Substitute Decision Making: Time for Reform

Submission to the NSW Legislative Council's Inquiry into Substitute decision-making for people lacking capacity

People with Disability Australia
and
NSW Mental Health Coordinating Council

pwd
people with disability

mhcc
Mental Health Coordinating Council

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1. Introduction

1.1 **People with Disability Australia** (PWD) is a national peak disability rights and advocacy organisation. Its' primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWD also has a large associate membership of other individuals and organisations committed to the disability rights movement. PWD was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own. PWD has a cross-disability focus – it represents the interests of people with all kinds of impairment and disability. PWD is a non-profit, non-government organisation.

1.2 The **Mental Health Coordinating Council** (MHCC) is the State peak body for non-government organisations working for mental health throughout NSW. It represents the views and interests of over 200 non-government organisations specialising in the provision of services and support for people with disability that is a consequence of mental illness. MHCC provides leadership and representation to its membership at a State and Commonwealth level and seeks to improve, promote and develop quality mental health services to the community.

1.3 The issues we wish to raise before the Committee are of very long-standing concern. At various points over at least the past 10 years reform proposals to address some or other of these matters have been developed at the agency level and advanced to central government for its consideration. Meantime, NSW legislation, institutional arrangements and practice in relation to supported decision making for persons with decision-making disability has stagnated or regressed.

1.4 NSW is now in the 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.

1.5 The focus on this area of public administration that preceded the enactment of the *NSW 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 so as to reflect Australia's international human rights obligations and contemporary best

practice in the area of supported decision-making. Unfortunately, that was not the case. Although we welcome the Social Issues Committee's review, we are now in a situation where a new law and a new institution have been created without proper regard for these fundamental issues.

1.6 We acknowledge that some amendments were made in the drafting of the new Act in an attempt to address some of our concerns, or at any rate they were presented as such by the '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 objective was to bring the contested provisions of the *Protected Estates Act* 1984 into line with equivalent or similar provisions in the *Guardianship Act* 1987.

1.7 We suggest that such an aim was ill-conceived. The *Guardianship Act* 1987, while in some respects 'less-worse' that the *Protected Estates Act* 1984, also urgently requires fundamental reform to ensure its consistency with Australia's international human rights obligations and best practice in the area of supported decision-making.

1.8 In part, we maintain that this aim developed without appropriate supporting evidence to inform decision making as a consequence of the absence of any 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 intentions.

1.9 No element of this communication involved consultation with disability sector representatives. As we shall shortly outline, 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.

1.10 We make these points not to rehash past frustrations, but to demonstrate the point that to start with the *NSW Trustee and Guardian Act* 2009 as a framework for the Committee's inquiry into substitute decision-making for persons with impairment or disability that impacts upon their capacity to make decisions is to 'put the cart before

the horse.' 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.

1.11 In our view, the necessary starting, or reference, point for the Committee's inquiry is Australia's international human rights obligations under the Convention on the Rights of Persons with Disabilities (CRPD) – in particular, Articles 5 and 12 of that Convention, which deal with, respectively, Equality and Non-discrimination, and Equal Recognition Before the Law. For your ease of reference we append a copy of the CRPD – Appendix 1.

1.12 We also refer the Committee to the United Kingdom's *Mental Capacity Act* 2005. At the time it was enacted, that Act reflected the international high-water mark of law and policy in relation to persons with impairment or disability impacting on their decision-making. That Act is a good comparator for the scale and scope of reform required in NSW. For your convenience we append a copy of that Act to this submission (Appendix 2).

1.13 The Committee should also consider the *Code of Practice* in relation to mental capacity developed under the *Mental Capacity Act* 2005 and a supplement to this *Code* that deals with deprivation of liberty specifically – the *Deprivation of Liberty Safeguards.* These documents are also appended for your convenience – Appendices 3 and 4 respectively.

1.14 Nevertheless, the *Mental Capacity Act* 2005 (UK) is not the best piece of legislation in every respect from a human rights perspective or in terms of its scope and application. Both the strategic approach and aspects of the Act's detailed content must now be considered in light of the requirements of the CRPD which has been finalised since that Act's adoption. We shall discuss the implications of the CRPD for this area of public policy in detail following.

1.15 Finally, we refer the Committee to work undertaken by the NSW Attorney-General's Department in 2007-2008 which resulted in the development and publication of a *Capacity Toolkit.* The *Capacity Toolkit* is also annexed to this submission – Annexure 5.

1.16 We note that the terms of reference for the Committee's inquiry are potentially very broad. As we have already indicated, we believe that a comprehensive and detailed review of this area of public policy is urgently required. While we take for granted that the Committee will use its best endeavours to address the terms of reference, it is,

nevertheless, difficult for us to see how justice can be done to the topic given the limited timeframe and resources available to the Committee to undertake this inquiry.

1.17 We note, by contrast with the approach to this issue being taken in NSW, that the Victorian and Queensland Governments have recently commissioned their respective Law Reform Commissions to undertake detailed reviews of guardianship laws in those States. While those reviews might also be criticised for their limitations, they provide a better basis for the detailed legal and policy analysis that ought to precede reform in this area.

1.18 Without diminishing the important role the Committee has the potential to play in shaping Government policy in this area, we therefore propose that the Committee also recommend to the Attorney-General that this area of public policy be referred to the NSW Law Reform Commission for Inquiry.

1.19 A longer and more detailed review by the NSW Law Reform Commission would provide the opportunity for the Government to properly consult with and engage persons with disability in the law reform process. As we have already noted, such consultation and participation is a fundamental instrumental dimension of Australia's international human rights obligations under the CRPD.

1.20 For such consultation and participation to be meaningful, it will be necessary to provide a range of disability related adjustments (for example, the provision of information in a variety of accessible formats, including in Easy-English and pictorial formats) and undertake a range of positive measures (for example, targeted consultations with persons with cognitive impairment using methods appropriate to their communication requirements).

1.21 Given the constraints associated with timeframe of the public submission process for this inquiry, our submission will focus on the following issues:

- The human rights context for this inquiry;
- Legal capacity and equality before the law;
- Law, policy and safeguards in relation to legal capacity;
- Institutional arrangements for supported and substitute decision-making and related safeguards;
- Restrictive practices – law, policy and safeguards

However, we underline the fact that these issues do not represent the totality of matters that ought to be considered leading up to comprehensive reform in this area.

2. Human rights context

2.1 In our submission, it will be important for the Committee to clearly identify at the outset the human rights context for this Inquiry and in particular the human rights and state obligations that are engaged by the Inquiry.

