have been voluntary? We know elderly people are in a very vulnerable position in many circumstances for the reasons you have given. How do we know that the free and voluntary test has been met?

Ms ELIAS: I do not know and that is why I would err on the side of caution every single time and bring in a professional assessment to make those judgments to see whether the person is making the decision voluntarily and freely.

The Hon. GREG DONNELLY: I am trying to understand those instances when you do bring in a medical expert, for example, to assess cognitive capacity and perhaps other things, are those persons also capable of establishing whether there has been genuine consent and voluntarism associated with the decision or are they trying to establish something else?

Ms ELIAS: It depends because there is a repertoire of levels of professionals. I believe that a psychiatrist or a psychologist would actually be able to look at those types of issues whereas a neuro-psychologist, psycho-geriatrician, geriatricians, gerontologists and neurologists and the aged care assessment teams would be more inclined to better reflect the medical issues impacting on that decision-making capacity.

The Hon. GREG DONNELLY: Do you say that typically a trained psychiatrist, as part of their toolkit, if you like, is able to establish if a person has voluntarily or non-voluntarily accepted a position?

Ms ELIAS: I believe so. It is my uninformed lay person's opinion, but, yes I would imagine that they would be the correct person.

The Hon. GREG DONNELLY: But you are not sure?

Ms ELIAS: No, I am not sure.

The Hon. GREG DONNELLY: The committee has heard other definitions of "capacity". In fact, earlier witnesses today from Blake Dawson, lawyers, presented another definition it has put together for its internal use to look at the whole issue of capacity. I am sure other definitions are used in other legal contexts. Have you looked at the range of definitions of "capacity" in terms of your analysis of looking at what you recommend to this committee as "capacity"? Have you merely looked at the Queensland definition and the Victorian definition, as I understand your evidence, and chosen the Queensland definition?

Ms ELIAS: Yes, and on the advice of our legal response working group who are professionals working in the sector that is where we arrived at putting forward the Queensland definition. But, I guess, in light of the hearings and the evidence of other people we would re-look at what other people have put forward and re-assess what we are recommending, in light of that.

The Hon. GREG DONNELLY: I have asked other witnesses this question, and you may not be able to make a comment, the notion of best interest for a person who may well be in a vulnerable position, for example, an aged person with advanced dementia or Alzheimer's, is that something your organisations deals with and works with as a concept when you are dealing with elderly people, when you try to work out their best interests in terms of their circumstances?

Ms ELIAS: I think we work on the assumption that we listen to people. Obviously if it came to that path we would definitely look at what is in the best interests of the person. Quite often we are contacted by consumers themselves, not by their families necessarily, and we have to take what they tell us on face value, if that is their wishes. I guess there is a very fine line; are we judging the person's decision or are we judging their capacity? I think they are two very different things and sometimes we may not like or agree with a decision someone has made but if a person has capacity we have to respect that decision even if we do not believe it is in their best interests.

The Hon. GREG DONNELLY: I will repeat that so I am very clear. You say there are some circumstances you say you sometimes find where a person's capacity enables them to discern and make a decision but there may well be an alternate view whether the decision they take is in their best interests. Is that right?

Ms ELIAS: I think we cannot judge that. We are a consumer organisation. We listen to consumers. We may not always agree with the decision a person makes but we cannot then judge their capacity because of that decision. So they are two completely separate issues. I may not like the decision my mother makes, and I may, in fact, quite vehemently disagree with it, but I respect her decision to be right or wrong in her own view, and for her to put that forward, because I respect her capacity to make that call.

The Hon. GREG DONNELLY: Taking that point and developing it further, to the extent that capacity is inhibited or ultimately weakened, that obviously affects then one's assessment of their ability to make judgements?

Ms ELIAS: But who am I to judge that? I am not skilled in that framework to make that judgement call as to whether a person has capacity. I have to presume that they have capacity, and as the conversation progresses, all I can do is provide them with advice and linkages and referrals to give them the best possible support but then accept whatever decision they may take, which may include not taking that referral or not taking that support.

The Hon. GREG DONNELLY: If I follow through with that logic, and being a devil's advocate, you are saying that you could provide a person with a recommendation, for example, to get some advice or some medical attention to deal with their circumstance, and they do not take your advice, that could lead them to make a decision hypothetically which may well not be in the best interests, because, for example, their condition deteriorated their cognitive capacity to make a judgement? Surely, that is an issue.

Ms ELIAS: It would be an issue but we are not a service organisation. If we were we would probably request a meeting with a wider range of people that are caring for and supporting that person to be a better judge of that. On a phone conversation I cannot really judge that but what I do know as a lay person is that I am very concerned about people judging a person's decision and confusing that with a person' capacity. I have ageing parents, or older parents, and I guess whenever I look at hearings such as this, I think of myself and my parents and how I would like to be treated or how I would like my parents to be treated. Given the age of my parents they have had many friends that have been subject to difficult decisions or subject to wrong decisions. In a healthy ageing society we want to believe that people have capacity over everything, and we want to assist them as far as possible to make those decisions with their nearest and dearest whether that be a friend or a relative, but again assisting them to make the right decision rather than imposing our own judgement or our own view.

CHAIR: In terms of coming to grips with capacity, decision-making and the effect of that decision, if I assume for the moment that I have full capacity or, for example, a family member has full capacity and makes a decision that I might think is not very smart, the effect of that decision can vary in degree as to the effect upon either me or another person in the family's capacity to continue to operate. Are you able to break up the effect into categories, like we have done with powers of attorney where you have prescribed, enduring and irrevocable powers of attorney? Is there an ability to come to grips with effect? I suppose it goes in some ways to the spectrum of going from substitute to assisted. I am thinking of the difference between a mother's love for a son or daughter who is not necessarily acting in their own best interests and the community at large. A mother says, "I am going to give to my son or my daughter", irrespective of whether it is a smart decision, "because of my love". The effect of that decision in some areas may not be enduring or irrevocable but in another case it may be. Is there an ability to delineate as to the effects of the decision-making by a person with either capacity or incapacity; in this case we are talking about a spectrum of incapacity? I suppose it goes to the proportionality effect. Is it an area where we should venture or should we leave it alone?

Ms ELIAS: I am not sure that I understand the question, but what I do want to say is that we really have an obligation to support people to make their own decisions, whether we like those decisions or not. And we get down to in the best interests of whom or the impact on whom, it has to be the person in question rather than the family or extended family.

CHAIR: If you are looking at the interests of the person in terms of the effect of the decision they make, if in the interests of the person that we judge to have some incapacity, whatever it may be, if the effect of the decision they make is irrevocable on their ability to sustain themselves, are you saying we have some responsibility to assist them in making that decision?

Ms ELIAS: If it is going to harm them? Who is going to be the judge of that, I guess would be my question.

CHAIR: If I am making a decision to give away my ability to feed, clothe and shelter myself to a loved one, who I love dearly and I want to give to, and I am giving away my whole existence to—food, clothing and shelter—and your capacity is in question, are you suggesting that it is not a very smart decision but we should let them do it?

Ms ELIAS: I think we have to work on the basis that we would be looking at the decision that they are making, not that they are making now, but before they lost capacity what decision would that person have made? If it is to hand over their decision-making ability to a close friend or relative, then that should be upheld. I guess alongside that we need so much education, both of consumers to understand that so that we could be making those decisions while we do have capacity. In fact, I ask around the table how many of you have advanced care directives or a will or enduring power of attorney or any kind of—

CHAIR: But that would be a luxury.

Ms ELIAS: It is a question, I guess. Do you know what I mean? We are not thinking that far ahead and for someone in the early stages of dementia, for example, it would be very fraught and difficult to raise that issue when they are dealing with the illness itself and then you are sort of prodding them to make decisions about their life once they lose capacity. That is where the Council on the Ageing would throw its weight behind, saying we would encourage a broad-sweeping education campaign of consumers to make the decisions while they have capacity so that in the instance that they lose capacity we know what their wishes would have been and we can uphold that, whether they are right or wrong.

The Hon. GREG DONNELLY: With at least one of the matters you have raised, the advanced medical directives, they are not without issue, are they, because, say I make one—may I say, I have not made one—but hypothetically if I did make one today, and thank goodness I am relatively healthy, but it was only called upon to be considered in several years time where, for example, medical technology may well have moved on in a significant way, particularly in my hypothetical example, in the area where I am now suffering some disability or some incapacity. The nature of that directive, whilst it may have been perfectly reasonable here in 2009, a reasonable person looking at that directive say in 2029 may well say, "Listen, things have moved on quite significantly" and that may not be what his view would be 20 years hence. Is that not some of the sensitivity and some of the issues associated with being so definitive about making a directive cast in stone, if I can put it that way, and exercise such certainty about prospectively the circumstance that I may find myself in many years hence?

Ms ELIAS: Yes, it would be difficult but I think that again education around how that is implemented is going to be really vital and that includes reviewing those decisions perhaps every five years so that you can account for changing landscapes. Having said that, for example, I have spoken to my children in the event that I am put on life support I would actually prefer not to be sustained to live if I have no capacity to make decisions for myself or if I am going to be in a more vulnerable position and it is my wish if I am being sustained only to have me lie in bed, that is not how I would like to end my life. I think I would rather know that my family is very well aware of my wishes in that circumstance and no amount of medical advancements is going to change that decision to not want to be sustained if it means that I am going to be stuck in a bed and without any consciousness or capacity.

The Hon. GREG DONNELLY: Once again that whole response is pretty loaded in terms of what is consciousness and what is capacity. We could have quite a debate. In fact, we have had quite a debate this morning about what capacity is.

Ms ELIAS: Absolutely.

The Hon. GREG DONNELLY: We had at least one piece of evidence yesterday of an example, and you hear this not infrequently, where very considered medical assessments are made, about a particular person and their diagnosis but then they change. The person's circumstances change and they actually do improve or there is a change in their medical disposition. It is pretty easy to quickly jump and end things—pull the plug, so to speak—but at that critical point one would hope there is fair bit of careful discerning going on about how quickly you jump in there and pull the plug.

Ms ELIAS: Absolutely, and I think what ultimately people want is a quality of life and if that quality of life does not exist it is their right to deny treatment in those circumstances, so if a person can be sustained and have a reasonable quality of life then they should be sustained, but if not then I think it is absolutely reasonable for a person not to want to be sustained in those circumstances.

The Hon. MICHAEL VEITCH: Some of my questions you may wish to take on notice. One of the recommendations in your submission is that we use the definition of "disability" as defined in the Queensland Disability Services Act 2006.

Ms ELIAS: Yes.

The Hon. MICHAEL VEITCH: I dare say legal people may have put this together for you, but can I ask why it is that particular Act as opposed to, say, the Commonwealth Disability Services Act?

Ms ELIAS: I did not look into that. My main concern is this Committee, and generally in documentation we talk about disability without referring specifically to cognitive disability. Many people have disabilities and their capacity to make decisions is not impacted in any way, shape or form. I think that that is probably a failing of the lack of definition, so in fact what we mean by "disability" is as highlighted in the Queensland definition, which defines intellectual or cognitive disability as an adult with an intellectual or cognitive disability who has a condition attributable to an intellectual or cognitive impairment or a combination of impairments.

The Hon. MICHAEL VEITCH: Why is that a better definition than, say, the Commonwealth?

Ms ELIAS: I do not know the Commonwealth one, so I would have to look at that and compare it.

The Hon. MICHAEL VEITCH: I would like to know why, in the submission, you honed in on that particular definition as opposed to definitions contained in a range of legislation in other jurisdictions, whether Commonwealth or State?

Ms ELIAS: Are you proposing a different one?

The Hon. MICHAEL VEITCH: No.

Ms ELIAS: So you are asking me to look at the Commonwealth—

The Hon. MICHAEL VEITCH: I just want to know why that definition, as opposed to definitions used in legislation in other jurisdictions?

The Hon. GREG DONNELLY: I think the question is what Commonwealth legislation are you referring to.

The Hon. MICHAEL VEITCH: The Commonwealth Disability Services Act.

Ms ELIAS: Or other jurisdictions?

The Hon. MICHAEL VEITCH: Or other jurisdictions. I just want to know why that has been chosen as the one to use?

CHAIR: As I understand it, you are saying that is because that is one you understand and the one you know.

Ms ELIAS: Yes, and I do not know if the others explore the defining of an intellectual or cognitive disability, but that is why the Queensland one was nominated.

The Hon. MICHAEL VEITCH: May I say, as someone who has worked in disabilities for many years, that definition may not suit a range of different circumstances, which is why I was asking. Yesterday it was raised with us that instead of defining "disability", whether it be intellectual, cognitive or mental impairment, a better way to go would be to simply define "capacity".

Ms ELIAS: Yes.

The Hon. MICHAEL VEITCH: In your submission you again mention schedule 4 of the Queensland Guardianship and Administration Act, which defines "capacity".

Ms ELIAS: Yes.

The Hon. MICHAEL VEITCH: If we were to use a definition of "capacity", why would we need to have a definition of "disability"?

Ms ELIAS: Only because they are the terms in the Act, so our feeling was that they both need to be defined if they are both in the Act. If both are not in the Act then you only define the one that is in the Act, but it is actually a question of capacity in decision making as opposed to physical disability.

The Hon. MICHAEL VEITCH: Is it better to define "capacity" as opposed to spending a lot of time defining the disability?

Ms ELIAS: I will take that on notice.

The Hon. MICHAEL VEITCH: I want to ask you about assisted decision-making versus substitute decision-making. We have heard a lot of evidence from people about New South Wales moving towards assisted decision-making.

Ms ELIAS: Yes.

The Hon. MICHAEL VEITCH: Could I gain your views about how that would appear in legislation?

Ms ELIAS: Which question—

The Hon. MICHAEL VEITCH: This is my question; it is not on the notice. I think in the questions you were provided there is something about assisted decision-making.

Ms ELIAS: Sorry, what was the question?

The Hon. MICHAEL VEITCH: It is about assisted decision making and, if we were to legislate that way, from your organisation's perspective, how would we best do that?

Ms ELIAS: To legislate assisted decision-making?

CHAIR: It is question 1 of the general questions.

Ms ELIAS: I think as the previous speaker highlighted, consistent with the United Nations Convention on the rights of people with disabilities, assisted decision-making is preferred with substitute decision-making as a last resort, and we would believe that and support that.

The Hon. MICHAEL VEITCH: As a last resort?

Ms ELIAS: As a last resort, and I would very much err on the side of caution and go for the formal capacity assessment in order to make the determination that substitute decision-making is necessary.

The Hon. MICHAEL VEITCH: When you talk about the formal capacity assessment, you previously had a document—

Ms ELIAS: Yes, it is here.

The Hon. MICHAEL VEITCH: What is that document?

Ms ELIAS: It is from the Law Society, and I can leave it behind—"A Practical Guide for Solicitors when a client's capacity is in doubt". There are some very good tools in it, not just from Australia but also from the United States, regarding principles and also how to enhance a client's capacity in an ageing population context.

CHAIR: Could you table that document?

Ms ELIAS: Definitely.

The Hon. MICHAEL VEITCH: Earlier in your evidence you spoke about the Queensland as opposed to Victorian public advocate role, almost an adult ombudsman type role. We heard evidence yesterday that another organisation preferred the Victorian model above the Queensland model. Could you explain in more detail why the Queensland model is more meritorious than the Victorian model?

Ms ELIAS: I will take that on notice because I would like to read both of them a lot more appropriately.

The Hon. MICHAEL VEITCH: We also heard yesterday that there is almost a need for—and I think this was the phrase used—a vulnerable person's ombudsman. I cannot remember who said that, but it was mentioned yesterday. I wonder whether the Queensland model that you are talking about fits that perspective where you have an adult ombudsman and a public advocate?

Ms ELIAS: I think so, and the role of the adult guardian, if I can read it out, is to protect the rights and interests of adults who are unable to make decisions for themselves. This lack of decision-making ability, known as impaired capacity, may be caused by intellectual or psychiatric disability, acquired brain injury, dementia or temporary illness such as delirium. So that is the role of the adult guardian.

The Hon. MICHAEL VEITCH: If you could take that on notice and get back to us in more detail, that would be fantastic.

Ms ELIAS: Definitely.

CHAIR: Thank you very much, and could we have answers to questions on notice in 21 days, if possible?

Ms ELIAS: Yes.

(The witness withdrew)

(Short adjournment)

RACHEL ANNE MERTON, Chief Executive Officer, Brain Injury Association of New South Wales, 3 Carlingford Road, Epping 2121, affirmed and examined:

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

Ms MERTON: Yes. To restate the purpose of our organisation, we are a peak body in New South Wales and among other things we represent people with acquired brain injury throughout New South Wales. Essentially, our position in relation to this inquiry is that the system has to be more responsive to change and the individual circumstances in which people find themselves. We are talking about the capacity of individuals but I think it is also an important point that we are talking about the capacity of the guardianship system as a whole.

The decision-making capacity of people with acquired brain injury may fluctuate considerably, especially in the first two years after their injury. Currently, as we understand it, the system does not really have the capacity to respond to those changes and fluctuations in capacity that may occur. Further to this, the United Nations Convention, which I am sure has been raised many times and to which we are now party, is important and quite a good opportunity for some positive changes to the system. That should inform our laws and practices in relation to people with limited capacity.

The Hon. MICHAEL VEITCH: The nature of acquired brain injury is not often understood. From the outset could you give us a broad understanding of the various things that fit under the banner of brain injury?

Ms MERTON: I was not sure about the level of knowledge around the table in relation to acquired brain injury. Essentially there are two broad ways in which people can acquire a brain injury: first, by traumatic means, which is usually a blow to the head or a trauma to the head, usually through a car accident, a sporting accident or a fall or similar kind of trauma. The second broad way of acquiring brain injury is through non-traumatic means, such as an infection in the brain, a stroke or an aneurism, encephalitis—there are a number of ways. Near drowning is another way. Depending on the location of the injury within the brain and the extent of the injury, the effects can be very broad. The injury can have just physical effects. For example, it is quite common for people to have paralysis down one side of the body or less control and less function on one side of the body. The effects can be sensory. A person may lose their capacity to speak, see, taste or smell.

