

**NSW LAW REFORM COMMISSION CONSULTATION PAPERS:**

**PEOPLE WITH COGNITIVE AND MENTAL HEALTH  
IMPAIRMENT IN THE CRIMINAL JUSTICE SYSTEM**

**A submission by the Public Guardian  
September 2010**

## **PART ONE: An overview of the role of the Public Guardian**

### **The Legislation**

The *NSW Guardianship Act* was enacted in 1987, against a backdrop of the closure of institutions, to protect the welfare and interests of people with disability and to ensure access to the range of community-based services that could provide them with the same opportunities as other people in the community.

The *Act* has been amended on a number of occasions since 1987. For example, in 1998 it was amended to allow for the appointment of enduring guardians. Further amendments to the *Act* in 2004 enabled decisions made by the Guardianship Tribunal or the Public Guardian to be reviewed by the NSW Administrative Decisions Tribunal.

### **NSW Public Guardian**

The Public Guardian exists to promote the rights and interests of people with disabilities through the practice of substitute decision-making, advocacy and education. The Guardianship Tribunal appoints the NSW Public Guardian as the guardian of last resort and the Public Guardian then acts as a substitute decision-maker for people under his guardianship.

The Public Guardian and is an independent statutory official. The Public Guardian is part of the Department of Justice and Attorney General and is supported administratively by the NSW Trustee and Guardian.

### **Relationship of guardians to persons under guardianship**

Section 21 of the *Guardianship Act* 1987 states that:

- (1) Subject to any conditions specified in the order, the guardian of a person the subject of a plenary guardianship order:
  - (a) has custody of the person to the exclusion of any other person, and
  - (b) has all the functions of a guardian of that person that a guardian has at law or in equity.
  
- (2) Subject to any conditions specified in the order, the guardian of a person the subject of a limited guardianship order:
  - (a) has custody of the person, to the exclusion of any other person, to such extent (if any) as the order provides, and
  - (b) has such of the functions of a guardian of that person's person, to the exclusion of any other person, as the order provides.

- (2A) Subject to any conditions specified in the order, the guardian of a person the subject of a guardianship order (whether plenary or limited) has the power, to the exclusion of any other person, to make the decisions, take the actions and give the consents (in relation to the functions specified in the order) that could be made, taken or given by the person under guardianship if he or she had the requisite legal capacity.
- (3) Section 49 of the Minors (Property and Contracts) Act 1970 does not apply to a person the subject of a plenary guardianship order.

### **Ancillary powers of guardian**

Section 21 B of the *Guardianship Act 1987* states that:

A guardian may, on behalf of a person under guardianship, sign and do all such things as are necessary to give effect to any function of the guardian.

A guardian has a general duty to act in the best interests of the person under guardianship. As such, the Public Guardian has an inherent advocacy role in relation to each person under his guardianship.

### **Interaction with the criminal justice system**

The Public Guardian interacts with the criminal justice system when a person under guardianship is arrested and charged with a crime. The person may already be under the guardianship of the Public Guardian, or the Public Guardian may be appointed because the person has been charged with a crime. In these situations the Public Guardian seeks to ensure that the Police and Courts are aware of the person's disability, that the person is appropriately legally represented and their rights are protected.

The Public Guardian may be appointed following an application by any person who has an interest in the welfare of the person including a legal practitioner who holds the view that the person cannot provide them with proper instructions.

### **Legal function**

Historically when appointed for a person involved in the criminal justice system, the Public Guardian would be given a services function or a legal services function in the guardianship order. Under that function the primary role of the guardian would be to ensure that the person under guardianship had access to

proper legal representation, and to arrange for clinical assessments and reports to be available for the consideration of the relevant court or tribunal.

Increasingly however, the Public Guardian is being appointed by the Guardianship Tribunal with a legal function which requires the Public Guardian to both appoint and instruct legal practitioners for the person.

The function is given in circumstances where a legal practitioner or another party believe that the person cannot properly instruct a legal representative because of their disability. Such matters include legal proceedings before administrative tribunals including immigration matters, Family Court proceedings and criminal matters before the Local Court.

An order containing such an authority will often be worded along the following lines:

“To make decisions in relation to the legal proceedings a person is presently engaged in”;

“To appoint and provide instructions to a legal practitioner”.

With a legal function the Public Guardian’s role can be broad and involve a wide range of advocacy.

The Public Guardian may seek the advice of, make a referral to and if necessary instruct a legal representative on behalf of a person under the guardianship of the Public Guardian. Issues related to providing instructions to solicitors for people who are not capable of providing their own instructions are discussed further in Part 3 of this submission.

Where legal proceedings involve the possibility of incurred costs, or where a person must pay for private legal services, either the person, their attorney under an enduring power of attorney or her/his financial manager must authorise the payment of fees.

In relation to the commencement of proceedings the Public Guardian will not act as the person's "tutor" or "next friend" unless indemnified against an adverse costs award. In such circumstances the Public Guardian may seek the appointment of a financial manager.

The Public Guardian will liaise with a legal services practitioner and provide information in the interests of a person under guardianship. The Public Guardian’s view is that liaison with a legal practitioner can also occur under other functions (most often a Services function), depending on the circumstances of the person and the nature of the issues arising.

Thus, the Public Guardian may decide to liaise with a legal practitioner (if this will be in the interests of the person under guardianship), despite not having a

specific legal function. The Public Guardian may take this step if the legal issues arising impact upon areas of the person's life in which the Public Guardian has decision-making authority.

However, the Public Guardian will not seek to instruct a legal practitioner on behalf a person under guardianship unless he has a specific function authorising him to do so.