2.2 In December 2006 the United Nations adopted the CRPD. The CRPD is constituted by 50 articles, approximately 32 of which have substantive human rights content. These articles include civil and political and economic, social and cultural rights. As we shall discuss in detail below a number of the civil and political rights incorporated into the CRPD are directly relevant to this inquiry, including:

- Article 5: Equality and Non-Discrimination
- Article 9: Accessibility
- Article 12: Equal recognition before the law
- Article 13: Access to Justice
- Article 14: Liberty and security of the person
- Article 15: Freedom from torture, or cruel, inhuman or degrading treatment or punishment
- Article 16: Freedom from exploitation, violence and abuse
- Article 17: Protecting the integrity of the person

2.3 The CRPD applies to 'all' persons with disability, and this includes those persons with long-term mental and intellectual impairment (Article 1). In other words, it applies to all those persons who are the focus of the Committee's inquiry.

2.4 The CRPD is a 'core' international human rights instrument, situated at the same level as other core treaties, such as the International Covenant on Civil and Political Rights (ICCPR). The CRPD has concurrent application with all other human rights treaties: the rights and freedoms enunciated in all other instruments continue to apply to persons with disability on an equal basis with others. (We shall return to the significance of this point when we discuss the right to a fair trial (paragraph 3.29) – a right not dealt with directly in the CRPD.

2.5 Australia signed the CRPD when the treaty opened for signature on 30 March 2007 and ratified it on 17 July 2008. The CRPD entered into force with respect to

Australia on 16 August 2008. In accordance with Article 4 of the CRPD its provisions apply to all parts of federal states, such as Australia, without limitation or exception. The terms of Article 4 are reinforced by Articles 29 of the Vienna Convention on the Law of Treaties, which provide that a treaty is binding upon a party with respect to its entire territory. In a nutshell, although it is the Commonwealth Government that is responsible to the international community for the implementation of the CRPD within Australia, all Australian States and Territories are directly bound by its terms.

2.6 The CRPD incorporates a number of international monitoring mechanisms. Principal among these is a Treaty Body, the Committee on the Rights of Persons with Disabilities, which is established under Article 34 of the CRPD. Parties to the Convention are required to submit reports to the Treaty Body outlining their efforts and progress in the implementation of the CRPD. The first of these reports is to be a comprehensive 'baseline' report, and thereafter 'progress' reports must be submitted every four years, or when the Treaty Body requests such a report. Australia's baseline report is due to be submitted to the Treaty Body in August 2010.

2.7 An Optional Protocol to the CRPD was adopted by the United Nations and entered into force simultaneously with the CRPD. The Optional Protocol incorporates a communications (or complaints) procedure that empowers individuals and groups of individuals to complain to the CRPD Treaty Body about the violation of CRPD rights and freedoms, provided they have first exhausted any reasonably available domestic remedies. The Optional Protocol also reposes in the Treaty Body the function and power to conduct inquiries into gross or systemic violations of CRPD rights. Australia announced its accession to the Optional Protocol on 31 July 2009, and in accordance with Article 13 of the Optional Protocol it will enter into force with respect to Australia 30 days after the formal instrument of accession is lodged with the United Nations.

2.8 The CRPD represents a 'paradigm shift' in the conceptualisation of impairment and disability, and in the nature of social responsibility to persons with impairment and disability. Most significantly, the CRPD designates persons with impairment and disability as right bearers and calls for action to meet their needs on the basis of their human rights, rather than as objects of population health or social development programs. This human rights approach to disability is grounded in the Social Model of Disability (see further Michael Oliver, 1983) which views disability as the result of persons with impairments attempting to interact with a barrier-filled social environment. The whole thrust of the CRPD is on the identification and removal of barriers to persons with disability experiencing equality with others.

2.9 As will be evident from the rights noted above, a major focus of the CRPD is the barriers that persons with disability experience to their enjoyment and exercise of the right to equality before the law.

2.10 At the most basic level, nations accept four levels of obligation when they become a party of an international human rights treaty. They solemnly undertake to *recognise* the treaty, and they solemnly undertake to *respect*, *protect* and *fulfil* the human rights and fundamental freedoms it enunciates.

2.11 The obligation to *recognise* human rights requires the Nation Party to undertake a number of substantial actions. Nation Parties must:

- Adopt laws, policies and programmes to give effect to the human rights and fundamental freedoms set out in the treaty;
- Modify or abolish laws, policies, customs and practices that violate these rights and freedoms; and
- Promote human rights and freedoms in the development of all policies and programs.

2.12 The CRPD extends and amplifies these obligations in a number of key dimensions that are relevant to this inquiry. Nation Parties must:

- Prohibit and eliminate discrimination on the ground of disability by State and non-State actors;
- Refrain from engaging in any act or practice that is inconsistent with the human rights and fundamental freedoms recognised in the treaty, and ensure that public authorities and institutions act in conformity with these rights and freedoms;
- Provide accessible information to persons with disability in relation all forms of assistance, support services and facilities;
- Promote the training of professionals and staff working with persons with disability in relation to CRPD human rights and fundamental freedoms so that they may better provide the assistance and services guaranteed by those rights; and
- Consult with, and actively involve persons with disability in the development of legislation and policies to implement the CRPD, and in all other decision-making processes impacting on persons with disability.

2.13 The obligation to *respect* human rights operates as a restraint on arbitrary or unjust governmental action which would deprive a person of their enjoyment of a human right or fundamental freedom or which would limit their enjoyment of that right or freedom.

The obligation to *protect* human rights requires governments to take action to prevent non-State actors (such as private individuals, non-government agencies and corporations) from arbitrarily or unjustly depriving a person of a human right or freedom, or which would limit their enjoyment of that right or freedom. The obligation to *fulfil* human rights requires governments to take positive action to ensure that all human rights are enjoyed to the full extent by all persons.

2.14 Human rights are typically conceptualised as falling into two basic categories:

- Civil and political rights (rights that protect the individual from arbitrary exercise of power by the State, and which protect the individual's right to self-determination free from arbitrary interference from the State);

- Economic, social and cultural rights (rights that seek to protect and enhance the economic status, and social and cultural well-being and progress of peoples.)

2.15 Under international law, civil and political rights are subject to a different standard of obligation to that which applies to economic, social and cultural rights. Civil and political rights are *immediately realisable,* which means that Nation Parties must give immediate effect to these rights. In other words, a nation must immediately recognise, respect, protect and fulfil these rights, otherwise it violates these rights. Economic, social and cultural rights are *progressively realisable*, which means that Nation Parties are not obliged to fully comply with the obligation but must work towards the fulfilment of these rights over time.