There may be considerable emotional changes as well. People can lose self-esteem, and depression and anxiety are quite common. There can be quite profound personality changes. Sometimes people become more irritable and have a short attention span and a short fuse. The important possible changes for this inquiry, I think, are the cognitive changes that may occur, and changes to behaviour and personality, as well as the huge social changes that people undergo. From the cognitive point of view, people may have trouble understanding complex concepts, so things have to be explained or put to them more simply. Goal setting and so on has to be done step by step, breaking things down, because people can become easily confused and overwhelmed by situations they do not understand. They can get lost in conversations if there is a lot of background noise. They may not be able to concentrate for long periods of time. Fatigue and tiredness are very common as well. Often you may have to break down a conversation, in this kind of context, to 15-minute periods of time or shorter.

Short-term memory and long-term memory may be affected. People may not remember something they may have heard yesterday. Learning new things and thinking more flexibly, thinking laterally, may not be possible anymore. I alluded to behaviour and personality changes earlier. People may become quicker to anger and more impatient or they may be quite the opposite and become unmotivated and have low energy. There is quite an extreme range of responses.

Really profound are the social changes. We find that people's personalities can change so much that the people they were friends with and their family may not be in their lives any more after the accident some years later. They have to develop whole new social networks and, as you can imagine, learning new things using social skills can be a real challenge, so the network may shrink and shrink and shrink. A lot of the people who are in contact with our association have no social network at all, no friends, very little family and very little support.

The Hon. GREG DONNELLY: Without wishing to interrupt, but you are not covering people who are born with a congenital issue?

Ms MERTON: No. That is a separate situation. The definition that we work under is a bit loose but any brain injury acquired after birth, so even during birth—lack of oxygen, for example, during birth—we would include.

The Hon. MICHAEL VEITCH: Some of the things that the Committee has been mulling over, and has been posed on a few occasions, are the various definitions that are used for intellectual impairment, cognitive impairment, mental impairment, and whether there needs to be a clear articulation of that in the Act and legislation and/or whether there should be a definition of capacity?

Ms MERTON: I would think it would be more important to talk about capacity. The reasons behind your limited capacity while important are not quite so important as your actual capacity to make a decision in this context, I would think.

The Hon. MICHAEL VEITCH: How do people with acquired brain injury find themselves in front of the Guardianship Tribunal? What is the basis for individual cases being taken to the Guardianship Tribunal?

Ms MERTON: Of course everybody is different and, as I said, the extent of disability as a result of injury is very different. You can have people who are in a permanent state of coma, through to people who function reasonably well physically but just do not have the cognitive ability to understand the nature of a decision and the consequences of the various options, or you may have people who may have some understanding of that but who may have difficulty in communicating their response or their decision. Depending on their circumstances, the support around them and what decisions they maybe facing, there are a number of different ways in which they may encounter the guardianship system.

The Hon. MICHAEL VEITCH: What are some of the issues then that people with acquired brain injury would raise about their experience with guardianship and the Public Trustee?

Ms MERTON: Currently?

The Hon. MICHAEL VEITCH: Yes.

Ms MERTON: A lot of frustration, I think. A key issue for us, as I started to say before, is the change in cognitive ability over time. A tribunal hearing may occur when someone has quite limited cognitive ability but then only a few months later, or a year later, they may have recovered quite significantly to be able to take part in their own decisions. Having decisions or orders reviewed is such a complex process, particularly if it is through the courts—that is another issue we wanted to raise. If someone has an order through the courts it is such a difficult process to get that reversed or reviewed. So people find themselves stuck in these situations when at a later point they can make decisions, or people around them can assist them to make decisions, but they are still under the order. Either they do not realise that they can go and have the order reviewed or challenged, or they just find the process too intimidating or difficult to go through.

The Hon. MICHAEL VEITCH: What would the view of the Brain Injury Association of New South Wales be about the move towards assisted decision-making as per the United Nations convention, as opposed to our current substitute decision-making processes?

Ms MERTON: It is a good question and certainly one we fully support; bringing in assisted decision-making as far as possible into the practices and the legislation and where substitute decision-making is there as a last resort—we fully support that. I have given this a bit of thought in preparation for today, and speaking with some people, we thought that the actual process of getting that into legislation is a complex and fraught question and there maybe better heads than mine that can come up with how that can be done in practice, but maybe—going in to some of the other questions you have asked here a little bit too—if there were processes where the Public Guardian could be involved earlier in the situation in a proactive way, or a Public Advocate if that is the path that we go down, whatever processes are in place, to intervene earlier maybe it is at that stage that assisted decision-making should be used as much as possible, and a guardianship order means that substitute decision-making is in place but that is only in place as a last resort. That is one possibility.

There may be ways that certain degrees of assisted decision-making could be brought into the guardianship order processes, but our feeling is that it would be so resource intensive that the Public Guardian's function, or whichever office takes that on, would have to be expanded considerably and resources put in to make that possible. That would be a good thing, a positive thing that we would support but worth bearing in mind I would think.

CHAIR: Are you saying that the word "guardian" is not universally acclaimed? Is there better terminology? Is "advocate" better terminology?

Ms MERTON: Guardian is probably not the ideal word. I do not know what the ideal word would be.

CHAIR: Language has a big bearing on the feelings of people.

Ms MERTON: Yes. Guardian does suggest somebody looking after every aspect of your life all the time and being there when you need them.

CHAIR: It has a Big Brother concept about it in the minds of many people?

Ms MERTON: It does rather.

CHAIR: Has the organisation given any thought to the language that is used in the area?

Ms MERTON: Not really, to be honest. However, we would be happy to do so. This issue is not exactly related to your question, but the new name of Trustee and Guardian is very confusing. It would be good to change that.

CHAIR: That is starting to come out in evidence.

The Hon. MARIE FICARRA: I have a question about your client base. You said that if people suffered oxygen deprivation or acquired brain injury as a result of childbirth those clients would be covered by your organisation. Is there a reason that you do not cover congenital or any other types of injury? How do you distinguish whether a client acquired brain injury during childbirth, or whether a child who was born with some sort of congenital disease has brain injury as part of its syndrome? How do you distinguish between the two?

Ms MERTON: We are not too hardline about these things. Generally, our view is to be inclusive. If somebody needs assistance and he or she has a brain injury we will not ask at that level of detail about how it happened.

The Hon. MARIE FICARRA: You are prepared to represent them?

Ms MERTON: Indeed. A lot of the barriers that people face—or they have done until recently—include not getting a service, say, from the Department of Ageing, Disability and Home Care [DADAHC] if they acquired their injury in a certain way, or within a certain time frame. That has been a real issue for many people. I know that DADAHC is changing its criteria, but the principle of excluding people based on how they acquired their injury is not one to which we would subscribe.

The Hon. MARIE FICARRA: Do you set any criteria or undertake any medical assessments? How do you take on a client that presents to you and that states, "I have a degree of brain injury?" How do you ascertain whether or not a client has a brain injury?

Ms MERTON: It depends on the service with which we are providing them. For our case management service, which is our main service delivery, we require some kind of evidence that they have a brain injury. But that can be a doctor's letter. We accept various forms of evidence for that. We do not require any evidence for our advocacy service or our general information line.

The Hon. MARIE FICARRA: I refer to the important issue of fluctuating capacity, as that is something that can occur for your clients. Is their fluctuating capacity for decision-making a challenge for you in your representations of them?

Ms MERTON: Potentially it could be. Often it is not a major challenge because our staff members are trained and are aware of the client group and the individuals with whom they are working. They are looking out for clues when capacity is less. Part of what we do is to involve people—carers, family members, and whoever else—in that person's social network that can help with those kinds of assessments and decisions.

The Hon. MARIE FICARRA: Do you see assisted decision-making as preferable? Should we rely on that rather than the current substitute decision-making, in particular, taking into account fluctuations of capacity that might occur with some of your clients?

Ms MERTON: Yes, exactly.

The Hon. MARIE FICARRA: I refer, next, to the functions of the Public Guardian—question No. 3 of the questions presented to you. The Public Guardian indicated that section 21A of the Guardianship Act is able to authorise members of the New South Wales Police Force to remove a person under a guardianship order from one place of residence to another. The Public Guardian is now recommending an amendment to specify that police may use all reasonable force. Do you or your organisation have any opinion on that particular amendment? Do you support it or are you against it?

Ms MERTON: In our experience that is not something we have encountered very often—where we see a need for the police to use reasonable force. We appreciate that there might be situations where that might be necessary. However, I think it is crucial to have clear policies and guidelines that clarify for police officers the circumstances under which this reasonable force may be required. The training of police officers is also crucial to this. Another problem that our members often encounter is people misunderstanding their behaviour. People think that they are drunk, for example, when they have balance problems, or when they cannot speak without slurring. People think that they are being belligerent or difficult when they are just not understanding the situation and shutting down. People think they are avoiding or not engaging when it is just a matter of them feeling overwhelmed. If the police are to have those powers, as they do now in other contexts, they need proper guidelines and training so that they understand the people with whom they are working.

The Hon. MARIE FICARRA: You made a good point. Another amendment that the Public Guardian is seeking to achieve is to be able, proactively, to investigate matters when he or she becomes aware of a vulnerable person in need of a guardian. Would you or your organisation be supportive of that proactive ability to step in and investigate?

Ms MERTON: Yes. We would support that. If work is done early—early intervention and picking up crises early—issues can be resolved and conflicts can be mediated or worked upon. If you get good advocacy and good intervention early on, no matter who does it—whether that is the role of the Public Guardian or the role of somebody else—it can save a lot of angst later. It also helps to maintain a person's rights. People have a right to access advocacy and to access help at the times that they need it.

The Hon. MARIE FICARRA: Would you have an opinion about the need for a guardianship order to be in place so that the Public Guardian is able to intervene? That is another amendment that is being sought.

Ms MERTON: Sure. In many cases a guardianship order can be avoided. If you have that early intervention you can resolve problems early and put in place some systems. If the Public Guardian could act without a guardianship order being in place I think that would be a positive thing.

The Hon. MARIE FICARRA: I refer to question No. 2—another question that you have been sent—relating to guardianship and financial management orders. From your experience are there any ways in which people with acquired brain injury interact with, or are treated differently from, persons with any other disabilities by, say, the Guardianship Tribunal or the New South Wales Trustee and Guardian? Are there any differences?

Ms MERTON: In our experience they have not been treated differently. There certainly have been inconsistencies, depending upon whom you get, on what day, and so on, but not as a group. So far as we have ascertained there is no differential treatment.

The Hon. MARIE FICARRA: There is a good understanding of the behavioural issues that you were talking about earlier relating to the New South Wales Police Force. I imagine that many service providers should have an understanding of that sort of behavioural awareness—how brain injury can manifest itself.

Ms MERTON: That is right, yes.

The Hon. MARIE FICARRA: Do you believe there is adequate training about what to expect with your client base?

Ms MERTON: I have to say that that has been variable. Some people have been treated well by the New South Wales Trustee and Guardian—formerly the Office of the Protective Commissioner—and others have not had a positive experience at all. Even the call centre process is difficult. People ring up and get a different person each time and they have to re-establish their story. They get a different response each time, different levels of expertise and different levels of rapport. That can be an issue. I am sure that is not unique to people with acquired brain injury. I think that is probably across the board.

The Hon. MARIE FICARRA: They cannot ring the call centre and be put through to a case manager, whom they have already built up a rapport?

Ms MERTON: My understanding is once a person is assessed as having a complex enough situation that they do have a specialised staff member. That is the case for people with a more complex range of circumstances, but not for everybody who does not fall into that category.

The Hon. TREVOR KHAN: We had specific evidence on that yesterday.

The Hon. MICHAEL VEITCH: My experience with disabilities has been that a common mistake is to assume that every person with acquired brain injury has exactly the same manifestations when, in fact, they may have one or some but rarely all of the problems that you alluded to. What is the degree of understanding of the guardianship order by the individuals upon whom the order is placed?

Ms MERTON: Again, that varies a lot. A lot of people have a low awareness of what the guardianship order means. Certainly for some people with acquired brain injury, they may not remember or they may not fully understand. One of the common ways of working with people with a brainy jury who have a memory difficulty is to keep reminding them, have written triggers and prompts and have information in a place where the person can access it to trigger the memory.

The Hon. MICHAEL VEITCH: My next question arises out of comments made yesterday about the presence of advocates at the tribunal. We have heard conflicting evidence as to whether advocates can be present, the number of advocates permitted and whether the advocates who do attend the hearing are recorded. From the perspective of your organisation and constituency, is there an understanding of how many advocates can be present? In relation to the process of the tribunal hearing do you know whether an advocate can be present or how many advocates can be present?

Ms MERTON: No. A lot of education is required to help explain to people about their rights and the processes.

The Hon. MICHAEL VEITCH: This is a completely different issue, which the Hon. Trevor Khan raised yesterday. I am still grappling with it this morning. It relates to someone with a power of attorney, even an enduring power of attorney. In the case of your constituencies where an acquired brain injury can be dramatic—a split-second car accident, a football incident, a hit in the head—and dramatically they find themselves with a whole range of issues, if they have a power of attorney in place before the accident and find themselves at the Guardianship Tribunal, what happens to the power of attorney post the guardianship order?

Ms MERTON: I do not know. That is a good question. Tying in with what you were asking the earlier speaker, which I listened to, even setting an enduring power of attorney, your wishes may change over time anyway. So there might be a need to review those documents over time in anybody's course of life. That is a good question. I have not considered that one. What is the answer?

The Hon. TREVOR KHAN: You might consider whether there is a need for the making of the order if there is an effective power of attorney in place. That is one of the questions the tribunal is likely to consider. Have you had much experience before the tribunal?

Ms MERTON: No.

The Hon. TREVOR KHAN: Have you been involved in the tribunal at all?

Ms MERTON: Personally no, but certainly staff from our organisation have.

The Hon. TREVOR KHAN: I am interested in the suggestion of a right to have legal representation before the tribunal. Let me posit this to you. A party to the proceedings may not necessarily be the person who is affected with the incapacity. It can end up that various family members with competing expectations and interests seek to be parties before the proceedings, is that right?

Ms MERTON: That is right.

The Hon. TREVOR KHAN: One family member may say, "He cannot handle his affairs", and another family member may say, "He is as good as the rest of us." Have you seen that happen?

Ms MERTON: Not exactly in that context, but certainly that scenario of conflicting views.

The Hon. TREVOR KHAN: Should family members in those circumstances have legal representation before the tribunal? I can understand in terms of the party who is affected. But in terms of family members, who perhaps are having an interfamily squabble, is it appropriate for them to be legally represented? Do you have a view on that?

Ms MERTON: Are you suggesting that different family members each have their own legal representation?

The Hon. TREVOR KHAN: It seems to be one suggestion that if you become a party to proceedings you are entitled to legal representation. As a lawyer I can understand the benefits of having as many lawyers in the room as possible!

The Hon. GREG DONNELLY: The worry is that was not a joke.

Ms MERTON: It is a good question. I do not know if I can come up with a very sensible response at this stage. I can see both sides. Certainly having an advocate or a legal representative if you are a party to a hearing, a tribunal, would be of great benefit. But I am uncertain about the benefit of potentially everybody having their own representation. That may overshadow any representation that represents what the actual person wants, what their wishes are.

The Hon. TREVOR KHAN: Do you want to take it on notice and if you develop a view, or your organisation develops a view, you can get back to us?

Ms MERTON: Yes.

The Hon. TREVOR KHAN: Going to the issue of brain injury—and perhaps drawing a little on personal experience—I am sure it is not limited to stroke victims, but my understanding is depending upon the area of the brain that is damaged there can be effects upon perception that may be complex. For example, depending on whether it is a left- or right-sided stroke—if I can use that example—the stroke victim may have a skewed perception of their physical capacity. They may believe they still are capable of walking when they are completely prone in a bed. Have you heard of that?

Ms MERTON: Not exactly that example but certainly, yes, that your perception can be considerably altered. This is one of the points I was going to raise. If you are using a person's previous choices or previous lifestyle as a basis upon which you can make a decision about what they might do now, their situation can be so different and their capacity to not just make decisions but to function in a way that represented their former life can be so different, but their perception of that may not align with their current capacity. They are very challenging situations where you need very trusted people, preferably close family or friends or community to that person, to help work through those decisions.

The Hon. TREVOR KHAN: I will come back to the capacity issue. I refer to a number of witnesses who have given evidence and again my personal experience. We talk in terms of advocates and the like, but there has been very little talk of families and support for families. From personal experience, my mother spends eight hours a day with her husband, my father, keeping him company, even though he is severely affected. An advocate cannot perform that role in any shape or form.

Ms MERTON: No.

The Hon. TREVOR KHAN: Yet advocacy organisations have spoken so much about the patient-client, but the one who in a sense suffers at least equally is that person who sits for eight hours by the bed. What services are available for that person? What support is there for that person?

Ms MERTON: Not nearly enough. Many a carer-advocate will tell you in great detail about the lack of services and the lack of recognition for carers and family members who, essentially, in many cases give up their own lives, their own ambitions and the things they want to do to care full-time for somebody because there are not respite services for them to turn to and there are not support services for carers. You are right. The other part of your question was about how can an advocate then be the representative when the family member has much more of that direct experience. In the case of acquired brain injury we really need advocates who can develop good rapport with family members as well as the person concerned with the brain injury. The advocacy is about standing beside somebody to represent them. It is not talking for them; it is helping them to represent themselves. If it is a family member who is representing because the person with acquired brain injury cannot represent themselves, then the advocate is there to speak for them or to help them speak for themselves, whatever is appropriate in that case. It is about being sensitive to that person's experience in a way that can actually benefit a process such as this, which can be intimidating and frightening and overwhelming to family members who are already overwhelmed with their experience.

