people with disability

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NGO in Special Consultative Status with the
Economic and Social Council of the United Nations

22 June 2009

The Honourable J Hatzistergos, MLC
Attorney General
Level 33, 1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General:

MERGER OF THE OFFICES OF THE PUBLIC TRUSTEE & PROTECTIVE COMMISSIONER

I write on behalf of People with Disability Australian (PWD) and the Mental Health Coordinating Council (MHCC). We are concerned about the Government's November 2008 mini-budget decision to merge the offices of the Public Trustee and Protective Commissioner (OPC).

We note that the *NSW Trustee and Guardian Bill 2009* (the Bill) is scheduled for business of the Legislative Council on Tuesday 23 June. We have read the Bill and examined Mr Barry Collier's speech in the Legislative Assembly delivered in association with the introduction of the Bill on your behalf.

As stated in our previous correspondence of 26 November 2008, we are prepared to support strategic reforms in this area of government if that will result in significant improvements to client services and fundamental reform of the *Protected Estates Act* 1983. Reforms in this area are long overdue.

We recognise that the Bill does include some provisions that would address, to a limited extent, a few of the violations of and inconsistencies with human rights contained in the *Protected Estates Act* 1983, and which we previously raised with you. We also recognise that the Government has now accepted the need for a public inquiry, which we have called for since the merger announcement, and will refer the issue of the merger to the Social Issues Committee, although no terms of reference for the Inquiry have been made available and the Inquiry would commence following the passing of the Bill.

Despite these improvements and concessions, we remain concerned about the decision to merge the offices of the Public Trustee and the Protective Commissioner. We maintain our position that a public inquiry should occur before any legislation is passed to ensure that the merger is based on a legislative framework that respects, protects and fulfils the rights of people with disability, is securely and adequately funded for the long-term, and is genuinely good public policy in terms of outcomes for people with disability.

We argue this for the following reasons:

- **Fundamental legislative reform**

While the Bill repeals the *Protected Estates Act* 1983, it essentially re-enacts most of the provisions of this Act. The few amendments in the Bill aim to provide consistency between the *Protected Estates Act* 1983 and the *Guardianship Act* 1987 by ensuring that the same general principles apply, that the presumption of incapacity is reversed in some sections, that the Guardianship Tribunal no longer needs to consult with the Protective Commissioner before excluding part of an estate from financial management and to limit the length of an interim order made by a magistrate or the Mental Health Review Tribunal. In general, the amendments aim to bring the *Protected Estates Act* 1983 in line with the *Guardianship Act* 1987.

However, we remain concerned that the Government is not using the merger of the OPC with the Public Trustee as an opportunity to fundamentally reform the Act so that it conforms to CRPD Article 12, *Equal recognition before the law*. By including only a few amendments, the Bill does not provide the basis for genuine and comprehensive reform. In addition, there is no recognition that the *Guardianship Act* 1987 also requires urgent and comprehensive review in light of the Government's obligations under Article 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD). While The *Guardianship Act* 1987 may provide marginally better protections and safeguards for people with disability, it has not been reviewed against the CRPD, a more recent internationally agreed standard on the human rights of people with disability.

We argue that the Bill provides for only piecemeal reform. This fact is acknowledged in Mr Barry Collier's speech, where he acknowledges "that these amendments have focussed almost exclusively on amalgamating the two offices and that further reform may be required".

Our analysis of the Bill indicates that it does not provide the minimum conditions required to begin reform in this area, and we do not believe that the Bill should be passed in its current form. In our view the institutional arrangements for estate management services cannot be properly crafted before the appropriate legislative arrangements have been adopted. To change administrative arrangements so fundamentally before appropriate reforms have been identified and acted upon risks the failure of those reforms.

However, if you are not prepared to delay the Bill until the inquiry is complete, we attach to this letter in summary form a list of proposed amendments to the Bill that we believe should, as a minimum be included in the Bill. We do not believe that these minimum conditions can be considered as options for reform during an Inquiry following the passing of the Bill.

- **Proposed funding arrangements for service delivery to OPC clients**

We remain concerned about the proposed funding arrangements for service delivery to OPC clients.