2.16 The human rights engaged by this inquiry (outlined above) are civil and political rights that must be immediately recognised, respected, protected and fulfilled.

3. Legal capacity and equality before the law

3.1 During the CRPD negotiation process, the issues related to the legal capacity of persons with disability received considerable attention as a principal site of human rights violation in all parts of the world. As a number of commentators have pointed out, particular approaches to legal capacity have, in many societies, and at various times up to the present, resulted in the 'civil death' of the person – that is to say, in their obliteration before the law.

3.2 This focus on the issue of legal capacity continues and is likely to intensify in international efforts to implement the CRPD. For example, in October this year the issue of legal capacity of persons with disability will be considered at a four-day Second Session of the Committee on the Rights of Persons with Disabilities. It is the first issue to be considered thematically by the Committee, which indicates the urgency and seriousness with which the issue is regarded within the international human rights arena.

3.3 Laws related to legal capacity operate in two fundamental, but not necessarily distinct, ways. They incorporate positive measures designed to overcome instrumental limitations in a person's capacity to exercise their human and legal rights and fulfil their legal duties, and they limit personal autonomy related rights in order to prevent or reduce the potential for the person's conduct to cause harm to self or to others.

3.4 Historically, primary laws related to legal capacity (guardianship, estate management and mental health laws) have generally reflected one of three approaches to legal capacity: the 'status' approach; the 'outcome' approach; and the 'functional' approach. Briefly, the status approach involves the declaration of incapacity based on the 'mere' fact that the person has cognitive impairment (for example, intellectual or psycho-social impairment). The outcome approach involves the declaration of incapacity based on the deviation of the person's conduct from their previous pattern of conduct or from social norms. The functional approach involves the declaration of incapacity with respect to a specific issue or issues, but not necessarily with respect to other issues.

3.5 Broadly speaking, Australian capacity laws purport to be based upon the functional approach, which tends to be viewed as being more consistent with human rights. However, in reality, these laws are a blend of all three approaches. In fact, the former *Protected Estates Act* 1984 and the new *NSW Trustee and Guardian Act* are closer in typology to the status model than they are to the functional model.

3.6 This is because the law only applies to persons with acute mental illness who are the subject of involuntary treatment, and because 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, or the harm that may result from particular conduct (although these factors are inevitably considered at least superficially in the course of the inquiry). Additionally, the 'declaration of incapacity' is essentially on a 'once and for all' basis without consideration of the sometimes episodic nature of mental illness.

3.7 The *Guardianship Act* 1987 is closer to the functional model. However, it too is a law of specific application to persons with disability - a guardian may only be appointed for a person 'who, because of disability, is totally or partially incapable of managing his or her person.' However, generally speaking, an inquiry pursuant to this test under the *Guardianship Act* 1987 would place greater emphasis on need and risk factors.

3.8 Although estate management orders may be terminated and revoked in specific circumstances (which are rarely invoked), orders otherwise operate on a perpetual basis, and are generally not subject to review. (Estate management orders made under the *Guardianship Act* may be reviewed by the Guardianship Tribunal but are not mandatory.) Moreover, current arrangements essentially require the person subject to the order to seek the termination or revocation of the estate management order. The Protective Commissioner (now Trustee) has standing to do so, but in practice rarely if ever does so.

3.9 Under international human rights law, any permissible[1] limitations to human rights must be 'prescribed by law' and any law prescribing a limitation to a human right must be of general application. The law cannot operate in an arbitrary way. For example, it cannot discriminate against a particular segment of the population, such as persons with impairment or disability.

3.10 Consequently, to the extent that guardianship and estate management laws limit the autonomy-related rights of persons with impairment and disability as a specific population group, they are arbitrary and in violation of the right to equality before the law.

3.11 This does not mean that the objectives of such legislation are impermissible from a human rights perspective (indeed, at least some of these objectives are not only ethically defensible but affirmatively required from a human rights perspective.) However, it does mean that NSW's existing architecture for the pursuit of these objectives is incompatible with human rights.

3.12 The failure of traditional formulations of human rights – including that relating to the right to equality before the law – to penetrate to the 'lived' human right violations encountered by persons with impairment and disability was a primary rationale for the

[1] Some human rights such as Freedom from Torture and other cruel, inhuman or degrading treatment may never be limited.

development of the CRPD. In particular, it underlies the rationale for Article 12 of the CRPD.

3.13 Article 12 is constituted by five major elements.

3.14 Clause 1 of Article 12 requires parties to 'reaffirm' that persons with disability have the right to recognition 'everywhere' as persons before the law. It uses the word 'reaffirm' because this is a pre-existing obligation under human rights law; emanating principally from the ICCPR. It uses the word 'everywhere' (a word also used in the ICCPR) to indicate the right to recognition before the law applies in all contexts.

3.15 Clause 2 of Article 12 requires parties to recognise that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Properly understood, this clause has a declaratory function. It positions legal capacity as central element of equality before the law, and declares that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life.

3.16 Legal capacity has two basic dimensions. The first dimension is legal personality; that is, a unique legal identity that bears legal rights and duties. The second dimension is the capacity to act; that is, the instrumental ability to realise rights and fulfil duties.

3.17 Clause 3 of Article 12 imposes a duty on parties to take appropriate measures to provide access by persons with disability to the support they may require to exercise legal capacity; that is, parties must, where required, provide assistance to persons with disability so that they may realise their legal rights and fulfil their legal duties. The clause does not specify the form of assistance required.

3.18 'Support' is a broad term capable of encompassing both informal and formal support arrangements. Nevertheless, it must be read and understood in terms of the policy of the CRPD as a whole, which is to promote individual autonomy, independence and freedom to make one's own decisions for persons with disability (Article 5(a) of the CRPD).

3.19 Clause 4 of Article 12 provides that all measures that relate to the exercise of legal capacity must operate subject to appropriate and effective safeguards to prevent abuse of such arrangements. It is important to note that this obligation relates to 'all' measures – not just formal support arrangements, such as guardianship and estate

management. These safeguards are required to ensure that measures relating to the exercise of legal capacity:

- Respect the rights, will and preferences of the person;
- Are free from conflict of interest and undue influence;
- Are proportional and tailored to the person's circumstances;
- Apply for the shortest time possible; and
- Are subject to regular review by a competent, independent and impartial authority or judicial body.