The Hon. TREVOR KHAN: I will again put on my legal hat because it will give me some degree of protection. If we can talk again about the capacity and perception issue, I am interested in your comments with regards to how one measures up or balances the altered perception state with what may otherwise be mental capacities in other areas that are quite advanced, still functioning quite well, but in a sense are in an awkward state of perception of what that person is actually able to do. Do you understand what I mean?

Ms MERTON: Yes, I do. It happens. It is not that common. I keep coming back to the people around the person. If there are people around the person who can work with that person to help them understand their current opportunities, abilities and capacity and also to access services—they may be mental health services or similar—to help the person with the brain injury discuss and work through their current life and how it is different from their previous life, they are the things that can be lacking. We talked before just briefly about shortage of services. There is such a shortage of case management and care coordination services for people with acquired brain injury and specialised services that understand the nature of the brain injury and how it interacts with other things that may be going on for that person. A person in that situation may need quite intensive services for a short time until they can recover to a certain point to understand the situation they are in. That probably does not quite answer your question.

The Hon. TREVOR KHAN: No. I am relaxed. I will leave it to others.

Ms MERTON: Okay.

The Hon. GREG DONNELLY: Thank you for your evidence; it has been very insightful.

Ms MERTON: You are welcome.

The Hon. GREG DONNELLY: I will ask you a question I have asked other witnesses over the course of the last day and a half about the notion of "best interests". You have been giving evidence for about 25 minutes this morning and I have not heard you use the phrase "best interests". I am not saying that as a criticism, but yesterday we heard it several times from various witnesses. I struggle to understand with precision what that phrase actually means. I have two questions. First, are you able to define "best interests" so we can understand what it means? Second, in your role as an organisation do you see and observe instances where you find it is more your judgement that people are advocating a position on behalf of someone that you would judge would not be in their best interests? In other words, there is a real competition between views about what is in the person's best interests?

Ms MERTON: Just harking back to the discussion before about language, I read something interesting about best interests being a paternalistic-type concept. It actually rang a little bit true to me. It means more to me personally to talk about that person's health and wellbeing and what makes up their world and what makes up their ambitions and their goals. It puts a slightly different slant on it for me. I find it a bit easier to think about health and wellbeing and what someone might like to have in their life as opposed to the best interests that almost seems like it is, you know, "This is for your own good."

The Hon. GREG DONNELLY: Putting aside the phraseology or the language you use, if you apply both those notions do you come to the same end point in your position?

Ms MERTON: Probably.

The Hon. GREG DONNELLY: So it is really a preference in language?

Ms MERTON: Yes, okay.

The Hon. GREG DONNELLY: Whether we call it health and wellbeing vis-a-vis what might be seen at least by some as a bit more paternalistic best interests. How do you define it?

Ms MERTON: I think the important concept is to have the person at the centre. We do come across many a scenario where you have relatives and carers and people around who say we need to do this thing, it is in the person's best interests. It is a vague and loose term. Obviously they are bringing their own values and judgement into that term. The same could be said for health and wellbeing. I think we are coming back to the same point. It just seems to be a phrase you can use that gives credit to what you are trying to say: We will do this because it is in their best interests.

The Hon. GREG DONNELLY: It validates it?

Ms MERTON: That is right. If you have two different family members or people around that person both saying this is in their best interests but they are saying different things or opposing things, then in practice that is a very tricky situation to work through.

The Hon. GREG DONNELLY: That leads me to my next question. Do you observe that to happen frequently or infrequently?

Ms MERTON: Yes, certainly. Or it may be that the person themselves has a view of what they would like to do and a family member has an opposite or different view. There is no easy answer to that. It is about working through what the issues are and where everybody is coming from and the possible consequences of all the things and options at play.

CHAIR: Do the conflicting views usually revolve around some pecuniary interest?

Ms MERTON: It is often around, yes, certainly money, estates and things like that, but often around accommodation. That is a big one. Where should the person live? Or is the person capable of finding a job or doing some voluntary work? We find a lot of family members hold back a bit. They are a bit protective: "Oh no, we mustn't allow that", but the person may want to try to do different things. So, it is working through that.

CHAIR: Concerning the conciliatory function of the advocacy tribunal, or the Guardianship Tribunal, and some additional role of conciliation that enables it to examine certain areas and make decisions where there is conflicting family advice about pecuniary issues or certain other issues, do you see any role for the association in being an advocate, or do you see a person or organisation perhaps having a special advocacy role in a conciliatory tribunal?

Ms MERTON: Yes, certainly, if that is something that the person with the acquired brain injury in this case would find useful and helpful.

CHAIR: Or as an adviser to the tribunal?

Ms MERTON: An adviser to the tribunal? That is a different question, is it not?

CHAIR: Yes.

Ms MERTON: Certainly.

CHAIR: Not an adviser in relation to the individual, but an adviser as to—

Ms MERTON: As to how to work with people with acquired brain injury? Yes. We certainly do that in other contexts. Awareness raising and helping people to understand the nature of acquired brain injury and how it impacts on people is at the heart of what we do.

The Hon. GREG DONNELLY: Just following on from my earlier question, in many of the examples presented both yesterday and today and probably some of the examples that your organisation deals with, they are matters of humanity in the rawest terms of human nature, human emotion, our feelings and the whole human person, not just of ourselves but between ourselves, particularly in intimate family relationships. Given that that is the nature of what we are dealing with here, and given best interests or welfare-health, what advice do you give back to us, as a Committee that is examining the whole issue, as to how we ultimately make recommendations to government to legislate in this area? What is your recommendation about how we try to come to terms with this?

It seems to me it is innately difficult to prescribe the legislation, regulation, provision and even guidelines to deal with some of these things. Do you have a view back to legislators about how we plumb some of these depths and fathom some of these issues? Personally I find it very difficult to see how anyone can be black and white on this.

Ms MERTON: Yes.

The Hon. GREG DONNELLY: I may just say that some people come before this Committee and are quite clear in their mind about what we need to do. I must say that I am not persuaded by that approach. Do you have a view?

The Hon. TREVOR KHAN: Do not be too dogmatic on the basis of the last question.

CHAIR: How long is a piece of string?

Ms MERTON: I just come back to principles, which I know can sound a bit vague. I am not a lawyer and I am not a legislator, so I cannot speak in those terms.

The Hon. GREG DONNELLY: It probably puts you at a distinct advantage over many people who have come before us so far.

Ms MERTON: Absolutely.

CHAIR: That might be a bit unfair.

Ms MERTON: If we can get into the culture of how the whole guardianship system works, how people who encounter that system are treated and dealt with, and if that culture can be one of assisting people to make decisions with flexibility, responding to individual needs and circumstances and change, that is the kind of end point, as I see it. How you legislate for that is the challenge, I know. As I said, I do not have the answer to that.

The Hon. GREG DONNELLY: But you are saying it is important.

Ms MERTON: It is important.

The Hon. GREG DONNELLY: You are clearly saying that really, before we start looking at the hard edge of the law, we really do need to get our minds around what are the principles that should be underpinning our thinking on the nature of this legislation.

Ms MERTON: I think that is absolutely it. Yes, I think so.

CHAIR: I am mindful of the time. Unfortunately we have gone over time. Thank you very much for your time this morning. It is has been very helpful.

Ms MERTON: You are welcome, thank you.

The Hon. GREG DONNELLY: And thank you too for the great work your organisation does.

The Hon. MARIE FICARRA: Yes.

The Hon. MICHAEL VEITCH: Thank you.

Ms MERTON: Thank you very much, and good luck with the process.

(The witness withdrew)

JANENE COOTES, Executive Officer, Intellectual Disability Rights Service, Suite 2C, 199 Regent Street, Redfern, 2016, and

BENJAMIN FOGARTY, Principal Solicitor, Intellectual Disability Rights Service, Suite 2C, 199 Regent Street, Redfern, 2016, sworn and examined:

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

Ms COOTES: I appear as the executive officer of the Intellectual Disability Rights Service. I mention also that I am a community member of the Guardianship Tribunal, but my answers will be given from the point of view of the Intellectual Disability Rights Service today.

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

Mr FOGARTY: Yes, I would, thank you. Firstly, we would like to acknowledge the traditional owners of the land on which we meet, and pay our respects to their elders, past and present. On behalf of Janene and I and our service, I thank the Committee for inviting us today to speak further to our submission and give evidence to the inquiry as well as address any specific questions the Committee has. As a preliminary matter, I inform the Committee that we do not have any amendments or additions to our submissions that were lodged on to 21 August 2009 and currently are published on the Committee's website.

In summary, we support the Committee's inquiries and its review and feel there is a lot to be done to ameliorate the experience of people with intellectual disability under the formal guardianship and financial management regimes in New South Wales. We consider some improvements can be achieved by statutory amendment, but at the same time we feel strongly that where informal arrangements are working in a safe, accountable and beneficial way—and this is what happens for the majority of people with intellectual disability who are cared for by their family, friends and support network, from our experience—there should not be greater statutory regulation and bureaucratic overlay.

The Intellectual Disability Rights Service [IDRS] feels that many of the problems experienced by our clients in the area can be fixed only by better resourcing, funding, and training of existing government organisations, and individual advocacy organisations that we would say know our clients best, so that our clients receive individualised, engaging and accountable guardianship and financial management services.

For the record, our is a community legal service that provides free legal services to people with intellectual disability across New South Wales. The service includes the provision of telephone legal advice and legal representation in a wide range of areas, including guardianship and financial management for both clients and sometimes as a separate representative at the tribunal. While our focus is intellectual disability, we do provide legal advice, but not ongoing representation, to people with acquired brain injury and other developmental disabilities like Aspergers and autism owing to the lack of specialist advice centres for those people in New South Wales. Obviously, we also engage in policy and law reform work and community legal education with a view to advancing the rights and autonomy of people with intellectual disability. Our service also has the Criminal Justice Support Network, which supports people with intellectual disability in the criminal justice system, usually at police stations and before courts.

Our work involves promoting the human rights of people with intellectual disability so that they can make their own life choices, live independently and with dignity and have equitable access to justice. The IDRS hopes that a human rights perspective will govern this inquiry, its recommendations and its flow-on outcomes. Most of the IDRS clients live independently and make most, if not all, decisions about their lives for themselves. Some clients require some assistance with some decisions about their lives on some occasions. Often assistance is provided by way of an informal arrangement between the person and trusted family members and/or friends who have a genuine interest in the welfare of the person and who have an ongoing relationship with them. Other clients are under more restrictive formal arrangements such as guardianship and financial management orders, and we acknowledge that in certain cases they are necessary.

I will focus on the five main points and the thrust of our submission. The first is our philosophy on decision-making. People with intellectual disability are autonomous and independent human beings with wishes, hopes, likes and dislikes just like any other person in our society. Just because a person has an intellectual disability does not mean they cannot make decisions for themselves. In our experience, too often people, businesses, professionals, government agencies, courts and tribunals presume people with intellectual disability cannot make decisions for themselves. Secondly, again from a philosophical point of view, decision-making should be regarded as a spectrum with complete autonomy at one end—which should be the default—and substitute decision-making at the other. In between there should be a scale of informal or assisted (supported) decision-making that will vary from time to time and from decision to decision.

Thirdly, assisted (supported) and substitute decision-making arrangements in our view do not require formalisation or orders in all cases. In fact, many such arrangements operate best informally within trusted, accountable and loving support networks. For that reason, the IDRS does not support legislating for new regimes or formalisation of such arrangements, but rather considers the focus should be on improving the current regime and processes, much of which we think can be achieved only by the New South Wales Government providing better funding and resourcing.

Fourthly, we feel there should be a statutory-based public advocate, as exists in a number of other jurisdictions in Australia, to act as an independent and powerful voice for vulnerable people with disability, including those subject to guardianship and financial management orders but not restricted to that purpose. The public advocate could scrutinise and take action against government agencies to promote and protect the rights of persons under guardianship and financial management orders and could affect systemic improvement in those areas. We see the systemic improvements as the focus. Lastly, and importantly, there needs to be an automatic, regular, periodic review of financial management orders in New South Wales as occurs already for guardianship orders. We welcome any questions the committee has arising from our submissions or more broadly.

CHAIR: Thank you for a very comprehensive submission.

The Hon. TREVOR KHAN: I refer to the periodic review of orders. We dealt with this issue in part yesterday. If a person has what seems to be a permanent problem, whether it be dementia, the effects of a stroke or some other problem of that nature, what do you see as the benefit of a review before a tribunal of that person's capacity?

Ms COOTES: It may not be as important for people who have a deteriorating condition like dementia. We are focusing very much on the people we know with an intellectual disability where the person's disability may not change but their capacity to learn and develop new skills is crucial. The person's circumstances may also change. Somebody may be in a situation where informal assistance with financial matters is not available, but they might then move to a different situation where there is good informal and trustworthy support. It is not only the person's capacity that is at issue but also their circumstances. We have made the point that need should be a consideration. With changing circumstances the need for a formal financial manager might change as well. We hear about the cases where financial management has not worked well for someone and where the frustration of a management order has led the person into criminal behaviour. We feel it is very important for the protection of the rights of the person that there is a review. It may not be an annual review; it may be over a longer period and it may vary from one person to another depending on how much you anticipate change in their circumstances. However, we think that review is crucial for our clientele.

The Hon. TREVOR KHAN: You would understand that we have to look at the broad spectrum of people who are the subject of orders. We heard yesterday that the largest group of people subject to orders are those suffering from age-related dementia of some sort and that that group is growing at a significant rate. If that is the case then by far the greatest percentage of people who are going to be covered by these orders are people in a deteriorating situation due to age. Were the committee to recommend that, for instance, an order can be for only five years, how do you see the tribunal operating?

Mr FOGARTY: I cannot answer that from a resource perspective. The tribunal is overladen with work already. My concern is typecasting a person as either/or and saying that he or she has dementia so we will not review the order. That is the concern from a philosophical perspective—once you are under this you are under it for good. Again, looking at the spirit of the United Nations Convention on the Rights of Persons with Disabilities and our disability discrimination laws, there has to be an opportunity for all those people to be reviewed. To assist the logistical side of things, a flexible approach as to when a review is undertaken is one way to alleviate the problem of having one every year for a person whose cognitive capacity is so severely impaired. Based on those principles, you need some review of every person going there under financial management.

The Hon. TREVOR KHAN: Is it correct that even if an order is made there is a capacity for that decision to be reviewed at any time?

Ms COOTES: There is a capacity for it to be reviewed at any time. It is very difficult for our clients to initiate a review because of their disability.

The Hon. TREVOR KHAN: I understand that.

Ms COOTES: For many of them who might want and need a review it will not occur if it depends on their initiating it. The tribunal can order reviews of financial management orders as things stand.

The Hon. TREVOR KHAN: And regularly do, do they not?

Ms COOTES: It is much more the exception than the rule. I guess I am saying that from my position as a tribunal member. An approach might be that the tribunal, if it does not order a review, should have to say why so that that made the tribunal think about that issue, if the tribunal was required to justify not reviewing it. Whereas I think I could say that, because of the sort of concerns you raise and because of history, I think it is now more that the tribunal justifies reviewing rather than justifies not reviewing. I would like to see that onus perhaps changed.

The Hon. TREVOR KHAN: Reversed.

Ms COOTES: Yes.

The Hon. TREVOR KHAN: Your submission is excellent and detailed. I would like to deal with a lot in it but I will be cut off by the Chair. There has been a submission made that every party to proceedings before the tribunal should be entitled to legal representation as of right. As a lawyer I have some concerns with that approach in the context of people who seek to become parties before the proceedings. If, for instance, multiple family members with competing expectations and desires in terms of a person were to have legal representation, it could be an interesting and complex piece of litigation. Do you have a view as to whether family members, firstly, should be parties to the proceedings, as opposed to witnesses; and, secondly, if they become parties to the proceedings should they be entitled, as of right, to legal representation?

Ms COOTES: I think that would be very unfortunate if everyone was entitled as of right to legal representation. I suppose again I am more speaking from my Guardianship Tribunal member hat. There is a lot of conciliation that happens in hearings. I think that some of the very good things that happen in hearings might not happen if everybody was legally represented. Also, it just would make it a very drawn out and expensive procedure, much more than it is at the moment. It is important that if the person with the disability wishes to be legally represented—

The Hon. TREVOR KHAN: I was quite clear about who I was talking about.

Ms COOTES: Yes, I noticed. So you do not need that point made, but I think it is important that leave would be given or that was considered a right for the person with disability.

The Hon. TREVOR KHAN: I am interested and accept your submission in regard to the section headed, "Problems experienced by IDRS clients under guardianship and financial management". What is portrayed there is a disconnect, in a sense, between the client and the trustee and guardian, or whichever the organisation is. Am I right, firstly, that much of this is done at arms length, essentially over the phone or by correspondence? Is that the general position at present?

Mr FOGARTY: That is the experience of the clients I have worked with, yes.

The Hon. TREVOR KHAN: It is a long time since I have done it but that was my experience, but I came from the country so I assumed it might be because of the bush. If that is the case, what I am interested in is this. If the public system fails the client, is arming or creating public guardians and the like, additional public bodies to look after people, simply in a sense repeating the same error, that we create figurehead bodies that then fail to meet the clients? If not, why not?

Mr FOGARTY: Can I ask a question? By "creating other public bodies" do you mean a public advocate?

The Hon. TREVOR KHAN: Yes, for instance, a public advocate. Do we in a sense create a title and somebody who will earn $200,000 a year but they do more in name than in substance?