Where Police or legal matters impact on areas of the Public Guardian's decision-making, the following actions may be undertaken without further specific functions:

- consent to the release of information to a person's legal service/practitioner
- advice to Police about the need to interview a person with an intellectual disability in accordance with the NSW Police Commissioner's Instructions 37.14 (that any interview should be conducted in the presence of an "appropriate adult")
- request that the person's case manager, or a nominated other, attend Police or other investigative interviews to provide support;
- advocate for a person to be assisted by a service provider to take out an Apprehended Violence Order (AVO). This may occur where a person has the capacity to use the legal processes available, and wishes to follow through with the provisions of an AVO
- make representation to the Police, requesting that an AVO be sought on the person's behalf
- seek the advice of, or refer complaints to, the appropriate bodies regarding discrimination or other matters. Such authorities include: the NSW Anti-Discrimination Board, the Human Rights & Equal Opportunities Commission, the NSW Ombudsman, the Community Services Commission, the Licensing Branch of the Ageing & Disability Department and the Health Care Complaints Commission
- make written representation to the Court advising of the Public Guardian's involvement with a person guardianship

There has been much discussion over a number of years about what role, if any, guardians should play in the legal proceedings of persons they represent. An earlier report of the Law Reform Commission indicated that the Public Guardian should have a clearly defined role in protecting the interests of people with disabilities before the courts. It is clear that over recent years the Guardianship Tribunal has responded to the needs of people with disabilities involved in legal proceedings by appointing the Public Guardian with specific functions designed to protect the interests of this very vulnerable group. A number of related issues are raised to help articulate the Public Guardian's views in this area later in this submission.

## PART TWO: Definitions and inclusions

In this section Public Guardian comments on two of the issues raised in Consultation Paper 5 in relation to 'umbrella' terms to be considered for inclusion in the *Mental Health Forensic Provisions Act 1990 (MFPA)*. Also this section discusses the question raised in Consultation Paper 6 in relation to the defence of mental illness being available to defendants with a personality disorder.

**Issue 5.1: Should a broad umbrella definition of mental health impairment, incorporating mental illness and cognitive impairment, be included in the NSW Mental Health (Forensic Provisions) Act 1990 (MFPA)? What practical impact would this have?**

The Public Guardian agrees with the Commission's suggestion that such a definition would be establish the criteria for identifying defendants whose mental impairments may warrant special consideration during sentencing. This may also provide a qualifying condition for diversion, consideration of unfitness to plead, or the use of the mental illness as a defence.

### Identification of mental health impairment

There are two useful classification tools that can be used to determine 'mental health impairment'. The *Diagnostic and Statistical Manual for Mental Disorders (DSM-IV-TR)* - American Psychiatric Association has several advantages:

- the definition of broad-based mental illness is the most comprehensive and generally covers all disorders in the *DSM-IV-TR*
- it is the most widely accepted clinical literature within the clinical and legal community both nationally and internationally
- it is a multi-axial classification system that defines a mental disorder as a clinically significant behavioural or psychological syndrome or pattern that occurs in an individual, which is associated with present distress, disability, or with a significant increased risk of suffering.
- it groups disorders by symptom clusters and differentiates between normality and psychopathology on the basis of the duration and severity of symptoms.

The *International Classification of Diseases and Related Health Problems (ICD)* is also relevant because:

- it is primarily used for reimbursement coding and is commonly used by community-based mental health services
- *ICD* is "cross-referenced" with *DSM-IV-TR* meaning that *DSM-IV-TR* diagnoses are included in *ICD*, but in less detail, whereby, the *ICD* is a supplementary resource to the *DSM-IV-TR*.

When the term 'mental illness' is used it should by definition include all disorders in *DSM-IV-TR*. The *DSM-IV-TR* and *ICD* incorporate both mental illness and cognitive impairment in the definition of 'mental health impairment'. If courts used either resource to determine whether a person would be classified as 'mentally impaired', or having 'legal incapacity', it would most likely include mental illnesses or cognitive impairments, which would warrant an umbrella definition. Importantly, this definition should include mental illnesses, cognitive impairments, and personality disorders. The practical impact of this would be that every mentally ill or cognitively impaired offender would be given the opportunity for the court to ensure their needs are adequately met through the criminal justice system, or they are appropriately diverted to community support, health care, accommodation, and services (Issues 5.1 – 5.3).

There are a number of mental illnesses, cognitive impairments, and personality disorders that are found within all of the Axes of the *DSM-IV-TR*. Both the *DSM-IV-TR* and the *ICD* could be used as resources by the courts and legal professionals to determine if a person with mental illness, cognitive impairment and/or personality disorder could be recognised by the Courts as having a 'mental health impairment' and, subsequently, be managed accordingly.

**Issue 6.21: Should legislation expressly recognise cognitive impairment as a basis for acquitting a defendant in criminal proceedings? If yes, should the legislation expressly include cognitive impairment as a condition coming within the scope of the defence of mental illness, or is it preferable that a separate defence of cognitive impairment be formulated as a ground for acquittal?**

Currently, there are some major differences between the terms 'cognitive impairment' and 'mental illness'. Mental illness is considered any disease of the mind or psychological state that impacts a person's behavioural or emotional wellbeing to the point they require psychiatric intervention. In addition, mental illness is considered a psychological or behavioural pattern that occurs in an individual that causes distress or disability that is not accepted as a normal part of development or a person's culture.

In comparison, cognitive impairment a broader term that describes a wide variety of impaired brain function relating to the ability of a person to think, concentrate, react to emotions, formulate ideas, problem solve, reason, and remember. (Reference: Australian Government website [http://www.jobaccess.gov.au/Advice/Disability/pages/Cognitive\\_Impairment.aspx](http://www.jobaccess.gov.au/Advice/Disability/pages/Cognitive_Impairment.aspx))

The severity of cognitive impairment can range from mild to severe and incorporates a variety of disabilities that are found within the *DSM-IV-TR* including, but not limited to, acquired brain injury, autism, intellectual disabilities, dementia, learning disorders, substance dependencies, and other psychiatric/mental health.