3.20 Additionally, clause 4 provides that these safeguards must be proportional to the degree to which measures relating to the exercise of legal capacity affect the person's rights and interests. In other words, the more intensive the support to exercise legal capacity is, the more intensive the safeguards must be.

3.21 Clause 5 of Article 12 applies the principles set out in clauses 1 to 4 specifically to the financial affairs of persons with disability. It provides that parties must take all appropriate and effective measures to ensure that persons with disability are able to own and inherit property on an equal basis with others; to have equal access to bank loans, mortgages and other forms of credit; and, are not arbitrarily deprived of their property.

3.22 Importantly in relation to this inquiry, clause 5 provides that measures must be taken to ensure that persons with disability are able to control their own financial affairs. Read in conjunction with clauses 1 to 4 this means that, where necessary, parties must provide assistance to persons with disability to manage their financial affairs, and all such forms of assistance must operate subject to the safeguards outlined in clause 3.

3.23 Article 12 must be read in conjunction with Article 5 of the CRPD – Equality and non-discrimination, from which it is ultimately derived (that is, Article 12 is a specific application of the universal right to Equality). Article 5 is important to a proper understanding of Article 12 for four reasons.

3.24 First, it identifies the broad scope of the right to equality before the law – and by implication, the necessary scope of legal capacity. It provides that all persons are equal *before* and *under* the law and are entitled to the equal *protection* and *benefit* of the law. The right to equality before and under the law requires that the law be the same for everyone, and that it be applied to everyone in the same way. The right to equal

protection and benefit of the law means that the law must protect and secure everyone's interests in the same way.

3.25 Second, it prohibits discrimination on the basis of disability and guarantees to persons with disability equal and effective legal protection against discrimination on all grounds. In particular, it should be noted, by these means Article 5 also prohibits the law operating in a discriminatory way against persons with disability.

3.26 Third, Article 5 imposes an obligation on parties to ensure that reasonable accommodation is provided. "Reasonable accommodation" refers to necessary and appropriate modifications and adjustments, not imposing a disproportionate or undue burden, where needed in a particular case, to ensure that a person with disability is able to enjoy or exercise their human rights and fundamental freedoms on an equal basis with others (Article 3).

3.27 Fourth, Article 5 provides that specific measures (sometimes called 'positive' measures) which are necessary to accelerate or achieve de-facto equality of persons with disability do not constitute discrimination.

3.28 It is important to appreciate that differential treatment related to the provision of adjustments and modifications necessary for persons with disability to enjoy or exercise fundamental rights and freedoms, or as a result of a positive measure aimed at achieving de facto equality for persons with disability do not constitute discrimination, and by extension are not 'arbitrary.' In fact, they are positively required by the CRPD. This applies to measures designed to assist persons with disability exercise legal capacity.

3.29 NSW laws with respect to legal capacity and financial management currently breach, are inconsistent with, or fail to fulfil, Australia's international human rights obligations in relation to persons with disability and equality before the law in the following ways:

- As already noted, they are laws of specific application to persons with disability, and to the extent that they limit autonomy related human rights they are therefore arbitrary. In these respects they violate Articles 5 and 12 of the CRPD;

- They do not establish a presumption of legal capacity. Although such a presumption may exist at common law, NSW capacity laws fail to affirm this

presumption. In this respect they fail to respect, protect and fulfil Article 12 of the CRPD;

- They are laws of very limited scope. They do not speak to the wide variety of circumstances where the issue of legal capacity is raised. They therefore do not provide any basis for the resolution of problems that arise in many areas. In these respects they fail to respect, protect and fulfil Article 12 of the CRPD;

- They do not mandate, and provide for, supported decision-making arrangements. The *Guardianship Act* 1987 recognises 'persons responsible' for the purpose of providing consent to some medical and dental treatments, however, such a role is not recognised in other areas of life, including with respect to financial management. The role is also framed in terms of providing informal substitute consent, rather than in terms of support for the person to exercise capacity. In these respects they fail to respect, protect and fulfil Article 12 of the CRPD;

- They do not reflect a proportionate approach to limiting autonomy related rights. Orders made under the former *Protected Estates Act* (now TGA) essentially operate in perpetuity and are not subject to regular review by an independent and impartial authority. Generally, orders are also plenary in nature. Although under the TGA the Mental Health Review Tribunal (MHRT) may now exclude part of a person's estate from management, it does not have a positive duty to consider this issue or to tailor any order to address only specific concerns. An equivalent problem exists with respect to the Guardianship Tribunal and the *Guardianship Act* 1987. Additionally, although the MHRT may make an interim order under the TGA, the interim order cannot extend past the period of the person's involuntary admission. This results in the MHRT making final orders in circumstances where it would be preferable to defer consideration the person's capacity to manage their affairs following their recovery. In these respects they fail to respect, protect and fulfil Article 12 of the CRPD;

- The TGA does not provide for the appointment of a private financial manager – who may have close relationship with the person and be better placed to assist them with the management of their affairs. (A private financial manager may be appointed under the Guardianship Act). It is therefore unnecessarily and inappropriately intrusive in many instances. In this respect it fails to respect, protect and fulfil Article 12 of the CRPD;

- The laws do not provide for the effective oversight of informal supported decision-making arrangements to prevent against abuse, neglect and exploitation. In this respect they fail to respect, protect and fulfil Article 12 of the CRPD;

- The laws are procedurally unfair to persons with disability, and in this respect violate the right to a fair trial, as well as Article 13 of the CRPD, Access to Justice. Under the TGA, applications for estate management may be brought essentially without notice to the person who is subject to the application. At that point in time, the person will be the subject of involuntary treatment in an acute mental health facility. This is a time when they would be least able to mount a persuasive defence to the application, and access the evidence they would require to do so. Hearings are typically conducted over the telephone or via video link under great time pressure. Typically, the person will not have been provided with the documents the applicant has put before the MHRT, or if they have, they will have received them at very short notice. This limits the person's opportunity to effectively mount a defence to the application, and for the MHRT to properly inquire into the issues and to give proper consideration to the submissions made by the person subject to the application. The person may not be legally represented, and even if they are, they will typically not have had time, or be in a position, to provide their legal representative with appropriate instructions and the evidence required to effectively mount their defence. The person is typically without any means of obtaining a second or independent opinion about their capacity to manage their affairs. Proceedings are not subject to the rules of evidence. In reality, a great deal of the evidence typically put before the MHRT is hearsay, which for the reasons given above cannot be properly tested either by the Tribunal or the person in the hearing.