Mr FOGARTY: To be honest—

The Hon. TREVOR KHAN: That is what I hoped you were going to be.

Mr FOGARTY: My knowledge of public advocates in other jurisdictions is not extensive at all. I have recently written a paper where I did some research but I could not find a lot; then I did not go to the jurisdictions and research intensively. I think there is value in a public advocate who raises those systemic problems. These sorts of problems come up time and time again, and I think you need that sort of body to raise them with other government bodies and to get it on to the public wavelength. I do some complaints to the Ombudsman and I think sometimes when I would make complaints—I have not specifically in this regard but I think I could craft an argument perhaps under the community services of the Ombudsman that might look into that, but I think a stand-along disability-specific public advocate would add because I find some of the complaints, with all due respect to the Ombudsman, I think the resources in that section are quite stretched and I do not think it gets the attention it needs. So I see the value in it being an advocate who understands disability and focuses on that and looks at the systemic issues and our organisation and other advocacy organisations can come to and say, "Look, we've had five clients, the same things is happening, same office. We need your help."

The Hon. TREVOR KHAN: In light of the problems that you identify as existing with people under orders, it seems that the conclusion you have to draw is that the advocate could not be the public guardian, because it seems that the advocate may be overviewing and being critical of the role of the guardian. Am I right?

Ms COOTES: I think that is a fair point, yes. In other States those roles are combined. I guess if you want a public advocate who could also comment on the problems of people under financial management with that system and people under public guardianship, it could not be the same.

The Hon. TREVOR KHAN: If in fact the most vulnerable group is being let down, then putting the two hats on is disentitling the most disadvantaged, is it not?

Mr FOGARTY: Yes, and there is probably that perception as well, and I think it is a perception, again with all due respect to the Ombudsman, that some of my clients have when you take, for instance, a police complaint. I then tell my clients, "The police have gone back to look at it". I guess there is a concern that the police are policing the police. That apparent bias may also come up.

The Hon. TREVOR KHAN: It is not only your clients who would have that view.

Ms COOTES: I think one thing we would like to stress is that the value of local advocacy organisations in advocating for individuals with disability, which often means that the need for guardianship can be avoided, we think that has a lot to be said for it. But there is a geographical spread throughout New South Wales of advocacy organisations. We have some concern about extending bureaucratic organisations to meet individual needs and the limitations of that. I guess we would stress that the principles in the Guardianship Act are not always carried out by those organisations and that that is a very important factor. The principles should underpin any bureaucratic or non-government acting under this Act.

CHAIR: You mentioned earlier in your other capacity as a tribunal member that on some occasions you play a conciliatory role. Is there a conciliation section within the tribunal, or do you just do it ad hoc?

Ms COOTES: There is no conciliation section. Conciliation happens within the hearing process. It is not always formal conciliation, but the thrust of a hearing is usually to see if people can focus on the interests of the person who is the subject of the application and come to some agreement.

CHAIR: Do you see any value in a conciliation section of the tribunal which may enable, without creating a monster, interested parties to express a point of view in a conciliatory environment as opposed to an arbitrary environment?

Ms COOTES: I think that is certainly worth considering. That is very much a personal opinion based on my experience as a tribunal member. It is a very valuable function that the tribunal carries out but it is not so formal as a lot of other conciliation bodies.

CHAIR: It may inform the tribunal, not necessarily deciding on capacity as such but obtaining information on interested parties?

Ms COOTES: In a lot of conciliation processes it is separated from the judicial function, and that is partly to free people up to say things that, if conciliation does not work, will not be used against them in later proceedings. I am not sure you could rely on information achieved through conciliation, but it may have a purpose to—

CHAIR: Inform?

Ms COOTES: Yes. and to try to get people to think about issues outside the judicial process.

CHAIR: If the role is to go to the best interests of the vulnerable person, if your whole concept is to assist in coming to that conclusion, obtaining the views in a conciliation forum, obtaining the views of possible competing parties, would it be helpful—it may not be, I am asking you—does it assist in allowing people the ability to express a point of view?

Ms COOTES: I think a lot of that is able to happen in hearings now. There may be some value in separating it out prior to hearings occurring. It is just not possible as things stand at the tribunal.

CHAIR: What you are saying is that that happens now?

Ms COOTES: I think it does.

Mr FOGARTY: I would concur with that. It reminds me a lot of the Human Rights Commission style and sense, and the investigators tend to be very good at working out who should be coming and getting people organised.

The Hon. MICHAEL VEITCH: I have only one question left. The pages of your submission are not numbered but I think it is about page 9 or 10. It has to do with the need. You go on in that section to talk about the appeal panel of the New South Wales Administrative Decisions Tribunal, and a decision it made when it noted that:

> … matters have no hierarchy or weighting" although each is a mandatory consideration.

That is to do with section 14 (2) of the Guardianship Act but you then go on to talk about when considering need the tribunal should ask a range of questions which you set out there in bullet points. You submit that section 14 (2) needs to be clarified. Can you talk through that? Yours is the only submission that talks about the need as defined by that, and it is the only submission we have received that talks about the appeal panel of the New South Wales Administrative Decisions Tribunal decision. I would like to know what brought Intellectual Disability Right Service to that position?

Mr FOGARTY: Maybe taking the second part first, in terms of what we meant by some amendments regarding need. One of the alternatives to being put under a financial management order is that a person is in need of such an order. When you look at the ability to revoke that, there is not an alternative, that this person no longer needs that regime or that order. Possibly it gets subsumed into best interests but we think for clarity purposes and to know that is something that can be separate and considered and may be different—and I can think of examples where that would be—that that should be a stand-alone alternative, to say this person should be able to get this order revoked because there is no longer a need. The sorts of situations are the ones where, through hard work from advocacy groups, case management, et cetera, the problems that affected their capacity or the risks at the time the order was made have been alleviated by extraneous support, and therefore the person no longer has a need. I think it overlaps with best interests.

The other concern we have with need, and something that again could come within best interests but perhaps does not, is how has the order affected the way the person has lived? If they have gone through all the problems we have raised, is it in their best interests to continue with, for instance, the Public Guardian? It is terrible, and we have had clients who have wanted to throw things through windows and things. If the frustration is that bad through no fault of their own but the system, is that something that is being taken into consideration when you are looking at the revocation? We say it should be and it could be looked at under best interests. It is not in this person's best interests to have the Public Guardian as their guardian, and there are is no longer a need, there are these other informed mechanisms in place, for instance, financial counsellors the person sees more regularly, who can fill that gap on the need, the need is not there any more. That is what we meant by having a balance between how you get in and how you can get out.

The Hon. MICHAEL VEITCH: The issue for me is that a lot of the submissions spent a fair bit of time talking about best interests and, as you know, there is a lot of legal interpretation around best interests—whose best interests, for instance. Yours is the only submission that goes into detail about need and I am wondering whether need should be placed before best interests or as part of best interests? How does it sit? This is a legal question really, a legal paradigm.

Ms COOTES: I think there are a lot more circumstances where you could have an order that was in the person's best interests but if you are looking at these sorts of orders as the end of the continuum, you probably need to be able to establish that this is the way to resolve the problem. So, there is a need for a formal order that restricts the person's human rights as well as in their best interests, if you see what I mean. There are a lot of circumstances where you could say it is in the person's best interests but is it what is needed? You might take other actions in the person's best interests as well.

The Hon. MICHAEL VEITCH: So it drives the question around capacity?

Ms COOTES: Capacity, and whether there is any less restrictive way to resolve the problems that are presenting. So, need is that a formal legal order is needed in order to resolve this situation that has brought the person before the tribunal. I think one of our other points is that less restrictive ways of resolving a person's problem should always be explored prior to restricting their human rights by making this sort of order.

Mr FOGARTY: On the question about a hierarchy, I think I am reluctant to think of it as there being a hierarchy. I have not really turned my mind to it but as there is an alternative at the start, I would argue so there should be an alternative at the end, to get out that is.

The Hon. MARIE FICARRA: In your submission you recommended that legislation should be introduced to provide that guardians or financial managers be penalised or ordered to pay compensation if they act dishonestly or without due diligence or contrary to the terms of the guardianship order or the financial management order. What has been your experience with instances where this has occurred for you to have made that recommendation to us? Is there something you are seeing occurring more and more without the proper processes in place to stop this sort of abuse?

Mr FOGARTY: In my two years of being at this centre I have not had a specific example where that has occurred. In preparing the paper I recently prepared I looked at all of the other jurisdiction and all of their Acts, and the Queensland Act has some of those provisions in there, certainly penalty provisions. To my mind, and I do not know how often they have been instituted—it is a 2000 Act—again to have that clarity in force behind those roles, and the importance of those roles, I think gives me peace of mind that where those things do occur there is something there to hang your hat on, rather than some sort of obscure administrative law or civil suit in a court for a client where there are costs risks et cetera to try to bring the person into line. I am not sure where Janine has had experience at the tribunal in situations where those things may have occurred. Certainly there is nothing under the Guardianship Act really, from my reading, that says what you can do other than seek for withdrawal of that manager.

Dr JOHN KAYE: Would it then be a normal civil or criminal matter to pursue?

Mr FOGARTY: Yes, from my understanding it would be.

Dr JOHN KAYE: Is your proposal to create another power under which such people could be pursued without necessarily suing them in an ordinary civil court or making a complaint to the police?

Mr FOGARTY: In terms of the penalty provisions that is what I did propose. I cannot recall which jurisdiction—it may even be Queensland—that has more than one jurisdiction provisions as to specifically express as to compensation for breaches of that role. I do not think I have put that in the submission but I could take that on notice and provide that. I do recall seeing it somewhere.

Dr JOHN KAYE: That would be really good because that is an interesting recommendation. In your opening remarks you referred to, I think, the language being used here is proportionality. You referred to the need for a variety of different responses to different levels of capacity. But you then went on to say "But there is no need for a new legislative regime"—I do not wish to verbal you but you can correct me if I am wrong but I think they were your words. You said we have got to get the existing system to work better. Does that mean you believe that with the existing legal structure, the administrative structures, we can actually respond to the variety of levels of capacity amongst people with the existing instruments?

Ms COOTES: We do not think there is need to legislate for people to be assisted to make decisions; that that happens informally through the networks that people have, networks of family, friends and sometimes service providers. Sometimes there is a need for a formally appointed substitute decision-maker but in a lot of circumstances people get informal assistance from trusted people around them. We do not see a need for all of that to be regulated somehow because a person lacks capacity. We think there would be a lot to lose in a system that tried to impose formal decision-making for the sake of tidying it all up, but the system needs to pick up when the informal decision-making is not working in the interests of the person or when there is conflict or when the person's ultimate assisted decision-making is leading them into risk and harm.

Dr JOHN KAYE: When a person comes before the tribunal, and the issue before the tribunal is whether some kind of decision-making is set up for them, are the informal arrangements admissible as evidence? Does the tribunal consider what support exists around them and what has been going on currently?

Ms COOTES: Definitely.

Dr JOHN KAYE: Does the tribunal have the capacity to fine-tune that without it going to the full extent of requiring a Guardianship Order, for example?

Mr FOGARTY: There are no orders the tribunal can make short of making a Guardianship Order. I suppose that is one of the issues the Public Guardian has raised in its submission as to whether the Public Guardian should have some power within the Act which is possibly triggered by referral from the Guardianship Tribunal where the tribunal does not feel that an order is required but there is need for some action to be taken on behalf of the person. That is a role the Public Guardian could take. I know that sometimes people are referred for advocacy assistance from a local advocacy organisation to explore whether that can resolve the problems short of making an order. Because sometimes the person could choose options but there are no options, and sometimes I would think the Public Guardian is appointed in order to find options, for example, often it will be accommodation and support for the person.

CHAIR: We ask that you return answers to the questions on notice within 21 days?

Ms COOTES: Yes.

(The witnesses withdrew)

(Luncheon adjournment)

JIM SIMPSON, Senior Advocate, New South Wales Council for Intellectual Disability, Level 1, 418A Elizabeth Street, Surry Hills, affirmed and examined:

CHAIR: Would you like to make any opening comments before we go to questions?

Mr SIMPSON: I would just like to say a few things. The New South Wales Council for Intellectual Disability is a peak advocacy group for people with intellectual disability, their families and service providers. We have a fundamental belief in people with intellectual disability being able to make their own decisions and run their own lives wherever that is possible. That is reflected in our constitution, which requires that the majority of our board of directors be people with intellectual disability, and we have support structures in place to support people to be able to fully participate in their role as directors.

I would just like to note in the interests of total transparency that I am a member of the Guardianship Tribunal, however I have been involved with the disability advocacy sector over many years and it is very much wearing that hat that I am here today. Having looked at the terms of reference and a lot of the other submissions that have been made, as well as our own, at least in the short term it would seem to me that the biggest priority in terms of reforming New South Wales is to ensure that substitute decision-making orders, appointments of guardians or financial managers are only made as a last resort and in a way that is the minimum intrusion possible on the life of the person concerned.

That already applies to a certain degree but there are ways that that could be made more consistent. I think what that calls for is for better support to be available for people with disabilities to assist them to make decisions for themselves wherever possible and that does not necessarily require legislation. That is a matter of further developing good practice and skills training and so on. There also needs to be more advocacy available for people who either need help to make decisions or who are not able to make decisions but need informal advocacy for them. That includes, I think, the Public Guardian needing to have that capacity to be able to advocate for people without being appointed as a guardian, and that of course would require legislative reform.

The various pieces of legislation that currently cover substitute decision-making needs some reform to achieve greater clarity and consistency that substitute decision-making should only be a last resort and a minimum intrusion. The Guardianship Act is probably the closest to that at present but there are changes that could valuably be made there, including requiring periodic reviews of financial management orders. The other bodies, which are of less relevance to my consistency but none the less sometimes are—the Mental Health Review Tribunal and the Supreme Court—there is clearer need for legislative change there to ensure that philosophy of last resort and minimum intrusion.

The other thing I would just like to emphasise is that for people with disabilities to have maximum control in their own lives, part of that is for them to have maximum input and participation in the tribunal processes that might be questioning whether substitute decision-making is required. Again I think the Guardianship Tribunal is currently the closest to optimum in that respect—anything can be improved but I think it is probably the closest to optimum in terms of its procedures being comparatively informal, the tribunal taking an investigative and often conciliatory approach, lawyers and legalism not being the norm in tribunal proceedings. I think that approach compares very favourably with the general run of other courts and tribunals in the State in terms of what I see as key here—people with disabilities being able to have maximum participation in the tribunal's own proceedings about them.

One final sentence: I think it is just so vital that any legislative reform is squarely acknowledged to call for resources as well because all too often we see legislative reform in these sorts of areas, which ends up being counterproductive because existing bodies are being asked just to do a whole lot more work without more money and so are not doing the job properly and therefore the reform can be quite illusory.

Dr JOHN KAYE: Hear, hear!

CHAIR: With that generalisation, have you made any assessment as to what sort of additional resources you think might be necessary?

Mr SIMPSON: Not specifically, but one example would be if the Guardianship Tribunal was regularly reviewing financial management orders, which it currently does not do except on application. That would undoubtedly have major resource implications.

CHAIR: One of the things that keeps cropping up is the vexed issue of the use of language and the perceptions people get when they hear words like the "Public Guardianship Tribunal". It conjures up in people's minds a bit of Big Brother. Do you see any difficulties with the title or any confusion with understanding titles and language?

Mr SIMPSON: I cannot say that in my sphere, the intellectual disabilities sphere I am aware of any significant difficulties there. I think the role of the Guardianship Tribunal and the Public Guardian is reasonably well understood and generally fairly well respected. The old label of the Protective Commissioner was certainly seen as being anachronistic with the emphasis on protection without the balance that is required between protection and enhancement of the person's autonomy. I think sometimes any label has a shelf life, that after a certain length of time it develops connotations, which means that rethinking is needed, but I would not have thought that was an urgent issue on the issue of guardian at this time.

CHAIR: Is there a reason why you call yourself the Senior Advocate and not the Senior Guardian?

Mr SIMPSON: Because I am advocating for the best interests of people with intellectual disability without any power to tell people with intellectual disability what to do. If I tried to tell the people on my board what to do, they would tell me what to do.

CHAIR: So you see the Guardianship Tribunal as telling people what to do?

Mr SIMPSON: That certainly is part of its role, yes.

CHAIR: It is part of its role?

Mr SIMPSON: Yes. Well, you get a range of situations in guardianship; from people who, unfortunately you are telling them what to do and they, quite rightly, perceive it that way. Quite a common one is an older person with dementia, who is fiercely determined to remain living in their own home and unfortunately the memory and insight loss that goes with dementia means that the person is just not seeing to what degree they are neglecting themselves and placing themselves at risk. Guardianship does sometimes, as a last resort, needs to be invoked to say, "Look, I'm sorry, but you've got to go to live somewhere where you can be better supported."

At the other end of the continuum you certainly also have people whose disability makes them vulnerable to being manipulated and who welcome having someone who will listen to them but ultimately take the weight off their shoulders by making some of the difficult decisions, which a family member or a friend who is taking advantage of them will not like.

The Hon. MARIE FICARRA: We have heard a lot about the need for a public advocate in addition to the current functions and duties of the Public Guardian. We have heard that in Queensland and I believe in Victoria that system operates very successfully. Do you have any opinion as to the worthiness of this proposal?

Mr SIMPSON: I think it is a valuable part of the continuum, if you like. What we see now is that there are situations where the Guardianship Tribunal quite rightly appoints the Public Guardian because that is the only way to get advocacy for a person that the person desperately needs. The Public Guardian is also given decision-making authority, but it is really the advocacy that is the core issue. It would be less intrusive and less formalistic if the Public Guardian could simply assist that individual without needing to go through tribunal processes and without the person's rights being taken away through guardianship.

The Hon. MARIE FICARRA: You see it as a more responsive, less formalised, less intrusive and less intimidating process?