Based on these definitions, it is argued that both cognitive impairment and mental illness relate to disorders that can be diagnosed using the *DSM-IV-TR* and should therefore come under the umbrella term, 'mental health impairment'. As a result, legislation should recognise cognitive impairment as a basis for acquitting a defendant in criminal proceedings and cognitive impairment should be included as a condition falling within the scope of the defence of mental illness. In addition, like mental illness, cognitive impairment is treatable and individuals diagnosed with either of these groups of disorders would benefit from treatment, community support, and access to health care and accommodation.

### **Case example 1: Ms A**

#### **Person with a diagnosable mental illness involved with the criminal justice system**

Ms. A is a 35 woman who has a history of mental illness dating back to her childhood. Over this time Ms. A has been given numerous diagnoses including Schizophrenia, Schizoaffective Disorder, Schizo-phreniform Psychosis, and Adjustment Disorder with Depressed Mood, Borderline Personality Disorder, and Anti-Social Personality Disorder. Ms. A has an eight year history of stays in a psychiatric facility and has a history of self harm and suicidal ideation. However, Ms. A has been deemed as unsuitable for a CTO 'due to unresolved mental health issues'.

In more recent years Ms. A was diagnosed by three separate and independent Forensic Consultant Psychiatrists as having Psychotic Disorder (Not Otherwise Specified - NOS) and Borderline Personality Disorder. The clinical definitions of both of these disorders are found within the *DSM-IV-TR* and the *ICD*. It is reasonable to ascertain that Ms. A could be seen as mentally disordered or have a diagnosable mental illness as per the definition of mental illness and/or impairment.

### **Case example 2: Ms K**

#### **Person who has a cognitive impairment involved with the criminal justice system**

Ms K is a 24 year old Aboriginal woman who has been diagnosed with an intellectual disability. She experiences a range of social difficulties including difficulty in maintaining appropriate housing, poverty, drug use and associated poor nutrition, and everyday functioning as well as involvement in the criminal justice system. Ms K has a history of childhood neglect and suspected abuse. In 2008, she was in jail and was homeless because she broke the conditions of the Section 11 bond, which enabled her to stay in a diversionary accommodation and support program. This is because she absconded and was apprehended by the Police and taken back into custody.



The Public Guardian questions why these two people would be treated differently within the criminal justice system.

**Issue 6.22: Should the defence of mental illness be available to defendants with a personality disorder, in particular those demonstrating an inability to feel empathy for others?**

A Personality Disorder (PD) is an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment (Reference: *American Psychiatric Association*, 2000, p. 685).

A major issue for individuals with PD is that many professionals consider they are "untreatable" and can also be considered to not have an Axis I diagnosis within the *DSM-IV-TR*, meaning they are not mentally ill. However, while people with PD can be more difficult to treat and/or rehabilitate they are not untreatable. This common misconception by mental health professionals often leaves individuals with PD to deal with their mental illness in other ways and frequently on their own, sometimes resulting in involvement with the criminal justice system due to antisocial behaviours and substance abuse. Finally, people with PD frequently get misdiagnosed, are poorly medicated and receive little support in the community which increases their chances of becoming involved with the criminal justice system or re-offending.

To argue that PD is not a diagnosable mental illness is inaccurate. Multiple personality disorders are noted in the *DSM-IV-TR*, along with the specific diagnostic criteria. To say that individuals with PD are not mentally ill is simply not true as the diagnosis is found in literature that is used internationally to diagnose a variety of mental illnesses, including PD.

### **Case example 1: Ms A Diagnosis of Borderline Personality Disorder**

Ms A had been diagnosed by three forensic Psychiatrists as having psychotic disorder and borderline personality disorder. However, a psychiatrist from a major psychiatric hospital disagreed with these diagnoses, and wrote a report stating that Ms A has "bad behaviour, is a dangerous individual, and has severe borderline personality disorder that is characterised by poor regulation of mood, recurrent rage, impulsivity, self harm, and displays features of a psychopathic personality". Consequently, this doctor justified not accepting Ms A into hospital by stating she does not have a mental illness. However, Ms A continued to re-offend (assault and set fires) due to her negative behaviours described above.

All of Ms A's characteristics are found within the *DSM-IV-TR* and meet the diagnostic criteria for Borderline Personality Disorder. Research demonstrates that psychotherapy, dialectical and cognitive behavioural therapy are effective approaches to teach the client how to better take control of their lives, their emotions, and themselves through self-knowledge, emotion regulation, and cognitive restructuring.

If the courts were to refer to the *DSM-IV-TR*, Ms A would be recognised as an individual with a mental illness that, albeit difficult to treat, is treatable under the appropriate therapeutic regime. Therefore, Ms A should be processed through the court as an individual with 'mental health impairment' and should be given the same rights as other offenders with diagnoses of mental illness and/or cognitive impairment.

**Issue 5.6: Should the *MHFPA* be amended to create a general power of the court to order an assessment of an offender at any stage during proceedings?**

The Public Guardian supports the proposition that the *MHFPA* be amended to create a general power to order an assessment of an offender at any stage during the proceedings.

**Early Identification of Mental Impairment**

Offenders with mental illness or cognitive impairment may be arrested for minor offences that are due to manifestations of their illness, their lack of treatment, and the lack of structure in their lives. It is asserted by a variety of mental health professionals that an individual with a diagnosable mental illness, as per the *DSM-IV-TR*, who commits a crime and subsequently enters the criminal justice system, might not have done so had they been receiving adequate and appropriate mental health support and treatment within their community.

This highlights the need for appropriate mental health support and treatment within the community which would potentially prevent initial contact with the criminal justice system or which would reduce recidivism. If this is not possible, it is important to have someone at the first point of contact with the criminal justice system that has the skills and capacity to identify offenders who could potentially have mental health impairment. This would ensure they are treated accordingly by the court system and would also help alert the court to the need to question the person's fitness to be tried or their capacity to understand the nature of any sentences that may be imposed on them by the court.