- The MHRT is not required to provide written reasons for its decisions, unless requested to do so (a pro-forma is completed which usually involves no more than the recitation of the statutory test). The absence of a requirement to provide written reasons for decisions as a matter of course compromises the integrity of the decision-making process – it results in decisions being made on vague and uncertain grounds, and in inconsistent decisions between applications. The person subject to the application may be unaware of their right to request written reasons or of their right to appeal against an order. This situation fails to respect, protect and fulfil the right to a fair trial and Article 13 of the CRPD.

- Most documents associated with the hearing process, and its outcome, are not in plain-English, and none are available in Easy-English. Depending upon the level of the person's cognitive impairment they may be very difficult or impossible for the person to understand. This fails to respect, protect and fulfil Articles 5, 9 and 13 of the CRPD.

- The law imposes no positive duties on the Protective Commissioner (now Trustee) to administer the person's estate in a way that maximises their dignity and human rights (Part 4.5 of the TGA). The emphasis is on the preservation and maximisation of the estate, rather than on the quality of life of the person.

- The current arrangements for levying of fees and charges on a protected person's estate are arbitrary to the extent that they do not relate to specific transactions and other instances of service provided to the person. (Fees and charges are applied at a fixed 'base' rate and then as a percentage of value of the estate). The lack of transparency associated with these fees and charges in grossly inappropriate in view of the compulsory nature of the state's intrusion upon the person's affairs. To the extent that such arrangements would not be tolerated in the commercial sector they are discriminatory against persons with disability, and in violation of Article 5 of the CRPD.

4. Law, policy and safeguards in relation to legal capacity

4.1 NSW law in relation to legal capacity ought to address the following problems:

- Legal incapacity based on the 'status' approach still exists in a number of areas of the law – for example, in relation to voting, the ability to hold office as a director of a corporation, and the ability to hold public office;

- 'Legal capacity' issues are currently dealt with according to a 'welfare and interests' approach, rather than a human rights approach (s 4(a) of the *Guardianship Act;* s 39(a) of the TGA);

- NSW law contains a number of different, and to a degree, inconsistent tests for capacity, which are incorporated into statute or which operate at common law. This leads to uncertainty, confusion and the inappropriate application of legal principles beyond the specific context in which they are formulated;

- There also exists in the community, and among the relevant professions, a high degree of confusion and very poor practice with respect to the assessment of capacity. The NSW Department of Justice and Attorney-General's *Capacity Toolkit* has been an initial response to this problem. However, the *Toolkit* is obviously framed within the existing law, which is a deficient starting point. The massive demand for the Toolkit (65,000 have been distributed since its publication in May 2008) is evidence of the overwhelming need for clarity in this area;

- Persons with cognitive and other impairments and disability experience widespread discrimination in access to justice and in access to financial services. For example:

  - they may, in effect, be unable to obtain equal benefit and protection of the law because they are unable to initiate action to protect their interests, and no-one else may do so on their behalf (such as obtain a personal violence order);

  - currently, the law assimilates the right to initiate and defend legal action to the person's estate (on the basis that it potentially impacts on their assets and liabilities) (s 16 TGA). Legal action can only be taken with the consent, and at the direction of, the Protective Commissioner (now Trustee). This presents a number of problems. The Protective Commissioner has historically been a very conservative body most unlikely to support its clients initiating legal action. More seriously, it is sometimes the conduct of the Protective Commissioner that is the subject matter of the complaint. The Protective Commissioner is therefore in a position to prevent a client from initiating legal action against that Office;

  - they may be refused access to a bank account, or if they have a bank account, the financial institution may refuse to allow them to operate it independently. Banks also frequently refuse to recognise persons such as family members who seek to assist a person operate a bank account informally.

- Persons with cognitive and other impairments also experience widespread abuse, neglect and exploitation both because of the lack of appropriate arrangements to support their capacity to manage their affairs and make important decisions, and as a result of poorly designed, delivered and monitored supported and substitute decision-making arrangements.

4.2 For the reasons outlined above, we believe that the law related to the exercise of legal capacity in NSW ought to have the following strategic approach:

- It ought to be a law of general application, that is, it should apply on equal terms to all members of the population who may encounter difficulties in managing their affairs and in making important decisions. The legislation ought not to specify impairment and disability as a threshold or essential basis for its application;

- Nevertheless, in recognition of the fact that persons with impairment or disability will disproportionately rely upon, or be subject to, its provisions, the legislation should incorporate a range of positive measures designed to assist persons with disability exercise legal capacity and protect against their abuse, neglect and exploitation;

- The law ought to incorporate a presumption of capacity for all adults, and it ought to apply this presumption in relation to persons with impairment and disability specifically (note s 1 of the *Mental Capacity Act* 2005);

- The law ought to explicitly recognise the human rights of persons with disability. It ought to repose a duty upon any person exercising a function, power or responsibility under the legislation to respect, protect and fulfil the human rights of persons with disability;

- It ought to clearly recognise and affirm that all persons with impairment and disability are equal before and under the law, and are entitled to equal benefit and protection of the law.

- It ought to specifically affirm that all persons with disability have legal capacity, unless a Court or Tribunal has determined that they do not have capacity with respect to specific issue or subject matter. It ought to impose an obligation on 'everyone' to recognise that persons with impairment and disability have legal capacity. Where a Court or Tribunal has determined that a person does not have capacity with respect to a specific issue or subject matter, it ought to require 'everyone' to recognise that the person has legal capacity in all other areas of life;

- It ought to provide a single, overarching, definition of capacity that is applicable in all civil law contexts (although the principles are the same, specific additional considerations arise in a criminal law context, and discussion of these issues is beyond the scope of this inquiry);

- It ought to cover all situations where persons with cognitive impairment are assisted to exercise capacity – from informal family based support through to formal institutional support;

- It ought to establish principles and a process for the assessment of capacity. These principles and this process must apply human rights standards;

- It ought to give precedence to supported decision-making arrangements over substitute decision-making arrangements. It ought to mandate and actively promote alternatives to substitute decision-making. This would include measures such as recognition of informal support to exercise capacity, recognition of advance directives, and the provision of professional support to persons with disability to assist them to develop the skills and insight to exercise capacity;

- It ought to provide for the least possible interference with the autonomy of the person consistent with the attainment of their other human rights – such as protection from exploitation, abuse and neglect. It ought to explicitly recognise that both supported and substitute decision-making arrangements may involve restrictions or limitations on the human rights of persons with disability to non-discrimination and equality before the law. It therefore ought to establish that any such restriction or limitation must be a 'proportionate' response to the issue, restricting or limiting human rights only to the extent that it is necessary to do so. Among other things, a proportionate response is one that would be limited in scope (or targeted) to the specific issues (or issues) of concern, and time-limited to that period in which support is required. A specific 'proportionality test' ought to be incorporated into legislation for this purpose;