Mr SIMPSON: Yes.

The Hon. MARIE FICARRA: I refer to question No. 2 of the questions that were submitted to you. You note in your submission that the persons making an application to the Guardianship Tribunal may have access to confidential information about the person for whom the order is being sought. Could you give us some additional information about that? For example, could you give us some instances of it? What amendments to the tribunal's procedures would you recommend to address these confidentiality concerns?

Mr SIMPSON: Let me give you an example. You may have an application for a guardianship order relating to a person with an intellectual disability and there might be a whole lot of issues in that. Various people will then provide reports to the tribunal staff, which then go to the tribunal at the hearing. In one of those reports a social worker might relate that the person with the intellectual disability has developed a comfortable and confiding relationship with that social worker and has told the social worker about some things that have happened in the family about which the person is very unhappy. People might tell the social worker about some sensitive medical issues on the basis that, whilst they love their family, they need to be able to talk to someone else about the issues and they do not want them to get back to the family.

Procedural fairness, in its strict sense, may mean that the tribunal has to divulge that report to a family member who is a party to the proceedings. Sometimes that might be necessary because those issues might be central as to whether or not a guardianship is needed. But in other cases it may be fairly plain to the tribunal that it needs to go down certain path anyway, and it just does not need to get into that. It is not so much a matter of tribunal practice, as the tribunal tries to accommodate those sorts of situations; it is more a matter of the legislation needing to make it clear that the tribunal can do that where the person's interests require the tribunal to withhold certain information or to put it to one side.

The Hon. MARIE FICARRA: At the moment that power does not exist for the tribunal or for the Public Guardian to divulge certain facts or issues of a confidential nature. You cannot do that as that could fall into the hands of other interested parties who might be affected by those comments? There is no power to do that at present?

Mr SIMPSON: No clear power. There have been cases where the Administrative Appeals Tribunal has given the Guardianship Tribunal a bit of a caning, for example, for being reluctant to disclose a whole lot of personal financial records to the applicant where the tribunal had some real concerns about whether the applicant was on a fishing expedition for ulterior interests.

The Hon. MARIE FICARRA: My other question relates to ministerial responsibility for the Guardianship Act. At the moment it rests with the Minister for Disability Services. We have heard about the pros and cons of shifting it into the Attorney General's Department, but clearly you oppose that shift?

Mr SIMPSON: Yes.

The Hon. MARIE FICARRA: Could you tell us why?

Mr SIMPSON: Yes. It goes back to the things that I was saying in my opening remarks—the importance of the tribunal being a body that is accessible to full participation by people with disabilities. It is about a person's life, for goodness sake, so the person should be at the centre of the processes and be able to participate fully in them. I am not for a moment saying that the Guardianship Tribunal is perfect in that respect, but within its resource constraints and all these things that everyone has to live with, I think it has a pretty good shot at it through things such as having that investigative capacity rather than relying on parties to have lawyers who provide mountains of documents and who then slug it out in the tribunal. It is also through there being three members on the tribunal rather than just a lawyer, and so on.

The fact that the tribunal has developed and been able to maintain that and the resources to go with it relate to the fact that successive Ministers for Disability Services have seen the importance of all that. By contrast, the Attorney General's Department—and I am not knocking the Attorney General's Department at all—has responsibility for a wide range of courts and tribunals that have different roles overall, and where adversarial, formal and legalistic procedures are much more the norm. Inevitably, if the Guardianship Tribunal was moved across there, there would be a danger, over time, of budget pressures being imposed each time Treasury does its budget cuts and so on that would reduce its investigative capacity, increase people's reliance on lawyers, and make more likely the moving towards a single member lawyer dealing with cases rather than multi members. There would be a prospect of the Guardianship Tribunal being absorbed into a bigger tribunal with a range of functions where it would be much harder for it to maintain and enhance the culture and style of operating that it has.

CHAIR: Do you mean it would be a specialist tribunal?

Mr SIMPSON: That would certainly be part of it, yes.

CHAIR: A tribunal with a specialist role within the disability services area?

Mr SIMPSON: Yes.

CHAIR: And it would become more mainstream. Do you have evidence in other areas to bring to us to support that view?

Mr SIMPSON: In other States and Territories where the tribunal operates within the attorney general or justice context, the kinds of things about which I am concerned tend to have happened—a movement towards single member tribunals, a lack of adequate investigative capacity, and so on.

CHAIR: In which States?

Mr SIMPSON: I would not like to say—

CHAIR: Could you take that question on notice?

Mr SIMPSON: I could certainly take it on notice and get back to you. I have a pretty good idea but I would rather not commit myself when I might be wrong.

Dr JOHN KAYE: In your opening remarks you referred to the regular review of financial orders. Do you support that across the board? Does your organisation in general support a five-year review?

Mr SIMPSON: Five years at the very least.

Dr JOHN KAYE: I meant to phrase that question differently.

Mr SIMPSON: Yes. When a financial manager is appointed, he or she is given broad powers. Despite the honest attempts that are happening at present to enhance the quality of service of the New South Wales Trustee and Guardian, there is a long way to go. I think the review is important from two perspectives—first, to check whether a less restrictive order is feasible, or indeed to revoke the order altogether; and, second, to monitor and to ensure that a reasonable quality of service is being provided by the financial manager, normally the Protective Commissioner.

Dr JOHN KAYE: It is not just a review of the capacity of the individual; it is also a review of the suitability of the arrangements and how well they are working?

Mr SIMPSON: Yes. Sometimes—certainly in my field of intellectual disability—the person's capacity is unlikely to have changed significantly. They might have with training, but it is comparatively unlikely. However, the reason for an order being made five years ago may have been because people were exploiting that person. Five years down the track the money might have dried up and that person might well have gone out of his or her life. It might well be that informal arrangements are adequate to support the person with his or her money rather than continuing the role of the New South Wales Trustee and Guardian.

Dr JOHN KAYE: I refer to page 2 of your submission in which you noted that it might not be in a person's best interests to be subject to a financial order simply because he or she was not able to manage his or her affairs, but that a less formal arrangement such as the power of attorney may suffice.

Mr SIMPSON: Yes.

Dr JOHN KAYE: Are you suggesting in your statement that there needs to be some change to the law, or that there needs to be a change to the practice within the tribunal?

Mr SIMPSON: No. I think so far the law recognises all of that. The point I was making in that section—perhaps not well enough—was that for both guardianship and financial management the law could valuably be made clearer. The issue basically is incapability and the need for an order, with a backdrop of an adapted version of the principles in section 4 of the Act. The Act is not as crisp as it might be in that respect at present. Sometimes that makes decision-making less clearly focused on the minimum intrusion than could be the case if the law was a bit clearer.

Dr JOHN KAYE: You are recommending a housekeeping action, not a substantial change of direction, to tighten up the laws?

Mr SIMPSON: No I think it is really clarifying the language and also making it simpler. That is a continuing theme from us to try to make the legislation as clear and as easily understood as possible.

Dr JOHN KAYE: Would that refer specifically to section 14 (2) of the Guardianship Act, which lists the factors about which the Guardianship Tribunal should be mindful when making an order? You referred in your submission to the Administrative Appeals Tribunal's interpretation of section 14.

Mr SIMPSON: Yes.

Dr JOHN KAYE: I think you were quite critical of that interpretation. Would you elaborate on what the Administrative Appeals Tribunal did and why that was wrong? What needs to be done to fix that?

Mr SIMPSON: Section 14 (2) states that the tribunal, in deciding whether to make a guardianship order, needs to take account of various factors that are listed, that is, the views of the person, the views of any spouse, the views of the carer, the desirability of preserving family relationships, and so on. I am not saying that any of those factors are irrelevant, but the AAT said that, at the end of the day, instead of coming down to the question of whether there is a need to make an order rather than less informal approaches being adequate, the tribunal has to address each of those factors in section 14 (2) and any other relevant factors, attach a weight to each, balance them up and come to a decision. That is convoluted and, at times, would call for an order despite the fact that informal arrangements are adequate and the person's rights do not really need to be taken away.

Dr JOHN KAYE: You are saying that the Administrative Appeals Tribunal put a black letter law interpretation onto section 14 (2)?

Mr SIMPSON: Yes.

Dr JOHN KAYE: Which now runs the risk of unnecessarily compromising the autonomy rights of individuals before the tribunal?

Mr SIMPSON: Yes, exactly.

Dr JOHN KAYE: In your submission you propose that section 14 (2) be done away with entirely and replaced with a simple statement that we need to respect the autonomy rights of individuals? Is that correct?

Mr SIMPSON: That is the nub of it, yes, but wherever possible we respect the autonomy rights. But if there is a clear need for an order, if the informal support is not adequate, then that is when we make an order.

Dr JOHN KAYE: You do not think the factors within section 14 (2) are worth preserving as a subordinate to the autonomy rights of an individual?

Mr SIMPSON: They are in section 4. So, they are already still there in the general principles of the Act. I feel that is adequate.

Dr JOHN KAYE: But I imagine that section 4 contains the objectives of the Act itself, not necessarily the objectives of the tribunal?

Mr SIMPSON: No. Section 4 says that everyone exercising functions under this Act should observe the following principles.

Dr JOHN KAYE: Which would include the tribunal?

Mr SIMPSON: The tribunal, the Public Guardian et cetera, yes.

Dr JOHN KAYE: The other issue is a matter I find quite complex. The Public Guardian has recommended that section 21A of the Guardianship Act should be amended so that the Public Guardian can authorise members of the New South Wales Police Force to use all reasonable force when enforcing an order to relocate a residential arrangement from one place to another. What concerns me and other members of the Committee is the expression "all reasonable force." Are we creating a situation where people are being dragged kicking and screaming out of the situation that the Guardianship Board or the guardian says is inappropriate but the individual clearly is expressing in some sense a desire to stay there? Can you comment on that?

Mr SIMPSON: Certainly. The first thing to be said is that that kind of power should be, and I trust is, only used as an absolute last resort. However, I do think it is necessary. You do get situations where someone with an intellectual disability is being abused and neglected, for example, and is very much under the power of the person who is abusing and neglecting the person due to that influence. If a guardian comes round to the house and says, "Come on, I've found a better place for you to live," the person just tells the guardian to go away. As a very last resort the police need to be able to come to support the guardian in that. Usually then the mere presence of the police would be adequate to resolve the situation. But if the absolute worse comes to the worst, yes, the guardian needs that power to authorise the police to use necessary force. Obviously, it needs to be applied with the greatest caution and care.

The Hon. GREG DONNELLY: I do not have too many questions because Dr John Kaye asked a number of them, but that is okay because you have given thorough answers and that is useful. I take you to page one of your submission, under the heading "Pre-requisites to making of guardianship orders" in the paragraph commencing "However" is the sentence "The spouse and carer are in any event parties to the proceedings and so are entitled to be heard." As I am not familiar with the Act, is that an automatic right of the spouse and carer?

Mr SIMPSON: Yes. The Guardianship Act in section 3 and thereabouts lists other parties in particular kinds of cases. I think universally—if not pretty much universally, certainly in guardianship applications—if there is a spouse who has an ongoing relationship and the carer, then they are parties.

The Hon. GREG DONNELLY: Once again, I am not familiar with the proceedings, so I do not have first-hand experience, but regarding the expression "other parties", are there any restrictions on individuals putting up a hand and saying, "I had an interest in this proceeding. I would like to be heard?"

Mr SIMPSON: No. In most cases it is of no great significance whether a person is a party because the tribunal wants to hear from anyone who has something legitimate to say. It is extremely rare for any person to be excluded from that—it might be a situation of threatened violence.

The Hon. GREG DONNELLY: My next question is not designed to cause offence to any solicitors or barristers in the room, or anyone with legal training, but from evidence yesterday and today I have gathered that tribunal proceedings appear to be run informally in an all-encompassing manner in that they allow individuals, as you have described, to come in and participate if they have a legitimate interest in the preceding, that the individual with whom the proceedings is dealing has capacity to have their interests well presented and articulated, and that three people hear the matter, and that structure works pretty well at the moment. Would that be your assessment of the way the tribunal operates in New South Wales?

Mr SIMPSON: In general terms, yes. I think there is always scope for self-evaluation by a tribunal and improvement, but in general terms I think it is operating reasonably well.

The Hon. GREG DONNELLY: Given a tribunal that you and your organisation appear before and are familiar with its operation, if we can put aside the resource issue for a moment—not because it is not important but, rather, almost a given in that there is always a need for additional resources—are there particular aspects of the running of the tribunal you think can be refined to enable it to perform and operate better in its functions and responsibilities?

Mr SIMPSON: The biggest thing I would do is reverse the legislative changes that were made about two years ago that allow only one member to sit on reviews of guardianship and financial management orders. I think that was a very unfortunate step in a bad direction.

The Hon. GREG DONNELLY: What was the position prior to the change? How did operate?

Mr SIMPSON: Prior to that you required three members to sit on all substantive hearings. It was only procedural hearings where there could be one member. Those changes within the context of the Council on the Cost and Quality of Government review allow for only one member to sit on reviews of orders whereas three members still are required for the initial hearings.

The Hon. GREG DONNELLY: Why is it your organisation's view that that has been a retrograde step? What particularly has caused you to come to that conclusion?

Mr SIMPSON: It is the principle, I suppose. Perhaps this comparison I think shows it fairly starkly. When a court takes away someone's liberty rights, it does it in a very different way to the Guardianship Tribunal, but it does it with a judge, often 12 jurors and often one or more lawyers for each party. There are many players sort of teasing things out. What the Guardianship Tribunal is now forced to do is basically have one person to be the only professional, if you like, doing all of those things. I think that has some inherent dangers in it.

The Hon. GREG DONNELLY: You may not have pondered this and you might want to take it on notice, but assume that it may not be possible to return to the preceding model of three. Is there some other possibility that has exercised your mind that might be a way of improving the position from just having a single person preside over it?

Mr SIMPSON: Two is—

The Hon. GREG DONNELLY: Better than one?

Mr SIMPSON: Two is certainly better than one and the tribunal can do that and does do that in certain circumstances. But the budget sort of makes it difficult.

Dr JOHN KAYE: There are those who think tribunals of two are never going to work because you either get unanimity or you get disagreement.

Mr SIMPSON: Yes. Under the current system, where it is three, a member can dissent. You see that extremely rarely. I think that flows from the problem solving I suppose and why the tribunal tends to operate and tends to lean towards a consensus amongst the members. I doubt if that would be a significant problem in practice.

The Hon. GREG DONNELLY: I will ask you now a line of questioning around another organisation's submission about particular aspects of substitute decision making. I will get you a copy of the submission. It is submission number 17 from Alzheimer's Australia NSW. I take you to the last page and specifically invite you to read paragraph 3 and paragraph (a) beneath it. What struck me when I read it for the first time a couple of days ago before the hearings commenced was the stark language with phrases such as "often older people" and "swiftly transferred". It struck me that there was real concern behind those words, at least from Alzheimer's Australia's perspective. Obviously, your organisation approaches it from a different point of view by the constituents you represent and advocate on behalf of. Considering your constituents and your experience, are those sorts of words accurate in respect to the issues on which we are reflecting?

Mr SIMPSON: I think that our society and those who are supporting people with intellectual disability from day to day have the full gamut of attitudes towards intellectual disability. Some people would very much embrace the view that people with intellectual disability should be allowed to make their own decisions as much as humanly possible, and that all support and skills training should occur to enhance that. At the other end of the continuum there would be a lot of people with the best of motives thinking that an intellectual disability means that this person just needs protection, needs me to sort of make decisions for them, tell them what to do, keep them safe. Clearly, from my organisation's point of view we need to be moving much more towards a consensus near the first of those options. I think that calls for a lot of things. It calls for just a continual process from when an intellectual disability might be identified in a small child of the parents and workers who are around that child being given good information and encouragement about how to maximise this person's capacity to make independent decisions.

But people are going to be supporting people with intellectual disability to make decisions or make decisions for them in all manner of issues day by day, week in week out. So we need to try to encourage the best practice in the way people are doing that. Yes, there need to be safeguards for the situations where people are being overly protective or controlling. I suppose the current safeguard we have is the guardianship legislation. There are applications made to the Guardianship Tribunal in situations where someone is being unduly controlled. Sometimes it is the controller who makes the application because someone is challenging their right to do that control; sometimes it is just someone else who wants to get the situation into a venue where the situation can be ventilated and explored.

That is some measure of a safeguard at present. On whether there needs to be other legislative safeguard mechanisms, I am open-minded at this point. I do not have a clear view. But certainly I think a lot of it is just that continual enhancement of good quality, availability of advocacy so that there are people someone can go to if they feel their rights are being trampled on, and the capacity to take things to the Guardianship Tribunal where appropriate.

The Hon. GREG DONNELLY: This is along the same lines of questioning, but it may be difficult if not impossible to answer. If it is, please feel free to say so. Do you see that in the last, say, two decades—let us take that period of time, 20 years—there has been a trend developing one way or the other in terms of society's general propensity to want to deal with matters in the way described in that paragraph—quickly moving to that position of having tidied up, if I may use that phrase.

In other words, perhaps we are not providing the due respect and consideration to the role that your organisation and equivalent organisations perform in terms of mediating the position by saying, "Listen, this is an individual. They are entitled to dignity and respect." This might be a way of quickly trying to tidy the issue up, but there is a lot more to this than perhaps meets the eye.

Do you see that society is moving in that particular direction and that, more than ever perhaps, the role of your organisation and equivalent organisations are quite important in terms of ensuring that these people have those interests well looked after and represented?

Mr SIMPSON: I think the overall movement has been positive over the last 20 years. I am thinking particularly in the intellectual disability context, obviously. The very fact that an organisation like mine now has a majority of its board members who have an intellectual disability is a sign. We have just produced a set of fact sheets about the health of people with an intellectual disability. One of those sets is for people with intellectual disability themselves. It is very much designed to empower people to understand their own health and make decisions about their own health.