Ideally, people with a mental health problem or cognitive disorder will be identified by the Police. Once the person appears before the court, it would be

helpful to have had an assessment completed if at the first point of contact with the Police had identified that the accused may have mental health impairment or cognitive disorder.

### **Case example 3: Mr W** **Early identification of mental impairment**

Mr W is a 24 year old man with an intellectual disability associated with Wilson-Turner Syndrome. He was a ward of the State until he reached 18 years of age and has a history of sexual assault as a child. As a result, he displays significant behavioural problems, including sexually inappropriate behaviour, absconding, stealing, and a risk to others. Mr W has been involved with the criminal justice system previously and is listed on the Sexual Offenders Register for a number of years. Mr W receives support from a non government service provider and ADHC. Both services believed that Mr W required more intensive due to problems that have arisen at Mr W's group home.

Since Mr W's needs have been identified, the Public Guardian has been able to advocate for a referral to the Community Justice Program and continues to play an active role in the development of appropriate accommodation and services. More recently, Mr W was found to have accessed inappropriate websites and is currently being investigated by the Police for this offence. However, the Police are aware of his mental impairments and are, therefore, assisting his service providers to increase community support and develop interventions that will prevent him from committing further offences. Early identification of Mr W's needs will, hopefully, prevent further involvement with the criminal justice system.

### **Capacity to Understand Convictions and Sentences**

Many clients under the guardianship of the Public Guardian who are involved with the criminal justice system simply do not understand why their actions are deemed to be wrong or unacceptable. Often they have behaved in certain ways to gain attention. Their behaviour is often described by behaviourists as functional. For example aggression towards themselves or others has a function to reduce their anxiety. Regardless of the reason why the person became involved with the criminal justice system, it is likely some individuals did not know that their criminal conduct was wrong (Issue 6.28).

An individual may be labelled as having 'challenging behaviour' within the context of a service/support arrangement and a behaviour modification response may be designed and implemented to modify this behaviour. If this same behaviour is manifested outside a service/support arrangement it may come to the attention of Police and be labelled criminal behaviour. This will set in train a completely different response to the same behaviour.

**Case example 4: Mr R****A person unaware of their actions being considered criminal conduct**

Mr R has alcohol related brain damage (Korsakoff's syndrome) and associated dementia, along with cerebral atrophy, chronic airways disease, a minor heart problem, a prostate problem, and occasional gout. Due to his incapacity, he did not know that he had been banned by the NSW and Victorian courts from operating a motorised vehicle. Mr R would frequently drive his vehicles on a suspended licence and while intoxicated simply because he could not remember he was not legally allowed to drive. In addition, due to alcohol induced brain damage, Mr R could not comprehend the laws surrounding operating a vehicle whilst intoxicated. This frequently resulted in contact with local Police and further criminal convictions.

The Public Guardian has now advocated for Mr R's family to organise the removal of his vehicles so he does not have the means to drive. In addition, the Public Guardian advocated for placement within a dementia specific unit, which would also offer Mr R a period of detoxification and treatment, until suitable and permanent accommodation could be located for him.

## **PART THREE: When an accused person cannot provide instructions**

This section discusses some issues related to circumstances when an accused person does not have legal capacity to provide instruction or to conduct a proper defence in matters before the Local Court. Discussion centres on what role an appointed guardian can play and what authorities a guardian would need to have to make appropriate decisions in this area.

### **The Public Guardian can act as a ‘tutor’ in legal proceedings**

A ‘tutor’, ‘next friend’ or ‘guardian ad litem’, is a person (acting as an agent who is recognised by a court) representing someone who is ‘incompetent’ or ‘infirm’, and who cannot therefore manage their own legal proceedings.

*Black’s Law Dictionary* states that a ‘tutor’ is recognised by the civil law as someone who has the care of a person and their estate, including care in overseeing their legal proceedings. A guardian ad litem is a ‘special guardian appointed by the court to prosecute or defend, (on) behalf of an incompetent, a suit (to which the person is a party)’. The guardian ad litem is regarded as ‘an officer of the court to represent the interests of the ... incompetent’.

The term guardian ad litem (as used in the Supreme, District and Local Courts of NSW) refers to an agent acting on behalf of a person with a disability who is defending legal proceedings. In these Courts a ‘next friend’, however, is the agent who acts to instigate proceedings on behalf of the person with a disability. Both terms can be substituted for the generic term ‘tutor’, which applies to agents on both sides.

In the Family Court of Australia the term ‘next friend’ or ‘litigation guardian’ refers to an agent who may act for either a plaintiff or a defendant. No specific term is used in this Court to delineate between the two parties.

The *Guardianship Act* 1987 does not define the many and varied roles of a guardian in the life of a person under guardianship. Nor does the *Act* specifically define the powers or authorities which can be conferred upon a guardian. There is no statement in the legislation regarding whether a guardian appointed under the *Act* can fulfil the role of agent on another person’s behalf in legal proceedings.

In many common law jurisdictions such a role is expected of guardians. For instance, in many US jurisdictions a guardian may participate in those legal proceedings necessary to uphold the support, care, education or well-being of the person.

The Public Guardian generally takes a cautious view and believes limited, 'personal guardianship' does not generally provide for him to be involved in decisions arising within the substance of a person's legal proceedings. Thus, the Public Guardian will not make decisions or take actions to affect the direction of a case, nor will the Public Guardian enter a plea for a person under his guardianship unless specifically authorised to do so by an order of the Tribunal or the Supreme Court.

The Public Guardian will make decisions to engage and instruct legal practitioners when appointed only with an order which expressly requires the Public Guardian to take those actions.

A number of points require consideration: Firstly, if a person has a financial manager, a solicitor would be expected to 'seek confirmation of the instructions to act (from the financial manager), to ensure that legal costs will be paid'. Guardians (appointed under the *Guardianship Act 1987*) are not legally authorised to make decisions about a person's finances or estate and therefore cannot commit finances to the engaging of a legal service/practitioner.