- It ought to provide that any examination of the legal capacity of a person with disability must be undertaken by an appropriate independent body according to a proper process that accords the person fundamental procedural rights related to a 'fair trial;'

- It ought to provide that any restriction or limitation to a human right must be subject to regular periodic review;

- It ought to impose specific obligations on Courts, Tribunals, and specialist and generic service providers and others to make reasonable accommodations, and undertake positive measures, to ensure that persons with impairment and disability are able to exercise legal capacity on an equal basis with others. This

ought to include programmatic and institutional arrangements for both supported and substitute decision-making;

- It ought to provide effective protection against abuse, neglect and exploitation from those who provide support to persons with cognitive impairment to exercise capacity, and from those responsible for making substitute decisions on their behalf. Such arrangements must include appropriate arrangements for the investigation of potential exploitation, abuse and neglect across all relevant contexts. This will also require the designation of specific criminal offences related to exploitation, abuse and neglect of persons with cognitive impairment who are subject to supported and substitute decision-making arrangements;

- It ought to repose specific positive duties upon the Trustee to actively administer the person's estate, to ensure that their human dignity and rights are realised to the greatest possible extent. This ought to include a specific duty to prepare, implement, monitor and regularly review, in consultation with the protected person and their support network, a 'person-centred,' individual financial plan linked with the person's realistic lifestyle goals;

- It ought to provide a transparent fee structure for the services provided by the Trustee based upon specific transactions and other instances of service. Persons whose only source of income is a pension or benefit, or who otherwise have low incomes and are asset poor, ought to be entirely exempt from the payment of fees and charges.

4.3 The time constraints do not permit us to discuss the elements of this proposed strategic approach in any detail. However, we do wish to make some specific observations in relation to the test of capacity in the TGA.

4.4 The Committee will note that under the TGA the relevant test of capacity is: 'incapable of managing his or her affairs.' In our view this is an inappropriate and loosely framed test that is open to abusive application. It requires significant revision.

4.5 In our view the legislation ought to clearly articulate the scope and content of the test of capability, which might be better framed 'unable to manage a pressing and substantial financial affair that presents an unreasonable risk of harm'. The test ought to incorporate important clarifications, limits and safeguards to protect against the unnecessary, unreasonable or abusive application of the test. Sections 2 and 3 of the *Mental Capacity Act* 2005 (UK) provide useful guidance in this respect.

4.6 The reasons for proposing this new test are:

- A financial manager ought not to be appointed merely because a person may be assessed as incapable of managing their affairs. There ought to be a pressing and substantial need to also justify the appointment (for example, an inability to manage debts, claim revenues, or manage important assets), and the failure to address this need ought to represent an unreasonable risk of harm to the person;

- The new test limits the scope of the inquiry and any ultimate appointment of a financial manager to only those aspects of the person's circumstances where assistance is required. In this respect it is less intrusive on autonomy and provides for the more effective targeting of assistance;

- The language and concept of the proposed new test is less stigmatising than the 'incapability' model of the existing test and recognises that capacity may be issue specific.

4.7 Other safeguards that ought to be explicitly incorporated into the test include:

- A person is not to be considered unable to manage his or her financial affairs:
  - merely on the basis of his or her impairment or disability;
  - merely because of the person's age or appearance;
  - merely because the person has a condition or exhibits behaviour that may lead others to make unjustifiable assumptions about his or her capacity;
  - merely because there is an element of risk associated with the person's conduct

5. Institutional arrangements

5.1 Currently, the *Guardianship Act* 1987, the Guardianship Tribunal and the Public Guardian (both of which are established under the *Guardianship Act* 1987) are administered by the Minister for Disability Services. The Guardianship Tribunal is administered organisationally through the Department of Ageing, Disability and Home Care. The Office of the Public Guardian is situated with the Department of Justice and Attorney-General, but is also required to report to the Minister for Disability Services under s 80 of the *Guardianship Act* 1987. The Minister for Disability Services and the Department of Ageing, Disability and Home Care are also responsible for the provision, funding or licensing of specialist disability services in NSW. This results in both a perceived and actual conflict of interest as most persons with disability who come

before the Guardianship Tribunal, and for whom the Public Guardian is appointed, would be persons who rely upon these services.

5.2 To be an effective safeguard of the human rights of persons with disability it is essential for the Guardianship Tribunal and the Public Guardian to have a very high degree of structural separation and independence from disability services. In particular, the Public Guardian must have the capacity to vigorously challenge disability service providers where required to secure or protect the human rights of persons with disability. This includes the Minister for Disability Services and the Department of Ageing, Disability and Home Care, who are the largest providers of disability services in NSW. The current administrative arrangements limit the Public Guardian's capacity to do so. The Public Guardian is sometimes subject to significant inappropriate pressure to accede to, or acquiesce in, conduct of the Minister or Department that compromises the human and legal rights of persons under guardianship. Key examples are the pressure placed on the Public Guardian to consent to placements of persons with disability in appropriate accommodation services, such as institutions and boarding houses.

5.3 We argue in this submission that NSW guardianship laws and institutional arrangements require very significant reform to comply with contemporary human rights standards, and to ensure that they have functions and powers relevant to the roles that need to be performed. If this reform is to occur, it would currently fall to the Minister for Disability Services and the Department of Ageing, Disability and Home Care to initiate and lead this reform. This is inappropriate for at least three reasons.

5.4 First, many of the reforms required would provide the new 'guardianship' bodies with greater power to scrutinise and direct the conduct of disability services. The Minister and Department are unlikely to effectively lead a process that will result in increased exposure of their functions to scrutiny. Second, the disability portfolio in government is subject to very heavy demands. Neither the Minister, nor the Department, are likely to view the reforms recommended here as a priority, nor is the Department likely to have the capacity to lead such a reform process. Third, the type of reform required to create new laws and institutions that comply with human rights is outside the expertise of the Department.

5.5 Consequently, for the reasons given above, we believe it is essential for the *Guardianship Act* 1987, the Guardianship Tribunal and the Public Guardian to transfer to the Attorney-General's administration. The Attorney-General's Department would provide better structural separation and independence of these bodies from disability

services, and be better placed to initiate, investigate, and implement the human rights related reforms required.