There is a hell of a long way to go, but I think that the trend, certainly in my area, is positive. To the extent that I have observed it, I think it is positive as well in other sectors. I think you are less likely to see, for example, an aged care assessment team jump to seeking a guardianship order to force an old lady out of her home when she is struggling to care for herself. I think you are more likely to see more attempts made to respect her wish to stay there for as long as is possible. I am not for a moment saying that we have reached Utopia, but I think the trend is positive.

The Hon. GREG DONNELLY: I welcome your observation. I am heartened by that. My last question is also one I have asked other witnesses, and that is the issue of the notion of "best interests". I am trying to get a clear perspective of what best interests means in the context of these people and their interests that we are exploring here. The phrase has not been used in your position this afternoon, as you have been articulating and presenting it. I do not think "best interests" appears in your submission either, but other witnesses have used it quite often, and sometimes in many instances during their evidence. Does your organisation have or use the term "best interest" in dealing with its matters affecting the people it represents? If it does, does that particular term have any particular meaning?

Mr SIMPSON: Yes, and I think it is quite widely used across the advocacy sphere for people with intellectual disability. I think the now Secretary of State of the United States once said that "best interests" is an empty vessel into which the prejudices of adults are poured. She was talking about the best interests of the child. That is the danger.

The Hon. GREG DONNELLY: Sure.

Mr SIMPSON: The danger is that it is such a matter of perception. But what you then rely on, I think, is that if you are going to use a best interests test—and for people with an intellectual disability, I think that still does need to be the test in the guardianship context—you need to then have some parameters in the legislation that at least informs your decision making about best interests. The other principles in section 4 of the Guardianship Act, while it says that best interest is paramount, are listed as a number of other principles which, I think, inform how you interpret "best interests". Perhaps those principles need to be refined.

The Hon. GREG DONNELLY: If I may press you further with that—I know I was putting you on the spot and you may not have thought about this—are there any particular aspects of the way in which your organisation considers best interests that you think could be put forward to scope out a bit further the meaning of "best interests"?

Mr SIMPSON: Yes. I think the relevance of this is that section 4 principles of the Guardianship Act already talks about less restrictive and as far as possible not reliant on the community, but I think it could be more baldly said that a person's right to make their own decisions should be taken away only in circumstances in which the support to make decisions or the informal assistance are inadequate to meet the person's interests. I think that could be just more baldly and explicitly stated.

The Hon. GREG DONNELLY: Thank you.

CHAIR: Thank you very much for attending, Mr Simpson.

Mr SIMPSON: It is a pleasure.

(The witness withdrew)

THERESE SANDS, Executive Director—Leadership Team, People with Disability Australia Inc., P. O. Box 666, Strawberry Hills, 2012, affirmed and examined:

PHILLIP FRENCH, Member and Adviser, People with Disability Australia Inc., P. O. Box 666, Strawberry Hills, 2012, sworn and examined:

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

Ms SANDS: Yes, thank you. Chair and members of the Committee, thank you for the opportunity to appear before this Committee. The issues we wish to raise before the Committee are of very longstanding concern. At various points over at least the past 10 years, reform proposals to address some or other of these issues have been developed at the agency level and advanced to central government for its consideration. All have been frustrated. In the meantime, New South Wales legislation, institutional arrangements and practice in relation to supported decision making for persons with a decision-making disability have stagnated or regressed.

New South Wales is now in a situation where its laws, institutional arrangements and practices in this area either positively breach, are substantially inconsistent with, or fail to fulfil Australia's international human rights obligations with respect to persons with disability and their right to equality before the law. The focus on this area of public administration that preceded the enactment of the New South Wales Trustee and Guardian Act 2009 ought to have provided for a thorough examination of all relevant issues so that new legislation and institutional arrangements could be crafted to reflect Australia's international human rights obligations and contemporary best practice in the area of supported decision making. Unfortunately, that is not the case.

Although we welcome the Standing Committee on Social Issues review, we are now in a situation where a new law and a new institution have been created without proper regard for these fundamental reforms and issues. We acknowledge that some amendments were made in the drafting of the new Act in an attempt to address some of our concerns. At least these were perceived to address them by the so-called merger implementation team. However, in relation to the issue of legal capacity, the merger implementation team appears to have proceeded on the basis that the aim ought to be to bring the contested provisions of the Protected Estates Act 1984 into line with equivalent or similar provisions in the Guardianship Act 1987. This was, however, a false goal.

The Guardianship Act 1987, while in some respects less worse than the Protected Estates Act 1984, is also in need of fundamental reform to ensure its consistency with Australia's international human rights obligations and best practice in the area of supported decision making. In part, the designation of this false goal resulted from the fact that there was no public consultation or, indeed, any rigorous or comprehensive internal review of the relevant issues conducted prior to the drafting of the new Act and the merger of the Office of the Protective Commissioner with the Office of the Public Trustee. Although the merger implementation team conducted several meetings with disability sector representatives in relation to the merger proposal, these meetings were called at extremely short notice and only involved the merger implementation team reporting its past actions and future interventions.

No element of this communication involved consultation with disability sector representatives. This was itself a breach of Australia's international human rights obligations under the Convention on the Rights of Persons with Disabilities [CRPD], which requires the active involvement of persons with disability through their representative organisations in government policy and decision-making processes that affect their lives. We make these points not to rehash past frustrations but to clearly ground the point that the New South Wales Trustee and Guardian Act 2009 is an inappropriate starting point and framework for the Committee's inquiry into substitute decision making for persons with impairment or disability that impact on their capacity to make decisions.

The issues that ought to lie at the heart of this inquiry are both prior to and very much broader in scope than that Act. Accordingly we are calling for fundamental reforms in this area. We are strongly opposed to tinkering at the edges of our existing laws and institutions. In our view the necessary starting or reference point for the Committee's inquiry is Australia's international human rights and obligations under the Convention on the Rights of Persons with Disabilities, in particular Articles 5 and 12 of that convention, which deal respectively with equality and non-discrimination and equal recognition before the law.

As we have noted, many of the issues canvassed in our submission are of longstanding concern and have been ignored or dismissed by successive governments over at least a decade. The Committee should note that there now is a high degree of cynicism and alienation within the disability sector with respect to the Government's position on these matters. It is therefore inevitable that these matters will now be exposed to the CRPD treaty body in shadow reports and in individual communications to the UN. In our view a mature and civilised society ought to be capable of taking action to recognise, respect, protect and fulfil the human rights of its citizens without being compelled to do so by international criticism. Thank you for the opportunity to make this statement. We would be pleased to discuss any questions the Committee would like to address with us.

Dr JOHN KAYE: Thank you for a very detailed submission and one which, I must say, is highly critical of the current situation. I take you to one specific issue on page 23. You refer to a perceived or actual conflict of interest that has been created by the Guardianship Act in which the Minister for Disability Services and the Department of Ageing, Disability and Home Care are responsible for the provision, funding and licensing of specialist disability services in New South Wales but they are also responsible for administration of the Office of the Public Guardian and the Guardianship Tribunal. You are suggesting in your submission there is a conflict of interest. I think you have expressed that fairly well. Where would you locate responsibility for those bodies if it were not with the Minister for Disability Services?

Ms SANDS: We outline in our submission that we think they would more suitably rest in a justice area, which is the Attorney General, and we say that for a number of reasons. One is the conflict of interest issue, but the other one is we are analysing these laws from the point of view of a new human rights framework set out in the convention. From our point of view it is not only the conflict of interest that is the issue; it is the fact that these bodies are situated or responsible in some respects to a disability area when in fact the issues are really not about disability so much as human rights.

Dr JOHN KAYE: We have heard from previous witnesses the exact opposite, and it is important, particularly with the tribunal, to keep the tribunal—I will paraphrase here—out of the hands of the lawyers. Their concern was that moving the tribunal into the hands of a justice department, the Attorney General, which is the only justice department that has any meaning in New South Wales, would compromise the capacity of the tribunal to act in a way that it was not like every other tribunal, that was not combative or in a normal legal mode. Are you concerned that by moving the tribunal in particular to the Attorney General's Department we would actually undermine some of its very important functions?

Mr FRENCH: There are risks of course for all tribunals in the way they conduct themselves, especially in relation to people with disability and others who are perhaps more vulnerable. I think some of the things that have been said in relation to the location of the tribunal are quite surprising. The Department of Justice and the Attorney General administer a wide range of tribunals, including multimember tribunals. Some of those tribunals already conduct their affairs without applying strictly the rules of evidence and so on. It does not seem to me there is anything new to the Department of Justice and Attorney General in that respect. What Ms Sands was arguing for is a difference in paradigm, moving from a welfare-based paradigm, which underpins the laws in these areas at the moment, to a human rights-based paradigm, which is perhaps better applied or more easily applied by a justice sector that is used to applying those sorts of principles in its decision making. For that reason we think it is important.

I think it has been put to the Committee that it is more likely that a Minister for Disability Services would continue to promote and protect the multimember tribunal structure of the Guardianship Tribunal. In some cases that is a value worth protecting, although I think it can be overstated. But to the extent that is a value worth protecting, the Minister for Disability Services is a member of a Cabinet that makes decisions as a whole and it seems to me he or she could advocate a position for multimember tribunals as effectively representing the constituency that they are responsible for as a member for the Cabinet, whether or not the Guardianship Tribunal is within a welfare portfolio or a justice portfolio.

CHAIR: What about the resources issue?

Dr JOHN KAYE: The question the Chair is putting to you, which is an excellent question, and the argument is this: As a Minister with a particular responsibility, because you have a department behind you—and because Ministers are human, too; that is not a news flash—there is a tendency to defend your own. The argument put to us was that it is more likely that a Minister with specific responsibility for disabilities would defend more actively the resources of a tribunal, more or less the only tribunal that he or she has, compared to just one other tribunal within Attorney General.

Mr FRENCH: Again I think that is a surprising submission. The area of disability is historically—this is not a particular criticism of any of the current Government; indeed the current Government has put substantial money into the disability sector, but historically the disability sector is resource starved. One of the most important principles for improving the situation that people with disability face is broadening the scope of government responsibility in the area. Therefore it is essential, from my point of view, that all portfolio areas accept their full responsibilities. And in this case would it not be good if both the Attorney General and the Minister for Disability Services were arguing for appropriate resources for the Guardianship Tribunal and other bodies? It is a serious point that I am putting though. In order to address the structural disadvantage that people with disability face in society, it is absolutely essential that all areas of government recognise and fulfil their responsibilities, and we must broaden the base of support for people with disability across government.

Dr JOHN KAYE: On page 11 of your submission you say that, "the statutory basis of the inquiry remains the person's capacity to manage their affairs, rather than on their need for assistance or other measures that would enable the person to manage their affairs". That is to say they are advocating a move from a capacity-based determination to a needs-based determination.

Mr FRENCH: To clarify, what we are talking about there is an impairment-based assessment. Both the Mental Health Act and the Guardianship Act at the moment require as a threshold issue determination of impairment or disability before the other stages of the inquiry can proceed. What we are saying is that the architecture of that approach is inconsistent with article 16 of the International Covenant on Civil and Political Rights, which is applied in article 12 of the CRPD. The reason we make that comment is that if one adopts a human rights approach in this area then it is important that all persons enjoy equal protection of the law. One of the fundamental aspects of that is that laws should not apply arbitrarily to any particular segment of the population. This test is activated in both the Guardianship Act and the Mental Health Act on the basis of disability at the moment, which in the end is not relevant to the issue about whether the person needs support in order to exercise legal capacity.

That might seem a bit far-fetched, but if you look at the terms of reference that have been referred to the Victorian Law Reform Commission by the Victorian Attorney General, this is precisely one of the major areas that he has asked the Victorian Law Reform Commission to investigate and report on because, particularly under the Victorian Charter of Human Rights and Responsibilities it is strongly arguable that laws that apply only to persons with disability violate the right to equal protection of the law under the ICCPR, which is incorporated into the Victorian Charter of Human Rights and Responsibilities.

Dr JOHN KAYE: What is the architecture you are then proposing?

Mr FRENCH: They should be laws of general application so they apply to all the population in the same way. They would of course, as we make the point in our submissions, disproportionately be utilised by people with disability because they are one major segment of the population who require such assistance. But they would not require an inquiry into impairment as the threshold element of the test. There are other people in the community who require assistance, like missing persons for example. Missing persons are unable to make decisions. They are another segment of the population who require assistance. There is no need for the laws to turn on this issue of impairment.

Dr JOHN KAYE: I am trying to follow your logic. Are you are saying you would just go straight to a determination of the need for assistance or intervention in decision making?

Mr FRENCH: Yes. The issue should be what is the person's need for assistance. What alternatives are there to providing that assistance? What alternatives have been tried and found unsuccessful? Is there a need to provide a more formal means of substitute decision making?

Dr JOHN KAYE: On page 16 of your submission you talk about the failure of the New South Wales laws to mandate and provide for supported decision-making arrangements. We have had other evidence on this, as you are probably aware. Do I take it from your submission that your view is that there should be a legislated framework for supported decision making?

Mr FRENCH: Absolutely, yes.

Dr JOHN KAYE: Can you walk us through how that would work? At the moment the situation, as I understand it, is that you either have decision making for you or you do not. It is this kind of binary thing. I think what you are suggesting here is a more graded approach. We have had the expression "proportionality" used. Is that where we are heading with this?

Mr FRENCH: Yes. One model that we have put forward for your consideration, not uncritically but we have put it forward to you for your consideration, is the United Kingdom's Capacity Act, which travels down this path much further than any of the New South Wales laws. To return to your initial point, when we say that New South Wales law does not recognise supported decision making we have part 5 of the Guardianship Act recognising persons responsible, who are able in effect to make substitute decisions but informal substitute decisions for certain classes for medical and dental consent. But that is the extent to which New South Wales law deals with the issue at all.

We make the criticism that that is framed more in terms of a substitute consent role rather than a support role. What we think the legislation should do is provide for the recognition and provision of a wide range of supports that vary in their intensity, which at one end might involve the provision of information and support to an individual to understand the decision they need to take, the implications of that decision and then the person being capable of making the decisions for themselves in the proper sense of that through to situations where a person may require a decision to be made on their behalf by another person.

Dr JOHN KAYE: We have had other evidence that suggests that a change to the law is not required to achieve the same outcome, that the tribunal is mindful of situations in which supported decisions are being made and adjusts its orders, taking into account the level at which that is already happening. You are saying that there is a need for laws to mandate that to happen?

Mr FRENCH: I am not quite sure of the submission that has been made to you in that regard, but one of the problems is that the issues in this inquiry might to too narrowly defined as those that presently come before the Guardianship Tribunal. People with disability, whether it is dementia, intellectual disability, long-term mental health conditions, encounter difficulties in exercising capacity in all sorts of areas. For example, a persons with intellectual disability might be refused the opportunity to open a bank account. It would seem to be a very harsh and unnecessary measure for that person to have to go before the Guardianship Tribunal to have a guardian appointed to be able to do that. We say in our submissions that New South Wales law in this area ought to create a statutory presumption of capacity, and then there ought to be a variety of safeguards around the exercise of that. To the extent that the Guardianship Tribunal deals with these issues, it deals with a very narrow range of the relevant issues.

The Hon. MARIE FICARRA: If a private manager dies or resigns from a role there is no provision to allow the New South Wales Trustee or Guardian to assume the role of financial manager until the relevant court or tribunal appoints a new private manager. This can result in difficulties during the time in which there is no financial manager for that person. What is your view of the proposal that legislation provide for the New South Wales Trustee or Guardian to fill this role until a new private manager is appointed?

Ms SANDS: We feel that that is probably a reasonable view if we are just looking very narrowly at this. Again we are talking about tinkering with the legislation but we would say that is reasonable as long as there is no delay to that and as long as there are safeguards in place for the person to perhaps make a challenge to that appointment and perhaps they also have the opportunity to nominate somebody themselves as an alternative private manager.

The Hon. MARIE FICARRA: In relation to the appointment of private financial managers do you think the New South Wales Trustee and Guardian should be able to compel these private managers to lodge security or, as is currently the case, simply request that they lodge security? Should we compel them? Have there been instances where you think this has been a problem in the past?

Mr FRENCH: There is no doubt there have been problems in this area in the past where, in effect, a person's assets have been whittled away by a private financial manager, and the person ought to have some claims against that individual. That is certainly true but we would be cautious in adopting this proposal uncritically because one of the consequences of it may be that it narrows the class of persons who are willing to provide informal support to individuals to exercise a decision-making capacity. It may mean, given the level of risk involved, the only person who can act as a statutory decision-maker in practise and I think that would be an unfortunate outcome. Yes, there is a genuine problem that would need to be safeguarded against but I think we would have to be very cautious in crafting the solution to it because what it may do is drive out family, friends and others and mean that it is only a statutory decision-maker that could make the decision.

The final point I would make on that is that we must not also assume that problems only occur in private management arrangements. There are many examples of where the Public Trustee, as it is now, but formerly the Protective Commissioner, has failed to take action to secure people's assets and legal rights, or failed to use a person's assets for their benefit and those sorts of things. So there are problems across the whole spectrum, not just in private manager arrangements. Really, the light needs to be shone quite brightly on the conduct of the Protective Commissioner, now Trustee, as well.

The Hon. MARIE FICARRA: In your submission you state that New South Wales law contains a number of different and, to a degree, inconsistent tests for capacity and that this leads to inappropriate application of legal principles beyond the specific context in which they are formulated. Will you explain what you mean by that and perhaps provide some examples? I should add other witnesses raised that criticism?