Secondly, the Public Guardian recognises that a 'tutor' can be made liable for costs in some legal proceedings. Whilst the NSW Trustee (acting as a person's 'tutor') may be able to meet such costs from the person's estate, or the Guarantee & Reserve Account (established for that purpose *inter alia*), the Public Guardian has no access to such funds.

Thus, the Public Guardian cannot commence legal proceedings in which costs may be awarded against him (acting as a "tutor"), as these costs could not be borne.

Further, in the Family Court a financial manager or guardian may act as a person's 'next friend' or 'litigation guardian' in legal proceedings. Where estate issues are involved the Public Guardian supports the recognition of a person's financial manager as the 'next friend'.

Less clear, perhaps, are Family Court proceedings involving marital conflict, divorce or child access arrangements and a range of criminal proceedings. The Public Guardian has been appointed to provide instructions in Family Court matters. The NSW Law Reform Commission, for instance, has previously suggested there may be a role for the Public Guardian in criminal matters involving persons with a disability.

The Public Guardian is concerned that a number of people appearing before the Local Court cannot properly instruct legal representatives on their defence. Despite this, cases proceed. Often that matter is dealt with according to the diversionary provisions under the *Mental Health (Forensic Provisions) Act*.

However, on many occasions these provisions are not utilised and the matter proceeds according to law.

A number of NSW courts and tribunals utilise a guardian in circumstances where it is apparent that the subject of the proceedings is unable to properly instruct legal counsel on their behalf.

A guardian may be appointed to assist in legal proceedings where a person is:

- incapable of representing him or her self
- incapable of giving proper instructions to his or her legal representative, and/or
- under legal incapacity due to age, mental illness or incapacity, disability or other special circumstances in relation to the conduct of the proceedings

The role of a guardian is to protect or promote the interests of the person in relation to whom they have been appointed ('the client').

### **Responsibilities of Guardian**

A guardian has responsibility and authority to make decisions in relation to the client only in the areas covered by the guardianship order, which may include legal proceedings in which the person is involved. A guardian when making decisions shall:

- promote the autonomy of the person under guardianship
- safeguard and represent the interests of the person
- take into account views, opinions, wishes and feelings as expressed by the person
- instruct the legal representative of the client in the conduct of the proceedings
- take into consideration any other special circumstances

### **Legal representation**

A guardian appointed for a person by an order of the Tribunal or Supreme Court has the authority to retain, instruct and dismiss a legal representative where the order so specifies. A guardian is responsible for arranging legal representation for the person under guardianship. Representation is generally sought through Legal Aid. If representation is arranged through other legal agencies the guardian would need to liaise with the appointed financial manager responsible for paying the clients costs and agreeing to a costs agreement.

## Issues around Bail

The Public Guardian has had many clients with a mental illness or cognitive impairment that, once charged, have not had the issue of bail considered. Often it is up to the guardian or case manager to push the issue. Additionally, there have been situations when the client indicates to the legal representative that they want to go into custody, resulting in no application for bail. This raises concerns about taking instructions from a client with a mental impairment.

### Case example 5: Mr C Person unable to comply with bail conditions

Mr C is currently being investigated for a murder that occurred earlier in the year. Mr C did have capacity when the murder was committed but, due to a severe motorised vehicle accident which caused a traumatic brain injury, he no longer has the capacity to enter a plea.

The Public Guardian was appointed with a legal function and was requested to consent to Mr C's bail application submitted by his Legal Aid Solicitor. He was granted bail with five conditions, which included he remain in the Hospital Brain injury Unit and not leave NSW.

Mr C absconded from the Hospital and managed to fly to Perth, breaking a number of his bail conditions. He was extradited back to Sydney and placed into the custody the custody of NSW Corrections. The Public Guardian actively advocated for him to be placed in a secure part of the facility while awaiting a court date due to the drastic nature of his brain injury and the potentially fatal consequences if he were to get into a physical altercation. The Public Guardian's request was upheld and Mr C is now under constant supervision and accommodated on his own. A bail application was refused because Mr C had breached the previous bail conditions.

## Interactions with Solicitors

Once an individual has committed a crime and becomes involved in the criminal justice system, their contact with solicitors can be problematic. Securing appropriate legal advice and assistance arises as a major issue for a number of people with mental health impairments.

Some clients experience multiple problems in accessing appropriate legal aid and services. Usually, Legal Aid becomes automatically involved with disadvantaged clients but there are many systemic issues that lead to problems. For example, there is a lack of resources, not enough solicitors, and the large caseloads of existing Legal Aid solicitors causes many clients to be transferred



between different solicitors and/or their case is represented in a manner that may not address their mental health impairment.

**Case example 6: Mr F**  
**Person having difficulty accessing appropriate legal aid**

Mr F was charged with assaulting a staff member in his supported accommodation service but had difficulties accessing a Legal Aid Solicitor. The solicitor was not allocated until the morning of the first court date. The solicitor had no experience working with someone with a disability, or the context of the issue. The incident report provided to the solicitor clearly indicated that the staff member did not follow appropriate behaviour support strategies, which led to the assault. The solicitor could only see that the report was clear evidence the client had assaulted the staff member and did not intend to seek to have the client diverted under Section 32 of the *MHFPA*.

The Public Guardian sought a legal advocacy function from the Guardianship Tribunal and advocated that the current solicitor be changed. The new solicitor pursued a Section 32 application but the matter is yet to be heard by the court.

Additionally, some solicitors have different perspectives about the best interests of the client or do not have training with people who have a diagnosed disability (mental health impairment). Another concern is that clients receiving Legal Aid services only meet their solicitor on the day of the first hearing, resulting in a very short time frame to properly prepare. This is a particular issue for people with mental health impairments, who may need additional time to understand the issues, and in turn the complexity of their background and situation may also require additional time for the solicitor to understand.