We are concerned that the Government has failed to respond to the Independent Pricing and Regulation Tribunal (IPART) 2008 report recommendation for a major injection of funds ($10.6million) from Treasury. This level of funding is required to pay for the current short-fall in OPC operating funds, and the future decrease in OPC operating funds that will result from the fee reductions. The Government proposes instead to merge the OPC with the Public Trustee in an apparent attempt to fund OPC's existing level of services by achieving efficiencies across both organisations, and through the Public Trustee's commercial income streams.

The IPART report states that demand for the OPC's services is expected to grow into the foreseeable future. Currently, OPC clients on low incomes receive inadequate financial management services from OPC. Few, if any, have individualised financial plans and budgets specifically tailored to their lifestyle needs and aspirations. Few clients have regular direct personal contact with OPC staff, and in these circumstances it is impossible for OPC to really know if the person's assets are being used for their benefit.

We argue that it is essential that OPC be provided with the financial capacity, not only to maintain, but also to significantly enhance its service delivery to clients on low incomes. The key priority in this respect is a much higher degree of individualisation in service delivery, including the development and maintenance of individual financial plans linked with lifestyle goals. If this does not occur, then the OPC will not be able to make genuine service delivery improvements, and may in fact be forced to reduce its services. The current inadequate service delivery will become entrenched at the OPC.

In addition to these concerns, we believe that the funding of the OPC through existing commercial income streams of the Public Trustee is a measure to correct the progressive withdrawal of funds from Treasury. In 2003 Treasury provided $9million to fund the service delivery of OPC. This funding was supposed to provide the basis for significant improvements to client services, and at the time, it was envisaged that such public funding would continue. However, without any rationale, this funding has been progressively withdrawn since 04/05. In the current financial year it has been reduced to $2.825million.

We argue that funding the OPC through existing commercial income streams of the Public Trustee cannot be sustained on a long-term basis. There is no apparent mid-range or long-range financial plan for the merger, and this is reinforced by Mr Barry Collier's ministerial speech, where he states that the Government is proposing that the IPART "limited mid-term review in 2010… also report on sources of funding for the New South Wales Trustee and Guardian and examine the fee structure of the merged organisation".

- **Human rights mandate for the Office of the Public Guardian (OPG)**

We remain concerned about the effect of the merger on the OPG as stated in our previous correspondence to you. We still consider the current merger proposal to present very serious risks to the status, independence, and activist culture of the OPG. In any event, even if there were to be no substantial change, the status quo is unacceptable, and ought not to be perpetuated in new institutional arrangements.

We believe that it is essential for the OPG to be provided with a strong, activist human rights mandate, and that it operate with a very high degree of institutional independence, including, in particular, from the Minister for Disability Services and the Department of Ageing, Disability and Home Care (DADHC).

The provision of an independent statutory basis (and related institutional arrangement) for the OPG, outside the *Guardianship Act* 1987 is essential to eliminate the conflict of interest inherent in current institutional arrangements (the Minister administering the *Guardianship Act* 1987 and to which the Public Guardian must report under s 80 of that Act is the Minister for Disability Services, who is also responsible for the provision, funding and regulation of disability services). This change is also necessary to enable the cultivation of an activist, human rights culture within OPG (currently the Public Guardian is subject to significant pressure to conform to NSW Health and DADHC service provision priorities, even if these priorities conflict with clients' human rights). We also note that in Mr Collier's speech that the Public Guardian will report administratively to the CEO of the merged organisation, the NSW Trustee and Guardian. Currently, the Public Guardian reports directly to the Director General. Not only does this add in a new layer of bureaucracy for the Public Guardian, it also creates the possibility for the Public Guardian to be under some influence and direction by the CEO, which would compromise their independence.

Public participation in the development of this reform agenda is essential both to ensure that it is comprehensive and that it is well supported among user groups. The level of public participation required has not occurred to date, with only a few meetings being conducted with limited numbers of stakeholders. We emphasise that these were not consultative meetings. They were meetings where past actions were reported to the disability sector. There has been no genuine consultation in relation to the proposed changes whatsoever.

Consequently, we again respectfully urge you to consider our concerns and to ensure that the Bill does not pass until the public inquiry process has been completed and its recommendations properly considered by the Government.