Ms SANDS: Section three of our submission explains in great detail about some of the inconsistencies and what some of the issues are around legal capacity and tests for capacity and that there are different ways to apply that test. There is no statutory framework that provides consistency around that test as there might be in the United Kingdom Mental Capacity Act as well. That becomes a problem because, depending which Act is being looked at, you do not get consistency for the person in that regard.

Mr FRENCH: I think a good example is what people believe to be the scope of responsibility of persons responsible under the Guardianship Act. In fact, that role is only limited to decisions that are taken under part 5 of the Act, that is, medical and dental consents. But in general life most people assume that a parent or some other person is capable of making decisions on behalf of a person in relation to accommodation, banking or whatever it may be and, in fact, that is not correct at law. It might be appropriate in a particular case but it is not correct in law.

Similarly the level of satisfaction that a solicitor might need in order for a person to make a will is not the same as it might be necessary for a person to open a bank account or do those sorts of things yet the principles that apply to the making of a will, or the entry into a contract, are used in context where they might prevent people from going about their daily lives.

The Hon. MARIE FICARRA: How do you envisage the New South Wales legislation should be amended? You mentioned statutory frameworks in the United Kingdom. Have you seen any other models that operate well?

Ms SANDS: If I can just say that I think again our submission outlines quite substantially how the legislation needs to change. I suppose it is difficult to pinpoint minor changes here and there in the current legislation because I suppose our submission points to fundamental structural reform and a complete paradigm shift in understanding these issues. A substantial amount of our submission went to not only a new architecture for a legal framework but also for a policy and program delivery as well as protections and safeguards for people with disability that may not be built—well, it is not part of the system at the moment and we do not even have the service models necessary to support people in terms of assisted decision-making as opposed to one aspect of legal capacity which might be substitute decision-making. It is very difficult. We have outlined these quite fully.

Mr FRENCH: I think the point is made that we have used the United Kingdom Mental Capacity Act as a potential model in the area. I think we said in the submission that we think that needs some re-thinking in some areas taken into account what article 12 of the convention says. Really, most jurisdictions are coming to terms with these issues on a scale that perhaps has not been seen before. The Victorian Law Reform Commission seems to have the most important terms of reference for considering these issues at this point in time. Really, the challenge in many jurisdictions is to create new laws that are consistent with those principles.

The Hon. MARIE FICARRA: In your submission you state that the capacity toolkit of the New South Wales Attorney General's Department is framed within existing law, which starts from a very deficient starting point. How can that capacity toolkit be improved?

Mr FRENCH: It comes back to the point that the capacity toolkit outlines four or five, or five or six different tests for capacity that arise in different contexts. I think I can say one of the initial objectives that lay behind that initiative was to enact a law in New South Wales that would modernise the recognition of legal capacity perhaps along the lines of the United Kingdom Mental Capacity Act. Had that occurred the capacity toolkit would have been a crucial resource under that legislation. We have given you reference to equivalent resources that have been created under the United Kingdom Act. The capacity toolkit is a very important and useful initiative but it is constrained by the problems that we have pointed to in our current law. Under a new Act that kit could do so much more work.

The Hon. GREG DONNELLY: Your submission is very comprehensive. In the context of that submission and your testimony today where does the notion of "best interests" of the person fit in? How can "best interests" be defined with some specificity?

Mr FRENCH: It is a difficult point. I agree with the previous witness that one of the problems is it is a bit of an empty vessel where it can often be the vehicle by which you import your own views and values and impose them on somebody else. What we think is very important is the approach that has been taken to this issue in the United Kingdom Mental Capacity Act that points out the scope and limits of the best interests test. The other thing we would say on this is that a perhaps more useful approach to deciding what decisions should be taken is the human rights of the person. So the reference point might not be best interests but might be human rights or, to look at it another way, the relevant content of the best interests principle is the human rights of the person. At least they would give us objective criteria from which to assess what was in the person's interests and it would not only be about trying to ascertain what they were in the abstract.

The Hon. GREG DONNELLY: You assert that the human rights perspective would enable a clearer articulation of what the position is but, surely, debate is going on around that issue itself? What are the human rights? Is it as clear as you are asserting?

Mr FRENCH: It will always be necessary to interpret and apply human rights but they are capable of being ascertained, I suppose. In many cases they are very clear, in other cases they are capable of being ascertained. I am talking about instruments that Australia has accepted as international obligations that are written. There is a great deal of treaty body commentary around those rights that often assist in interpretation. They have been the subject of adjudication in many cases. I would certainly agree with you that it is not possible to say that everything is written down in black and white but the content is ascertainable whereas I think best interests in many case is too abstract to be ascertainable.

The Hon. GREG DONNELLY: In terms of ending up in real conundrums if we take the example you gave a few moments ago in relation to Dr Kaye's question about the scenario in Victoria with the Charter of Rights that in fact as I understand it, and perhaps clarify me if I have misunderstood you, that the Charter of Rights cannot provide for something with respect to persons with disability and now that is being challenged as being inappropriate. Is that essentially the example you used a bit earlier? I do not have the charter in front of me but I thought you indicated that within the charter there was some acknowledgement of the rights of people with disability but that is now being challenged, using the sets of arguments that you are presenting to us today? Did I misunderstand you?

Mr FRENCH: I think you may have misunderstood me.

The Hon. GREG DONNELLY: Would you explain it to me?

Mr FRENCH: The charter guarantees all Victorians equality before the law. What that means, generally speaking, is that there should not be laws of specific application that limit the rights of one group but not other groups. So in this case one of the issues with guardianship laws is that they often result in limitations to autonomy related rights. But those limits can only be applied to people with disability and, in that sense, they are discriminatory and arbitrary and so they violate the right to equal protection. That was the point I was making. I was saying that does not mean the objectives of that legislation are improper, it may be that the architecture for achieving those objectives is not appropriate.

The Hon. GREG DONNELLY: We have heard other witnesses speak quite positively about some of the legislation in this area in Alberta, Canada. Obviously you have spoken with support about the United Kingdom legislation. Are you familiar with the legislation in Alberta, Canada?

Mr FRENCH: Broadly.

The Hon. GREG DONNELLY: You might want to take this question on notice—I do not want to put you on the spot—but at least one of the witnesses yesterday spoke about that very favourably as being a piece of legislation in that jurisdiction overseas that perhaps we should look at. I welcome your comments on that. In addition to the United Kingdom legislation that you have referred to in your detailed submission, are there any other jurisdictions overseas that you would invite us to have a look at in terms of contemplating these issues that we are looking at?

Mr FRENCH: No, I cannot think of anything else that I would direct you to. I think the United Kingdom law at the time it was enacted represented the sort of high watermark of thinking in the area, but as I think we say in the submission, it is very important that we look at that Act now through the lens of Article 12 of the Convention on the Rights of Persons with Disabilities. There are a number of good ideas that come from Canada; the personal representative idea is a good one.

The Hon. GREG DONNELLY: Can I just probe you on that? Can you explain what that means?

Mr FRENCH: I suppose what we are looking at are potential models for supported decision-making as distinct from substitute decision-making, not as alternatives to substitute decision-making in every case but as models that would support people to make their own decisions without having to be declared incapable of making a decision and appointing someone else. The United Kingdom legislation, as you may be aware, provides for the establishment of capacity advocates. There is a model of support in—

Ms SANDS: Sweden, where there are personal ombudsmen, who also play a role in working substantially with the person in terms of developing a relationship so that they are able to assist that person in terms of making decisions and I believe that model has been in place for 10 years in that country. There is also the representative agreements, which are in place in Canada. I am not sure whether they relate to the particular legislation you are talking about in Alberta and I cannot give you detailed information at this point about them, but they are also people who make an agreement with a person to assist them in making decisions and in some cases to represent their views.

I suppose from our point of view in terms of really pointing to Article 12 in the convention, it is just a recognition that we are talking about a system that concentrates very specifically on assisted decision-making in the true sense of the word, but that at one end of the spectrum there would be people who may require, as a last resort and perhaps with the least restrictive principles attached, substitute decision-making and safeguards attached to that.

The Hon. GREG DONNELLY: I am conscious of the time so perhaps this will be my last question and I will put the others on notice. As you might appreciate, this is almost the conclusion of the second full day of our hearings. We have had representatives from a whole range of organisations representing people with disabilities. It has been very informative. I want take you to page 33 of your submission and specifically the second sentence of 8.3, which states:

> The Committee should note that there is a high degree of cynicism and alienation within the disability sector with respect to the willingness of Government to address the sector's concerns with regard to these matters.

I read that at lunchtime today when I was reviewing the submission. To be honest with you, after almost two full days of hearing with representatives from a whole range of organisations, with them being very open in their submissions and testimonies before the Committee, I have to say that not one of them has struck me as being cynical about things. That is not to say that they have not raised issues, concerns, matters to do with resourcing, structures, form, procedures, how things could perhaps be done better, but it has not struck me that they are cynical of what is happening here in New South Wales. In fact, it is quite the opposite. Some of them have been very praiseworthy of the structure, saying that we should be looking to build on what seems to be working quite well.

To use the specific example of the tribunal, the general import that I have received from various witnesses is that they think the tribunal system in New South Wales, whilst not perfect—in fact I recall one witness yesterday said they would happily keep that over the Victorian model. The point I am getting at is that your language is very strident and robust. What is exercising my mind is why should I be prepared to accept your interpretation of the reality in New South Wales with respect to this area as opposed to what a dozen or up to 15 witnesses, who have presented a very different picture on this issue in New South Wales?

Mr FRENCH: I will just clarify that our submission is substantially addressed to the Protected Estates Act, as it was, which has now come in under the new arrangements as the Trustee and Guardian Act. It may be that a lot of the evidence that you have taken has been in relation to the Guardianship Tribunal and the Guardianship Act. We would still raise concerns about that, but what I would urge the Committee to maintain a high consciousness of is that the substantial problems that we are pointing to in this submission relate to the functioning of the Trustee and Guardian Act, formerly the Protected Estates Act, and that is an Act that is administered principally by the Mental Health Review Tribunal.

The Hon. GREG DONNELLY: I think it is important to get that on the record and clarified that.

Mr FRENCH: But I would not resile from the fact that many of the points that we make, perhaps with less stridency, are general principles that would be applicable in all substitute decision-making contexts in New South Wales. It is fair to say that over the last 10 years various reform proposals have been advanced to government and have not gone anywhere. Our constituency does have a high degree of concern about that because it means that our institutions have stagnated and regressed whereas in some other parts, like in Queensland, for example, there has been a very important inquiry by the Law Reform Commission into the area; in Victoria we see the same. In Tasmania we see the same.

I do not think we would resile from those remarks and we would encourage you to see the broad context in which this happens. Certainly the people with disability that we encounter on a day-to-day basis who appear before these tribunals do have a high degree of cynicism.

The Hon. GREG DONNELLY: I understand what you are saying and I am not challenging your right to be so clear and unambiguous about your position as an organisation but, in large measure, it is inconsistent with the import of the general sentiment and comment that certainly I have taken from a range of witnesses we have heard thus far.

CHAIR: Being mindful of the time, when we read the transcript we can then take a view as to whether your view is correct. Thank you very much your evidence. It is greatly appreciated.

(The witnesses withdrew)

(Short adjournment)

NIHAL DANIS, Senior Solicitor, Mental Health Advocacy Service, Legal Aid New South Wales, PO Box 1350, Burwood 1805,

ALAN JOHN KIRKLAND, Chief Executive Officer, Legal Aid New South Wales, PO Box K847, Haymarket, New South Wales 1238, and

MONIQUE HITTER, Director, Civil Law, Legal Aid New South Wales, c/o 323 Castlereagh Street, Sydney, New South Wales, 2000, affirmed and examined:

CHAIR: We have received a number of submissions of extremely high quality, such as your submission. Do you wish to make any brief comments before we go to questions?

Mr KIRKLAND: I will make a brief opening statement. We are here in our capacity as a service delivery agency. We provide free advice on capacity and guardianship issues and on a broad range of matters, including issues through our offices across the State. There is no means test for access to that advice. More particularly, we have a specialist Mental Health Advocacy Service that has been in existence since 1986. That provides representation in some matters before the Guardianship Tribunal and the Mental Health Review Tribunal. We can comment on some of the issues before the Committee from that perspective of providing practical assistance to people in those matters. Our submission focuses on three specific reforms flagged by the Attorney General in the Committee's terms of reference.

If you wish we could elaborate further on the arguments we made in that submission. We may not be able to comment on some of the broader policy issues that have been raised because they do not necessarily sit within our role or expertise. Where we can comment based on our service delivery experience we will be happy to try to assist the Committee. I have Ms Danis and Ms Hitter with me because they will be able to comment from a base of more significant expertise than me in relation to many matters, so I will defer to either or both of them. Would it be helpful if we briefly outlined what the Mental Health Advocacy Service does?

Dr JOHN KAYE: Yes please.

Ms DANIS: We provide representation on a duty and non-duty basis for people under the Mental Health Act and under the New South Wales Trustee and Guardianship Act. We do that by having lawyers visit people in hospital settings to provide duty service. We provide representation in the Guardianship Tribunal either in the capacity of a separate representative or in our capacity as legal representatives sought under instructions from subject persons or other persons who may be parties to the proceedings in that jurisdiction. The means and merits do not apply to subject persons in guardianship jurisdiction in the Guardianship Tribunal; we apply to other parties in those proceedings. Applications that are made for persons to become the subject of financial management orders in hospital settings and in the community go before the Guardianship Tribunal.

The Hon. MARIE FICARRA: How wide do your resources reach? I imagine that many people want to come to you. I do not know, you tell me, as I might be putting words into your mouth. Are your resources being stretched?

Ms DANIS: In duty work we have legal advocates who visit hospices. We operate with 10 people in the service.

Dr JOHN KAYE: Did you say you operated with 10 people?

Ms DANIS: Yes.

Ms HITTER: It is a mixed model in that we also engage private practitioners to do that work. Some of our lawyers who are based in regional offices also provide that service. In a sense it is a statewide service.

Ms DANIS: What we do as a service is to coordinate all that representation. People who are appearing in mental health inquiries throughout the State who, in the first instance, appear before a magistrate and then subsequently before the Mental Health Review Tribunal, will have representation within established guidelines.

The Hon. MARIE FICARRA: How do you know whether people require representation?

Ms DANIS: We liaise with hospitals and with the tribunal. We know the days that hospitals have magistrates' hearings and we are always there for those hearings, which are on set days. When the tribunal conducts ongoing reviews we get notices of those hearings, and we know which of those fall within our guidelines for us to be able to organise representation.

CHAIR: You can allocate resources accordingly and you can assess whether there is appropriate adequacy, or whether you are covering the field?

Mr KIRKLAND: Anybody who meets the eligibility test for a particular type of matter will receive aid, whether it is through our solicitors or through a private practitioner.

Ms DANIS: Resources do get stretched as we have more beds being created in a variety of jurisdictions. That becomes an issue.

The Hon. MARIE FICARRA: How does the Mental Health Advocacy Service determine best interests? We have had lots of comments on what is "best interests". If a person lacking capacity appears before the Guardianship Tribunal or the Mental Health Review Tribunal, how do you determine that and what parties are consulted?

Ms DANIS: The best interest aspect comes into our advocacy depending on what role we are playing. It comes into operation when we are appearing as separate representatives, where the appearance is not on instruction from subject persons but in their best interests. The tribunal makes a determination about why it might want somebody represented on a separate representational basis. We know that we can speak to them and to everybody around that person about competing issues, seek assessments if we need to do so, or do other investigations as best as we can to provide ourselves with an opportunity to put submissions before the tribunal relating to where that application should go. When we are sought to assist somebody on direct representation we are acting on their instructions, so the best interest issue does not come into that. We are bound by their instructions. We might give them some options about where things lie with those instructions against all the evidence but it is not a best interest aspect.

The Hon. MARIE FICARRA: What safeguards are in place during tribunal hearings to minimise the opportunity for people to exploit persons lacking capacity?

Ms DANIS: If we are talking about the Guardianship Tribunal it has a clear investigative role when applications are made, in the sense that it gathers all the information available that should be made available for the purposes, or all the evidence that needs to be gathered, to make a proper and legally based decision. Those matters will proceed to hearing in all circumstances but there is a mechanism by which the tribunal wants to know that they are bona fide applications and not fishing expeditions. There is a process involved within that. Our experience is that the tribunal does not just let someone wander through the door, make an application, gather all the information regarding a subject person, and walk out.

They really have to proceed to a hearing for the tribunal to determine what should happen. It is a protective division so they have to act within the confines of that protective division. Referring to the applications for financial management orders in the Mental Health Review Tribunal, they do not make appointments for private managers; they do not have that facility available to them. But again there is a range of information that comes before them by means of social work reports or other reports that may give rise to some abuse circumstances that they would have to dwell on.

The Hon. MARIE FICARRA: What is your view on applicants to the Guardianship Tribunal having access to private information relating to the person for whom an order is being sought? This information would otherwise be considered confidential, such as financial records. Have you seen any problems arise with access to private information that has distressed applicants?

Ms DANIS: I cannot speak of an experience to that effect directly. Of course, people have concerns that it is all about them that is coming out on the table. It is often unknown to the subject person or those around them as to how the tribunal deals with that material until they wander into a hearing setting and you see the settling of their concerns very clearly because they are bona fide applications and they are applications that take the paramount interest of the subject person into account. Whilst there may be some concerns arising from those issues whilst investigations are going on, when evidence is being gathered, the tribunal manages that and they have to manage it so that they know who is seeking what information for what purpose and do not readily just provide that without good reason as to why that should be the case.

The Hon. MARIE FICARRA: You have not seen any problems in the operations of confidential records thus far? You are quite happy?

Ms DANIS: I have not seen that, no.

The Hon. MARIE FICARRA: My last question goes to duration of orders. Guardianship orders are made for a maximum of five years, however, we are told that financial management orders often can be for an indefinite period of time. Do you see any inconsistency or any need to change the legislation?