**Case example 4: Mr R**  
**Lack of understanding of disability issues**

Mr R, as previously discussed, has been diagnosed with and alcohol related brain damage. While he was in custody awaiting a court hearing, the Public Guardian was appointed, which resulted in his matter not being heard by the court for a further 10 weeks. Mr R received no assistance from the court and the Public Guardian faced further difficulties in accessing an Aged Care Assessment or case manager to assist him once released back into the community. In addition, his solicitor entered a plea and requested his release from prison for his current charges as he had already served the necessary amount of time whilst awaiting his matter to be heard. As a result, Mr R was released from prison with an ACAT assessment that recommended nursing home placement but with no accommodation arrangement made prior to his release. In the absence of any other accommodation or support, Mr R returned to his home in a rural area where he soon engaged in behaviours that lead to his further contact with NSW Police.

Solicitors have differing opinions regarding who should instruct them when representing a client with mental health impairment. This includes matters involving plea bargains, entering a plea, lodging an application for bail and defending AVO applications. Solicitors often find it difficult to work with a guardian appointed for a client with a mental impairment.

The Public Guardian considers that it is essential to provide education to solicitors who are required to represent people with mental health impairments to ensure that such people have their rights protected.

## PART FOUR: Issues regarding diversion options

The Public Guardian considers that there are some issues in pre-court diversion that could be addressed. Improved access to treatment options and inpatient treatment in a hospital may divert people with mental health impairment from the criminal justice system.

### Issue 7.3 – Does S22 of the *MHA* work well in practice?

In the Public Guardian's experience, Section 22 of the *Mental Health Act* often does not work well in practice due to the refusal of the mental health facility to accept individuals brought to the facility by police under S22.

#### Case example 7: Ms X Access to mental health facilities

Ms X lives with her family in a rural NSW town. She has a history of mental illness. Ms X becomes highly aggressive and agitated, and during one episode, tried to run over her father. The NSW Police were called to take Ms X to the local hospital. The hospital refused to accept Ms X because she had previously assaulted a staff member at the hospital. The closest mental health facility (which is 3 hours away) refused to accept Ms X, despite the fact she is clearly mentally disordered. The result is NSW Police held Ms X for approximately 7 hours in the cells. No alternative options were made available and pressure was put on the family to accept Ms X back for the short term. Ms X returned to the family environment and is at significant risk of committing an offence due to her highly agitated state.

In this case example, the problem of admission to hospital could be resolved if the following clause was added to s22 of the MHA:

- (3) The declared mental health facility has an obligation to accept the person upon presentation and examine the person as soon as practicable (but not later than 12 hours) after the person arrives at the facility.

### Issue 7.4 - Should the police have an express, legislative power to take a person to a hospital and/or an appropriate social service if that person appears to have a cognitive impairment, just as they can refer a mentally ill or mentally disturbed person to a mental health facility according to s 22 of the MHA?

Ideally, it would be helpful for the police to have legislative power to take a person to an appropriate facility. However as noted in the case example 7 there are problems with the hospital or service not accepting the individual. Furthermore, individuals presenting in a highly aggressive state, are at risk of

assaulting staff of the hospital or service. This could result in the individual being charged by police.

**Issue 7.5 - Do the existing practices and policies of the Police and the DPP give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender?**

The Public Guardian believes greater emphasis should be given at this pre-court stage for diversion of people with a mental illness or cognitive impairment away from the criminal justice system.

**Issue 7.6 - Do provisions in the Bail Act 1978 (NSW) setting out the conditions for the grant of bail make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders?**

It is the experience of the Public Guardian that the provisions in the *Bail Act 1978* (NSW) make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders. In particular s 8(2)(a)(i), s 8C and s 9B(1)(c) and (d) make it difficult for individuals with a mental illness or cognitive impairment to be granted bail.

#### **Case example 4: Mr R Lack of access to alternative options**

Mr R has alcohol-related brain damage, cerebral atrophy, Korsakoff's syndrome, chronic airways disease, a minor heart problem, a prostate problem and occasional gout. Mr R was held on remand for 4 weeks prior to his hearing. The Public Guardian was subsequently appointed and the matter was not heard for a further 10 weeks.

Mr R did not meet the requirements for bail and he received no assistance from the court for diversion. He remained in remand for 14 weeks when other options could have been considered that would have been more appropriate.

**Case example 2: Ms K  
Person unable to apply for bail due to lack of options**

Ms K is a 24 year old Aboriginal woman who has been diagnosed as having an intellectual disability. Ms K experiences a range of social difficulties including difficulty in maintaining appropriate housing, poverty, drug use, poor nutrition and everyday functioning as well as involvement in the criminal justice system. Ms K has a history of childhood neglect and suspected abuse.

Ms K absconded from a diversionary accommodation program, thereby breaking the conditions of a Section 11 bond. Ms K was taken back into custody and a magistrate decided Ms K should not return to the program. Her solicitor was not able to apply for bail until an alternative accommodation option could be found for Ms K in the community. ADHC were unable to identify an accommodation option for several months.

Ms K finally was finally released from custody several months later to be supported by a CLASP (Comprehensive Lifestyle Accommodation and Support Program) funded by ADHC.

In both of these cases, the person with mental health impairment spent additional time in custody due to lack of appropriate identified options in the community.

**Issue 7.7 - Should the *Bail Act 1978 (NSW)* include an express provision requiring the police or the court to take account of a person's mental illness or cognitive impairment when deciding whether or not to grant bail?**

The Public Guardian's view is that this provision should be included, provided this did not jeopardise the chances of a person with a mental illness or cognitive impairment being granted bail. Comprehensive support plans from key service providers could be provided to the court to assist with this process.

**Exclusion from alternatives to full-time imprisonment**

Although there are a range of diversionary options available to individuals who come before the court, most individuals with a mental illness or cognitive impairment are not eligible for these options due to the nature of their disability.