5.6 Although this inquiry does not involve the Mental Health Review Tribunal, except to the extent of its jurisdiction under the TGA, we note that it also has compromised structural independence in that it operates under the administration of the Minister and Department of Health. In our view it too ought to be resituated within the Department of Justice and Attorney-General.

5.7 If the Government were to proceed with fundamental reforms to the law relating to legal capacity in NSW, new institutional arrangements would be required to administer these laws. This would require fundamental reform of existing institutional structures in terms of their strategic profile, role, functions and powers.

5.8 The strategic profile of the new organisation(s) ought to be strongly and positively focused on promoting and supporting relevant persons to effectively assert and exercise legal capacity, and on safeguarding against abuse and exploitation in both informal and formal supported decision-making arrangements. The agency(ies) would continue to have a residual role in substitute decision-making for persons genuinely unable to make decisions for themselves, even with support. However, the agency(cies) would primarily be involved in identifying and removing environmental barriers to the exercise of legal capacity, in assisting relevant persons to exercise their legal capacity, including by assisting them to develop the skill and insight to do so, and in tailoring appropriate alternatives to substitute decision-making.

5.9 The functions and powers of this agency(cies) would be to:

- Develop, implement, and monitor a range of supported decision-making options – for example, personal support programs such as 'capacity advocates' (cf s 35 and 36 of the *Mental Capacity Act* 2005);

- Assist relevant persons to develop the skills and insight to exercise legal capacity through the development of accessible information, tools to support decision-making and the conduct of adapted educational programs;

- Provide person centred substituted decision-making for those persons genuinely unable to exercise legal capacity, even with support;

- Educate the public (for example, financial institutions, legal and health practitioners, disability professionals and service providers, family members etc) about legal capacity;

- Receive, investigate, determine and make recommendations in relation to complaints about abuse, neglect and exploitation related to legal capacity and supported decision-making (both formal and informal). A range of compulsory powers related to the right of entry, seizure of documents, and compulsion of witnesses ought to support this and related functions;

- The power to initiate 'own motion' complaints for investigation by the agency(cies) itself or by other bodies;

- The power to conduct reviews into the circumstances of a person or group of persons in relation to legal capacity and formal or informal supported decision-making arrangements. This ought to include the power to make recommendations to relevant respondents for remedial action;

- The power to conduct policy and programme reviews and 'audits.' This also ought to include the power to make recommendations to relevant respondents for remedial action;

- The power to undertake own motion enquiries into systemic issues in relation to legal capacity and formal and informal supported decision-making. This function ought to be supported by a range of royal commission equivalent powers;

- The power to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits;

- The power to develop and publish policy recommendations, guidelines, and standards to promote quality improvement related to the recognition and support of legal capacity and informal and formal supported decision-making;

- The function and power to collect, develop and publish information, and conduct professional and public educational programmes, in relation to legal capacity and informal and formal supported decision-making.

5.10 In parallel with the submissions above, we wish to make some specific observations of more limited scope in relation to the Public Guardian (assuming the Government is unlikely to embrace the wider reforms outlined above in the short-term).

5.11 The Public Guardian is established under Part 7 of the *Guardianship Act* 1987. Part 7 only reposes limited functions in the Public Guardian – essentially, just those of any guardian appointed under the Act. This contrasts with the much more extensive role, functions and powers of the Victorian Public Advocate, for example.

5.12 Moreover, the Public Guardian is currently appointed subject to the Chapter1A of the *Public Sector Employment and Management Act* 2002. In other words, the officer that holds this position can be removed for any reason. In our view this is inappropriate given the very significant statutory functions of the role and the likelihood that the proper performance of these functions will, from time to time, create tensions in relationships within Government.

5.13 Consequently, we believe it is essential in the short-term for the Public Guardian:

- To be provided with investigation and public advocacy functions at least equivalent to those of the Victorian Public Advocate – and that its name be changed to the NSW Public Advocate to reflect this new organisational profile;

- That the conditions of appointment of the Public Advocate be equivalent to those of the NSW Ombudsman.

6. Restrictive practices – law, policy and safeguards

6.1 Under current law and policy, a primary reason for the appointment of a guardian is to authorise the use of restrictive practices upon a person with disability. Restrictive practices include chemical, mechanical and physical restraint, detention, seclusion, and exclusionary time out.

6.2 Restrictive practices may cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement, alter thought and thought processes, and deprive persons of their property and access to their children. They may constitute humiliation and punishment.

6.3 Some restrictive practices ought to be unlawful in all circumstances. Other restrictive practices may be justifiable in very specific circumstances where they are necessary to prevent serious harm to the person or others. However, any such use ought to be subject to the principle of the 'least restrictive alternative,' and the active promotion of positive alternatives. They should also be subject to rigorous approval and to ongoing monitoring and review by an independent authority.

6.4 In our view, capacity legislation is an inappropriate and insufficient basis for the regulation of these practices, and for the protection of persons with disability from violence and abuse arising from the use of these practices. We are especially concerned that there are, in effect, very limited or no effective remedies where such violence and abuse occurs.

6.5 In particular, we are concerned about the growing use of the guardianship legislation to authorise what is, in effect, civil or preventative detention of persons with disability who have been assessed as a risk to others. This is increasingly the case with respect to persons who are provided with accommodation and support services by the Department Ageing, Disability and Home Care under its Community Justice Program and related initiatives.

6.6 In light of this development, we believe that guardianship legislation ought to be amended to explicitly provide that in no case may a provision in the Act, or an authority provided under the Act, be used to authorise a restrictive practice that amounts to civil or preventative detention of a person for the primary purpose of protecting others from harm.

6.7 More generally, we recommend that specific NSW legislation is enacted to regulate the use of restrictive practices. This legislation ought to apply in all situations (that is, in situations of informal support (such as a family context), in the specialist mental health, brain injury and disability service systems (including acute mental health services), and in the commercial disability service sector (in particular, licensed residential centres).

6.8 The legislation ought to provide that certain restrictive practices are entirely prohibited. These ought to include the following practices:

- Practices that are experimental;
- Practices that cause pain or discomfort;
- Practices that are cruel, inhuman, degrading, or humiliating;
- Practices that result in emotional or psychological deprivation or other harm;

- Physical restraint; and
- Seclusion.