Ms DANIS: Yes. We think that there should be some inbuilt mechanisms within the making of those orders to have review of those orders. I think there are changing circumstances that relate to people who are subject to those. They may be young people, they may be old people, but they have changing circumstances that ought to be reviewed at some stage to see how that order is operating, whether it is still in their best interests and whether there are some issues that need to be ironed out. We would support such a move.

Dr JOHN KAYE: Thank you for coming today. I take you to the terms of reference and whether we should amend the Act to allow the Mental Health Review Tribunal [MHRT] to appoint a private manager. I understand that currently the MHRT cannot appoint a private manager, is that correct?

Ms DANIS: That is right.

Dr JOHN KAYE: What was the thinking behind that? Why was the MHRT not allowed to appoint a private manager?

Ms DANIS: I am not sure that I can answer that.

Mr KIRKLAND: I am not sure if we can answer questions about why the current legislation is framed in particular ways.

Dr JOHN KAYE: You support a proposed amendment using an example. Can you envisage situations where it would not work well? What kind of safeguards should be built into the legislation to stop those situations occurring?

Ms DANIS: The tribunal would have to be satisfied that it is an appropriate option available and, like the Guardianship Tribunal, they are going to look at who is being proposed to manage, what their background is, what is their experience, what is the capacity to manage themselves an arrangement that they are putting themselves forward to or the subject person might be. It is not just a simple case of, well, you have that option available therefore we will take it on board. It is more to do with how would you do that management and how would you go about doing that. Often those private financial managers are under supervision under the New South Wales Trustee and Guardian Act. So that does bring about some protection. Those are matters that can be taken back to the tribunal to look at the operation of such powers. The fact that a private manager has to act under directions from the New South Wales Trustee and Guardian provides reasonable protection.

Dr JOHN KAYE: Basically you support translating the provisions or the conditions that currently operate under the Guardianship Tribunal across to the MHRT?

Ms DANIS: That is right.

Dr JOHN KAYE: There is nothing specific about people presenting with mental illness issues that requires additional layers of protection or different kinds of protection?

Mr KIRKLAND: We have not considered it in great detail. In terms of a general scheme, it probably would make sense to translate something similar. If we got to the stage where there was draft legislation that came before the Committee, I imagine we would be writing a more detailed submission on that. I do not think we can say on the spot that it would necessarily be exactly the same, but in general terms we would support that sort of reform.

Dr JOHN KAYE: Another request from the Attorney General has been for us to consider amending the Trustee and Guardian Act to allow a relevant court or tribunal to exclude parts of an estate from a financial management order. I understand that does not happen currently; it is an all-in or all-out situation. I understand that the relevant court or tribunal would be the New South Wales Supreme Court, the MHRT or the Guardianship Tribunal, is that correct?

Ms DANIS: That is correct.

Ms HITTER: That is correct.

Dr JOHN KAYE: I understand at the moment that it is either all in or all out?

Ms DANIS: With the MHRT. They do not have the means to separate—

Dr JOHN KAYE: To do partial orders?

Ms DANIS: No.

Dr JOHN KAYE: Does the Guardianship Tribunal have that capacity?

Ms DANIS: It does.

Ms HITTER: The Supreme Court does as well. We would say that having that flexibility to offer a less-restrictive option at all forums is something worth considering because there are occasions when somebody is just unable to handle a particular decision in relation to a particular financial management decision and is okay with other parts of their financial management.

Dr JOHN KAYE: They are more or less the same supporting arguments we heard about appointing a private manager. There is nothing specific about the operations of the MHRT or the clients it sees that requires a different level or type of protection?

Ms DANIS: That is right.

Dr JOHN KAYE: That certainly is your professional experience?

Ms DANIS: That is right.

Dr JOHN KAYE: That is good to know. Section 14 (2) of the Guardianship Act lists the issues the tribunal needs to consider when making a guardianship order: it should consider the views of the person, the person's spouse and the persons carer, if any. We have heard from a number of people that that is inadequate and that it would be far better removed because those conditions already are covered in section 4 of the Act, and that it would be better just to talk about protecting the autonomy rights to the maximum extent possible in section 14 (2). To paraphrase, the arguments put forward were that by not putting the rights of the person before the tribunal as the number one consideration we run the risk of running counter to our international treaty obligations. There were various other arguments. Does that accord with your understanding?

Ms DANIS: Yes it does. There is no harm in those submissions at all.

Dr JOHN KAYE: Would your position be to support the removal of section 14 (2) and replace it with provisions that the tribunal needs only to be mindful of the human rights of the person before the tribunal?

Ms DANIS: Not "only". I would add to what is there rather than remove it.

Dr JOHN KAYE: Making it subordinate to the human rights issues or co-equal?

Ms DANIS: I think co-equal, really.

The Hon. GREG DONNELLY: You can take the question on notice.

Dr JOHN KAYE: Yes, I am sorry to put you on the spot. I am just trying to resolve in my mind how much damage would be done by removing that list of persons from section 14 (2) of the Act.

Ms DANIS: I think there is a lack of expectation on those persons named there to be given some regard to what they have to say. Often they are people best placed to know quite a bit about the subject person.

Dr JOHN KAYE: That is a requirement under the guardianship order; it is not a requirement, I understand, under any financial order. Is there any reason why the views of those persons ought not be considered when a financial order is being made?

Ms DANIS: No. Often those views are tabled informally anyway.

Dr JOHN KAYE: When they are, do you think they contribute positively towards the outcome in general?

Ms DANIS: It depends on the circumstances of the case, really. If you have a mother who is complaining about her son's addiction problems and spending all their money on addictions and so forth, then the information they put before the jurisdiction often goes against what the subject person might be saying. So you end up with competing interests being put before them and that has to be managed somehow. It depends on the circumstances and the facts of the case.

Mr KIRKLAND: But the decision still falls back to the best interests of the person. I guess we start from a position of understanding that the tribunal makes decisions in the best interests of the person. We do not have that sense that there is a general problem with the tribunal preferring the interests of people who give evidence over the interests of the subject person.

Dr JOHN KAYE: Certainly we have not had any evidence to that extent, nor have we had evidence being critical of the functioning of the tribunal. Yesterday we heard a lot about proportionality, which, to paraphrase, is the idea at the moment that you either have an order or you do not: You are either under a guardianship or financial order or you are not. There does not seem to be a lot of legal gradation between them. There are informal arrangements of supported decision making without any legal support behind them, not that they are irrelevant to the tribunal's decision making. The tribunal might take into account the capacity to create a supported informal arrangement, but they are not something that the court can order. The evidence we heard yesterday was that there are a range of capacities and that perhaps we should consider grading the law so that there is a gradation of things that the tribunal, the MHRT and, indeed, the Supreme Court could order rather than just the notion that you are all in or you are all out. Is that something on which you can give the Committee advice?

Mr KIRKLAND: We would not dispute the evidence that there is a range of levels of capacity. We probably cannot comment in general as to how you might amend the law to address that. I guess though that whatever regime you have, you need to have a degree of certainty for the subject people, the people who may be the subject of orders or proceedings for the legal representatives involved and for the tribunal members or court or judges who are seeking to apply the law. I think there are some challenges in trying to create a very broad and flexible range of options in providing that degree of certainty and consistency in decision making. But I think to that extent, it is possible to do it in a practical way such as the recommendation around allowing financial management orders to be made in relation to parts of estates. That is a practical way of reflecting that people have a range of degrees of capacity and it is done within a legislative framework that provides that certainty.

The Hon. GREG DONNELLY: Thank you for coming along today. It has been put by some of the witnesses thus far that, as a result of Australia becoming a signatory to the United Nations Convention on the Rights of Persons with Disabilities, that now ignites in some sense, or really compels us to ignite, a broad discussion about the whole issue which is the subject of this inquiry such that our thinking about how we might change legislation really has to be run back through the prism of that convention, specifically Article 12.

In terms of putting an argument to us, at least some of the witnesses have put, as I understand their submission, that it really agitates a real reconsideration of the whole way in which we manage this area and deal with the issues that flow from these matters. Other witnesses have acknowledged the effect of the Article 12 provision of the convention, but have been a bit more reflective about the system we have in that it fundamentally works reasonably well; nonetheless, we need to improve and refine what we have, and there is scope to do that.

There is the paradigm of a more radical reconsideration of things in the light of the convention, and the other view is to acknowledge the convention and its impact, particularly through Article 12 but really just refining what seems to be working essentially quite well. Do you have a view about those perspectives? Do you sign up to one perspective or another, or do you have perhaps another position that you would like to put to us?

Mr KIRKLAND: I think there are some very big policy issues in there that it is really difficult for us to comment on, as a government service delivery agency.

The Hon. GREG DONNELLY: Sure.

Mr KIRKLAND: It is probably beyond our role as an agency as well.

The Hon. GREG DONNELLY: Okay. I did not mean to be overreaching, but I just wanted to get your opinion to the extent that you might want to express some views.

Mr KIRKLAND: I think in reality some of those issues will be teased out over time as the Commonwealth considers whether the Federal legislative framework needs to be revised to reflect the obligations to which it has signed up. I expect the Australian Human Rights Commission also will assist in helping us to understand the degree to which domestic legislation might be inconsistent with those new obligations and, if so, whether any inconsistency means that you do have to take a really radical approach to redrawing the law, whether or not that is just a matter of more minor amendments. I think that that is the process of the Federal Government's legislation, and the Human Rights Commission considering it through its inquiry process, will help us to get a better understanding of those issues.

The Hon. GREG DONNELLY: That is my thinking as well. We just have to let a little bit of time pass to see what develops. The other question I will ask relates to some of the witnesses coming before us suggesting that we need to look north of the border and south of the border to Queensland and Victoria respectively to see some of their legislative changes that they have either implemented or are looking at in the areas we are considering. Do you have some view about us looking at those jurisdictions? If you do, is there any recommendation about a particular aspect, other than what is provided in your submission, to look at those models in a favourable light in terms of our consideration?

Mr KIRKLAND: In general I think it is useful to be looking at what is happening in other jurisdictions because we have to remember that people move. People live along borders and people move between States and Territories and generally do not have an understanding of what is covered by State and Territory law as opposed to Federal law. When guardianship and mental health law, which impact on people's day-to-day lives, are different between jurisdictions, it does create confusion for consumers and for family members. As a general principle, I think it is useful to look at what is happening in other jurisdictions and to be seeking to introduce similar legislation, where possible. But as to the particular legislation that is there, I do not know if there is anything we can say.

The Hon. GREG DONNELLY: That is okay. Ms Danis, in terms of your comments about the investigative process in New South Wales with respect to the tribunal, I got the impression from the evidence that you presented that the investigative process is quite a thorough process.

Ms DANIS: I should perhaps rephrase that.

The Hon. GREG DONNELLY: I am sorry, I did not mean to put words in your mouth. The import of what you said gave me the sense that the process is a reasonably detailed and thorough process.

Ms DANIS: It is detailed and thorough in terms of gathering the evidence that goes to the elements that have to be dealt with in any of those applications. The whole range of things, might be happening around a person who can provide an opinion about those sorts of applications, is gathered. When I talk about an investigative role, that is what they are doing.

The Hon. GREG DONNELLY: The phrase has been used by other witnesses. The purpose of the question is that I was going to ask you whether you think there is scope to improve the process from what we currently have operating under the current legislation to make it a better process?

Ms DANIS: It would be true to say that more resources could assist in those processes. They can be lengthy processes. If there needs to be a better response period, then that will depend upon how that investigation is going.

The Hon. GREG DONNELLY: Some of these investigations can take some time, can they?

Ms DANIS: Sometimes they can because there may be some assessments that are being needed for the subject person, and there may not be those available to do it too readily. Those processes can impact on when a proper hearing is going to take place. The longer it goes, the more a sense of agitation comes about for those involved in those cases.

The Hon. GREG DONNELLY: You have not experienced any issues associated with persons claiming to have some legitimate interest in the matter being denied a capacity to participate in a process or a hearing—people who have a legitimate basis who want to put their hand up and say, "I've got an interest in that. I would like to be heard"? You have not experienced difficulties of people being denied that?

Ms DANIS: Those cases that we have been involved in, the mere fact that we may involved in them can provide some voice in some of those circumstances. The tribunal does endeavour to hear, as best as possible, from everybody.

The Hon. GREG DONNELLY: And to not exclude, therefore.

Ms DANIS: Yes. And, yes, there are times when people will make that out, and they can take that to the Administrative Decisions Tribunal [ADT] for review.

The Hon. GREG DONNELLY: Just by the bye, does that happen very often?

Ms DANIS: Often enough, I imagine.

The Hon. GREG DONNELLY: In terms of the tribunal, it is a three-member panel, as some of the witnesses have explained to us. That sort of structure, having three members presiding over a matter, is not the case in other jurisdictions and the Commonwealth. At least some of the witnesses have commented favourably about having three persons to preside over a matter being important in the New South Wales scenario. Do you have a comment about that, as opposed to some other configurations, such as a single member?

Ms DANIS: I can understand perhaps going to a single member panel for subsequent reviews, but where the first instance hearing is happening, it probably is appropriate to have the three.

Ms HITTER: One of the benefits of having more than one person is that the three-member panel often comes from different disciplines, so you get a broader range of considerations being taken into account, which can be useful.

The Hon. GREG DONNELLY: Yes. That seems to be the overwhelming sense of what I got from the witnesses. They spoke in favour of the configuration of three. I have no further questions.

CHAIR: I will quickly go to the issue that you refer to on page 3 of your submission. It goes to the issue of financial management orders and the difference in the requirements of the Guardianship Tribunal and the court and the Mental Health Review Tribunal in regard to financial management orders. As I understand it the Guardianship Act requires that the tribunal under section 25 has to satisfy itself of three criteria: that the person is not capable of managing their affairs; that there is a need for another person to manage those affairs on the person's behalf; and it is in the person's best interest that the order be made. But in terms of the court and the Mental Health Review Tribunal, they only have to satisfy themselves that the person is capable of managing.

That goes to be vexed issue referred to in example Y in your submission on page 3. It goes to the important issue of what happens to family members who may have other involvements, such as powers of attorney [POAs], decisions of the court that to overturn or negate any POAs. Can you explore for me why there is a difference and whether or not, as you have indicated in your submission, there should be some changes? What changes should we make? Is there inconsistency in the approach? If so, do you know if there is a reason for that inconsistency? What would be the best way to resolve that inconsistency? What should we do?

Ms DANIS: I am not sure that I can speak to the history of how that inconsistency has come about but, yes, there is an inconsistency, and I think there ought to be more consistency. I would prefer to see that everybody was applying the same test, and perhaps the test for incapacity, which is set by a Supreme Court precedent and is somewhat narrow and ambiguous, ought to have a better legislative definition so that there is no tying of incapacity, in considering financial management applications, to a disability. Maybe that ought to change so that there is a disabling factor that is being looked at.

I think you have had submissions from various parties talking to that effect, or to that factor, under the Mental Health Capacity Act in the UK. We can do with a better definition of "incapacity" than what we have currently. My view is that that ought to apply to whichever jurisdiction is entertaining an application. Consistency is not a bad thing in this jurisdiction at all.

CHAIR: However, if the focus is on capacity, what happens to the mother and the grandmother of the indigenous man in regional New South Wales who ventures into a large metropolitan area, like in your example on page 3, and who then has one episode and finds himself the subject of a financial management order?

Mr KIRKLAND: In relation to that specific proposal, what we were supporting was an ability for the order to be revoked, even if the person still lacks capacity in the particular circumstances of the case. I think that would address the specific example that we provided.

CHAIR: You are indicating that the three criteria that the Guardianship Tribunal uses, which has been indicated to us to be a much more user-friendly environment, are perhaps not the correct views as to capacity. People are saying to us that that we are not welfare based, but we should be rights and capacity based. But if we bring that concept into play, what happens to client Y in your example?

Ms HITTER: I think what we would say is that although the three criteria in the Guardianship Tribunal are helpful, what we would like to see is a little bit more guidance around the definition of what characterises lack of capacity. All we have at the moment is this Supreme Court precedent, which is a bit of a blunt instrument. It basically says you either have capacity or you have not. We would say that it would be great to have some more guidance around that because there are times when people flow in and out of capacity. They have capacity to make some decisions but not the capacity to make other decisions. So having some legislative guidance around the definition of "incapacity" would be helpful.

CHAIR: Without examining the evidence in great detail at this time, I do not think we have received any comprehensive definitions between what the Guardianship Tribunal is using and what the court and the MHRT are using. Perhaps you might take it on notice and give some thought as to whether or not there is such an animal.

The Hon. MARIE FICARRA: We have been referred to the Victorian jurisdiction today, have we not?

Ms HITTER: You have, and we would be happy to provide some additional material in relation to that. We are aware that there is a piece of legislation in the United Kingdom which works really well in that it allows you to define capacity in terms of time and the decision that needs to be made.

The Hon. GREG DONNELLY: We heard about that earlier.

Ms DANIS: The United Kingdom legislation says that a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain. There is a tying of the disabling factor to the fact that it might be bringing about an incapacity at that moment in time. That would assist. It would give more than what we have got out of PY versus RJS.

The Hon. MARIE FICARRA: What mechanisms are in place to allow for the abuse of a power of attorney to be reported? What steps are taken if this abuse is reported?

Mr KIRKLAND: On the issues of power of attorney in general, we do not deal with those issues very much at all. So we just do not have much of a practice base from which to comment on how they currently work of how those provisions might be improved.

The Hon. MARIE FICARRA: In that case I do not think I will bombard you with the other four or five questions.

CHAIR: Do you have any closing comments you would like to make?

Mr KIRKLAND: No, thank you for the opportunity.

(The witnesses withdrew)

(The Committee adjourned at 4.03 p.m.)