The Public Guardian notes the following alternatives are available to full-time imprisonment:

- Periodic detention
- Intensive Community Corrections Orders
- Home detention orders
- Community Service Orders (CSOs)

- Good Behaviour Bonds
- Dismissal of Charges and Conditional Discharge
- Conviction with no other penalty
- Deferral for Rehabilitation or Other Purpose
- Suspended Sentences

Many people with a mental illness or cognitive impairment do not meet the current requirements for these alternatives as they are either required to have entered a guilty plea and or been deemed by the court to be unable to comply with the requirements. As such, S32 of the *MHFPA* is the only practical mechanism in the local court.

The Public Guardian notes that there is a service system vacuum in this area, and the lack of options that can be brought before a magistrate compromises the court's ability to allow for alternatives to full time custody.

### **Exclusion from Crime Prevention Programs**

Many individuals with a mental illness or cognitive impairment are excluded from the current crime prevention programs available due to their perceived inability to participate/rehabilitate.

The Public Guardian notes the following programs available:

- CREDIT
- Domestic Violence Intervention Court Model
- Drug Court
- Forum Sentencing
- MERIT
- Rural Alcohol Diversion (RAD) Pilot Program
- Traffic Offenders Intervention Program
- Youth Drug and Alcohol Court
- Aboriginal Programs – Aboriginal Client Services Specialist Program; Aboriginal Community Justice Groups Aboriginal Justice Plan; Safe Aboriginal Youth Program (SAY); Care Circles; Circle Sentencing

These programs currently require the individual to be able to meaningfully participate in the programs. It is the experience of the Public Guardian that many individuals with a mental illness or cognitive impairment are excluded because they are considered unable to participate in the programs.

The Public Guardian's view is that individuals with a mental illness or cognitive impairment should be given greater access to crime prevention options. Additionally, a new program could be developed which specifically targets the needs of people with a mental illness or cognitive impairment.

## Creative Sentencing Options

Given the difficulties faced by people with a mental illness or cognitive impairment accessing the current diversionary options, the Public Guardian supports provision within the *Act* for more creative sentencing options. A possible expansion of the Community Service Orders could allow for individuals with a mental illness or cognitive impairment to be eligible for this option.

### Case example 8: Mr F Providing other sentencing options

Mr F lives in his own Housing NSW unit and spends most of his time with other young street people. Mr F broke into his day program with a group of young people, and drove the bus around the car park. Mr F was arrested and charged. The local solicitor, believing he was he was doing the right thing, entered into a plea bargain with the Crown not to pursue certain charges. The Public Guardian became involved and tried to get the matter dismissed under S32 of the *MHFPA*. Throughout this process Mr F was not consulted and did not have any sense about what was actually taking place.

A possible creative sentencing option for Mr F could have been for the Magistrate to use S32(2)(c) of the *MHFPA* to order Mr F to wash and clean the bus over a number of weeks.

### Case example 9: Ms G Person with acquired brain injuries from alcohol abuse

Ms G has an acquired brain injury due to alcohol abuse and suffers depression. The Public Guardian was appointed with the functions of accommodation (coercive), medical and dental consents (including authority to override objection to treatment), health care and services. Ms G is not eligible for Legal Aid or Housing NSW as she has a small settlement from a family law matter.

Ms G is in constant contact with the criminal justice system for breaches to the *Telecommunications Act 1997 (Cth)*. Ms G calls emergency services without a need and consequently continues to breach her bail conditions. Ms G has been referred to MERIT as a way of trying to get her to engage with rehabilitation for alcohol abuse. However she refuses to admit she has a drinking problem. The Magistrate has suggested that the next option may be for her to be held at Macquarie Hospital under the *Inebriates Act*, although this option does not provide rehabilitation.

There is a need for creative solution or alternatives to people in similar circumstances as Ms G who currently is not assisted by current forms of treatment options.

The Public Guardian also supports the proposal to expand diversionary options in superior courts.

## **PART FIVE: Issues of Concern**

### **Education /Awareness**

There is an opportunity for early intervention and diversion if people with a mental illness or cognitive impairment can be identified from the beginning of their contact with the criminal justice system. The first point of contact is often with NSW Police. Increased training for NSW Police officers regarding disability issues and better early identification of people with a mental health impairment would allow for individuals to be diverted earlier and reduce the number of individuals charged and coming before the Court.

#### **Case example 10: Mr P Awareness of disability issues**

Mr P has a moderate intellectual disability. It was alleged that Mr P had sexually assaulted a victim and their mother. NSW Police contacted Mr P the day after the alleged assault. At that point in time Mr P was suffering from a diabetic coma. The Police thought Mr P was intoxicated and arrested and charged him. Mr P's matter was later dismissed as the alleged victim did not turn up to court.

This example illustrates that the initial contact with the Police could have led to diversion or flagged that Mr P was suffering from a mental illness or cognitive impairment.

### **Specialist Mental Illness/Cognitive Impairment Court Officers**

The Public Guardian is aware of a trial with a number of courts having a mental health nurse who assess the person in the cells and then present information to the Court. An extension of this trial could include an appropriate person with expertise in relation to cognitive impairments. This would allow individuals to be flagged as possibly having a cognitive impairment and then further assessments could be referred.

#### **Case example 8: Mr F Court support**

The CNC Liaison Officer with the Local Court had been pivotal in assisting Mr F above her role and responsibility in the absence of formal case management. This is despite the fact Mr F had an assigned probation and parole officer and was linked with the local mental health team. The CNC has driven case management issues as his housing and support remains tenuous.



Mr F has been placed on a good behaviour bond as a suspended sentence for charges of indecent assault on a minor and possession of a prohibited substance.

The Public Guardian's view is that the role of the CNC before and after the court hearing has been essential in Mr F's case. There is a clear benefit for all defendants with an intellectual disability or other incapacity issues to be formally assigned a similar 'court case manager' for the term of legal matters.

### **Criminalisation of the Mentally Ill**

The term 'criminalisation of the mentally ill' was coined by Abramson (1972) to refer to individuals diagnosed with mental illnesses that engage in criminal activities and are, subsequently, arrested and prosecuted rather than taken to hospital or other psychiatric facilities to get necessary treatment.