6.9 It is further recommended that an independent, statutory office of Senior Practitioner is established to regulate the use of restrictive practices in NSW. The Senior Practitioner ought to have the explicit role of protecting and promoting the human rights of persons with cognitive impairment subject to, or at risk of, restrictive practices. The Office ought to have at least the power to:

- Declare a restrictive practice prohibited (both at large and in relation to a specific individual);
- Authorise, or refuse to authorise, a restrictive practice (both at large and in relation to a specific individual);
- Impose mandatory conditions on the use of restrictive practices (both at large and in relation to a specific individual);
- Give compulsory directions to service providers in relation to the use of restrictive practices;
- Enter any premises upon reasonable notice, interview any personnel, and examine and copy any document about or relating to the use, or suspected use, of a restrictive practice;

6.10 Additionally, the Senior Practitioner ought to have the following functions:

- Developing standards and guidelines in relation to the use of restrictive practices;
- Developing and delivering professional education in relation to restrictive practices and positive alternatives to restrictive practices;
- Research and development in relation to restrictive practices, and in particular, to positive alternatives to the use of restrictive practices;
- Evaluating and monitoring the use of restrictive practices, including by collecting and publishing data in relation to the use of restrictive practices;
- Developing policy recommendations to government and other relevant bodies about any matter relating to the use of restrictive practices;
- Publication of comprehensive periodic reports detailing the type and incidence of restrictive practices used in NSW.

6.11 The legislation ought to provide that all forms of restrictive practice not prohibited must be subject to explicit approval, monitoring and review arrangements. Moreover the legislation ought to require that any use of restrictive practices must comply with human rights related standards and be for the purpose of fulfilling a human rights related goal. Under the legislation evidence that the a restrictive practice has been used contrary to a direction of the Senior Practitioner ought to be designated prima facie proof that the practice is unlawful for the purpose of civil and criminal proceedings.

7. Proscription of criminal conduct

7.1 Persons with disability who may require assistance to exercise capacity are subject to specific forms of abuse, neglect and exploitation that are not necessarily proscribed by the criminal law. The law therefore does not provide effective remedies against, or effectively deter, such conduct. In our view, the criminal law ought also to be amended to create specific offences related to violence and abuse perpetrated as a result of the unlawful or abusive use of restrictive practices, and in relation to financial exploitation.

7.2 A common and aggravated offence in relation to the unlawful and abusive use of restrictive practices might be formulated in the following terms:

It is an offence for any person to unlawfully:

. *cause pain or serious discomfort to another person; or*

. *restrain another person whether by physical, chemical, mechanical or other means.*

for the purpose of modifying their behaviour, or for any other purpose.

It is an offence for any person to unlawfully:

. *cause pain or serious discomfort to another person; or*

. *restrain another person whether by physical, chemical, mechanical or other means.*

for the purpose of modifying their behaviour, or for any other purpose, in circumstances where such conduct causes actual bodily harm.

7.3 There ought to be a specific (statutory) offence of deprivation of liberty. To ensure that such an offence penetrates to the lived experience of persons with cognitive impairment, it ought to be framed in the following terms:

It is an offence for any person to wilfully or recklessly deprive another person of liberty without lawful excuse.

In this section,

'deprivation of liberty' includes any practice that has the purpose or effect of confining a person to a particular place and or otherwise restricting his or her freedom of movement. A person may be deprived of liberty against his or her will, or by inducing the person to falsely believe it is necessary for him or her to comply with restrictions on his or her liberty. Deprivation of liberty may occur without the victim's knowledge and/or comprehension.

'lawful excuse' means either:

'action taken in an emergency to prevent serious harm to the person or to another person or persons'

'action that is authorised by a Court or Tribunal'

7.4 There ought to be an offence related to the unlawful or reckless use of chemical restraints. Such an offence might be formulated in the following terms:

It is an offence for any person to wilfully or recklessly administer, or cause to be administered to another person, any poisonous or noxious substance, or any combination of poisonous or noxious substances:

- *for an unlawful non-therapeutic purpose; or*
- *without lawful excuse, to cause distress or pain to that other person; or*
- *which endangers the life of, or inflicts grievous bodily harm on that other person.*

For the purpose of this section:

'Poison' or 'noxious substance' includes any medication, whether or not prescribed for the person, and whether or not administered as prescribed.

'Grievous bodily harm' includes a serious loss of either cognitive or physical function, or both cognitive and physical function.

7.5 The *Crimes Act* 1900 ought also to be amended to include a new offence against property that proscribes conduct by a duty bearer that results in the serious neglect of the estate of a person with cognitive impairment, or which represents a serious failure to use that person's property for their benefit. This offence might be framed in the following terms:

It is an offence for any person who has a duty to:

. *protect the estate of another person; and/or*

. *ensure that the estate of another person is used for that other person's benefit;*

to either wilfully, or recklessly, fail to fulfil this duty, where such conduct results in serious detriment to that other person.

In this section:

'person' means a natural person and other legal persons, including a statutory or other corporation

'detriment' includes loss of chance.

8. Conclusion

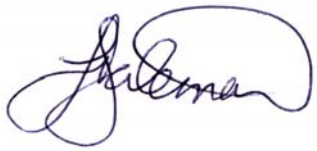
8.1 In this submission, PWD and MHCC have called for a comprehensive review, and fundamental reform, of NSW civil law related to legal capacity. We have noted that it will be extremely difficult for the Committee to do justice to the scope of review and reform required within the constraints of this Inquiry. We have therefore proposed that the Committee recommend a thorough review of the area by the NSW Law Reform Commission.

8.2 The key driver of this reform process ought to be the human rights of persons with disability to equality before the law, and to equal recognition as a person before the law. The United Kingdom's *Mental Capacity Act* 2005 will also serve as a useful comparator for the scale and detail of the reform required.

8.3 As we have already noted, many of the issues canvassed in this submission are of long-standing concern, and have been ignored or dismissed by successive governments over at least a decade. 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.

8.4 PWD and MHCC suggest that inevitably these matters will now be exposed to the CRPD Treaty Body in Shadow Reports and in individual communications. 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.

8.5 PWD and MHCC thank the Social Issues Committee for its interest, and express our willingness to be available for any further consultation in relation to these matters.



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Appendix 1: United Nations Convention on the Rights of Persons with Disabilities

http://www2.ohchr.org/english/law/disabilities-convention.htm

Appendix 2: United Kingdom Mental Capacity Act 2005

http://www.opsi.gov.uk/acts/acts2005/plain/ukpga_20050009_en

Appendix 3: Mental Capacity Act Code of Practice

http://www.publicguardian.gov.uk/mca/code-of-practice.htm

Appendix 4: Mental Capacity Act Code of Practice – Deprivation of Liberty Safeguards

http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/DH_082420

Appendix 5: Capacity Toolkit

http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_capacity_toolkit