We view this matter with such concern that we have also provided our concerns to the Leader of the Opposition, to Shadow Attorney General, the Shadow Treasurer and to other members of the Parliament, requesting their support for such an approach.

We would welcome the opportunity to discuss this matter with you further, and in particular, to provide our views on the scope of any terms of reference that may be developed for a Parliamentary inquiry. We would also welcome the opportunity to discuss the amendments outlined in the attached document..

To organise a suitable meeting date please contact Therese Sands on 9370 3100 or thereses@pwd.org.au.

Yours sincerely

THERESE SANDS
Executive Director, Leadership Team
People with Disability Australia

Corinne Henderson
Acting CEO
Mental Health Coordinating Council

ATTACHMENT - PROPOSED AMENDMENTS

1. Section 38 - definition of 'estate' ought to be amended to exclude 'legal personality' of the person so that the person will be free to litigate and lodge complaints etc independently of the Trustee. However, this would need to be balanced in section 56.

2. Section 39 – add new clause 'the human, legal and service user rights of such persons must be respected, protected and fulfilled to the fullest possible extent.'

3. Sections 43 to 45 should be amended to require an application to be made for a financial management order on reasonable grounds – the law should not presume incapacity by requiring this issue to be considered automatically.

4. Section 46(2) specifies a "sufficient interest" standing test – this is too restrictive in this jurisdiction and may mean that only a person with a financial interest in the estate is capable of bringing the application – a disinterested person should also be able to bring an application – the standing test should be the same as for other community welfare legislation - "genuine concern".

5. Sections 44, 45 and 46 ought to specify a maximum length for an estate management order – ie an estate management order may be made for a period not exceeding 3 years after which it must be reviewed by the MHRT. The MHRT should only be able to make a new order if there is a continuing need for such an order. If the order is not reviewed before the expiry of 3 years then it lapses.

6. Section 51 – delete the words 'if requested to do so by any party to the proceedings (including the person to whom the order relates)' – providing reasons for decision will ensure that the person understands the basis of any decision made – and is necessary for access to justice.

7. Section 52 ought also allow the MHRT to appoint a private financial manager, where appropriate and subject to safeguards (equivalent to guardianship act)

8. Sections 53 – ought to provide that the MHRT is to review any voluntary arrangement within six months of it being made, and thereafter at intervals of not less than 3 years. The MHRT ought to be able to direct that the arrangement be continued, varied or terminated.

9. Section 56(b) ought to provide that the MHRT, Supreme Court or Guardianship Tribunal may order that the Trustee has the function of 'personal legal representative'

10. Section 57 – should commence with the words 'subject to this act' to preserve the limits on estate management suggested above

11. Section 59 – should be amended to include 'the reasonable lifestyle needs and aspirations of the person taking into account their financial means'

12. Section 61 – this should be amended to also allow the MHRT to give directions to the Trustee

13. Section 62(3)(c) – "person whose interests adversely affected" - this standing test is too restrictive – a disinterested person should also be able to make an application – the test should be "genuine concern"

14. Section 70(3)(b) – this standing test should be made consistent with community welfare legislation - "genuine interest"

15. Section 74 – this section ought to be amended to **require** the Trustee to prepare an **annual** financial plan for the person. It ought to require the Trustee to consult with the person and significant others in the development of this plan, and explain the plan to the person, to the extent that is it practicable to do so. This plan ought to be capable of being varied or revoked and a new plan instituted should circumstances require it. Any variation etc ought to involve consultation with the person, and be explained to the person. The section ought also to provide that a fee will not be charged for the development of this plan, unless the estate generates substantial income. The threshold for this may be prescribed by regulations.

16. Section 111(2) delete - instead it should be 'fees are to levied in relation to specific services provided, and not otherwise' These fees must be reasonable having regard to the market rate for these services. The fees are to be prescribed by the regulations. A new section should be added to the effect – fees shall not be payable by persons with estates less than the threshold amount prescribed by the regulations.

PUBLIC GUARDIAN

- Should be established on same level as CEO with same status
- Part 7 Guardianship Act provisions ought to be re-enacted in Chapter 2 and new Chapter of this Act – with necessary amendments.