Ms A's (case example 1) story is a clear example of the criminalisation of the mentally ill in the sense that, had the Public Guardian not been involved and had not intervened when necessary, Ms A would have simply continued through the revolving door of the criminal justice system. She would have been processed through the court and would have likely been incarcerated without further intervention or assistance in regards to her diagnosable mental illness. Both Psychotic Disorder (NOS) and Borderline Personality Disorder are diagnosable disorders for which there is treatment. Individuals with personality disorders are difficult to treat, but not impossible and, therefore, are entitled to the same defence as every other person under Sections 32 and 33 of the *MHFPA*.

#### **Case example 1: Ms A Raising multiple issues of concern**

##### *Criminalisation of mental illness:*

Ms A, introduced in Part 1, was diagnosed by three separate and independent Forensic Consultant Psychiatrists as having Psychotic Disorder (Not Otherwise Specified - NOS) and Borderline Personality Disorder. She was an inpatient in a psychiatric hospital when she attempted to light a fire in her room. This behaviour was well documented in Ms A's history and was part of the reason she was in hospital. In response to this incident the hospital called the Police and had Ms A arrested. There is no doubt that this behaviour was dangerous to the staff and residents of the hospital. The nurses identified this behaviour as an occupational health risk. But it was behaviour that was characteristic of her mental illness and was the reason she was in hospital.

##### *Difficulties with Legal Aid:*

Ms A was charged with lighting the fire, but had trouble accessing appropriate support from Legal Aid when she was due to appear before the court. Ms A encountered multiple problems when accessing Legal Aid:

1. The first Solicitor refused to accept instruction from the Public Guardian, which resulted in her matter being adjourned so that the Public Guardian could have the Legal Advocacy function added to the current Guardianship Order.

2. The second solicitor wanted to accept Ms A's wishes to plead guilty without having determined her capacity to enter a plea. There was no consideration of Ms A's mental illness and recognition of her condition as a result of her mental impairment.

3. Finally, due to the complexity of Ms A's case, it was imperative to have a solicitor that was aware of every issue that lead to her coming before the court. Luckily, one solicitor picked up Ms A's case by requesting to be assigned consistently to carry the file and see it through the court processes.

There were a number of systemic issues that arose when accessing Legal Aid for Ms A. As a result, the Public Guardian actively tried to engage Legal Aid but, due to their workload and lack of available solicitors, it was very difficult to get one solicitor to commit to carry Ms A's file. In addition, the risk in Ms A's case was that a Duty Solicitor would pick up the file only moments before the matter was due in court.

Without the intervention of the Public Guardian, which only occurred because the Public Guardian was advised of the court case by Ms A's case manager, it is highly likely Ms A would have been processed through the criminal justice system without any consideration of her mental illnesses.

*Lack of recognition of Section 33: Hospital Refusal to admit Ms A*

Although Ms A has been diagnosed by three forensic Psychiatrists as having psychotic disorder and borderline personality disorder, a psychiatrist who later assessed her disagreed, stating that she has bad behaviour, with severe borderline personality disorder. Consequently, this doctor justified not accepting Ms A into hospital by stating she does not have a mental illness. However, Ms A continued to re-offend (assault and set fires) due to her negative behaviours described above.

As discussed previously, research has demonstrated that psychotherapy, dialectical and cognitive behavioural therapies are effective approaches to work with a person such as Ms A. If the courts were to refer to the *DSM-IV-TR*, Ms A would be recognised as an individual with a mental illness that, albeit difficult to treat, is treatable under the appropriate therapeutic regime. Therefore, Ms A should be processed through the court as a mentally ill individual and should be given the same rights as other offenders with diagnoses of mental illness and/or cognitive impairment.

*Systemic Issues:*

Ms A has now gone before the court multiple times and her case has repetitively been adjourned; first to get the Legal Advocacy function added to the Guardianship Order and then for the solicitor to have more time to apply for Section 33. At the third hearing, Section 33 was granted and the two AVO's were dropped. Steps were then taken to get Ms A re-admitted into hospital but the treating doctors refused her admission based on their assessment that she is not mentally ill. As a result, she went back into custody and reappeared before the court again. The matter was adjourned again, and Ms A was sent to a correctional facility.

As a result of a complex care meeting, the NSW Chief Psychiatrist confirmed Ms A required treatment in a secure facility. A psychiatric hospital agreed to her admission, so another Section 33 was granted by the court. However, when Ms A was presented to this hospital, she was again denied admission as she was assessed by the admitting doctor as not mentally ill or disordered under the *MHA 2007*. As a result, she was taken back into custody.

Another complex care meeting was held to determine the best way to manage Ms A based on her diagnoses and involvement with criminal justice system, including her defence of being mentally ill and should, therefore, be subject to Section 33 of the *MHFPA*. This matter was also raised with the NSW Attorney General and the Health Minister of NSW with the intention of getting assistance to facilitate Ms A's admission into hospital. Ms A appeared before the court again, her matter was adjourned again and she was remanded back to custody until the next complex care meeting. At this meeting, it was agreed that another Section 33 should be sought. This was granted at her next court appearance and Ms A was finally admitted to another hospital for two or three days prior to being transferred to a Forensic Hospital as a civil patient (Ms A was not classified as a forensic patient as she has not been found guilty).

The case studies above provide a snapshot of the range of complex issues facing the criminal justice system when dealing with people who have a mental impairment. The Public Guardian has historically sought to limit his involvement in these matters. However, it is clear that the Public Guardian needs to play a more active role in seeking to ensure that the rights and liberties of people with mental health impairment are upheld within the context of matters coming before the courts in NSW. The Public Guardian is willing and capable of playing a much more significant role in representing the interests of people with mental impairment when properly appointed for this purpose.

The Public Guardian would be happy to provide further input to this inquiry during scheduled hearings.