



Mr P McKnight
Executive Director
NSW Law Reform Commission
DX 1227
SYDNEY

30 July 2010

Dear Mr McKnight,

RESPONSE TO CONSULTATION PAPER – PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENT IN THE CRIMINAL JUSTICE SYSTEM

Thank you for extending the time for submissions on this Consultation Paper, to 30 July 2010. We appreciate the opportunity to respond.

In regard to the proposed amendments, we submit the following comments for your consideration. We recognise the difficulties in effectively improving the support for these vulnerable members of society in the face of limited (and inadequate) funding.

In the context of our response, we feel that it would be of assistance for the Commission to have some understanding of the NSW Trustee & Guardian and our involvement in the financial management of people with cognitive and mental health impairment.

NSW Trustee & Guardian (“NSWTG”) was established on 1 July 2009 by the NSW Trustee and Guardian Act 2009 merging the former offices of the Protective Commissioner and the Public Trustee NSW. NSWTG is a NSW Government agency within the Department of Justice and Attorney General.

Under section 11 of its governing legislation the NSWTG may act in any of the following capacities:

1. financial manager of the estate of a managed person
2. agent or attorney
3. executor or administrator
4. trustee
5. collector of estates

6. guardian or receiver of the estate of a minor
7. receiver of any other property

Currently, NSWTG has in excess of 6,000 deceased estates under administration and over 9,500 clients under direct financial management. A further 2,950 clients have a private financial manager appointed, whose management is overseen by NSWTG. NSWTG also holds about 17,000 powers of attorney most of which are dormant, but which may become active if the principal loses capacity or seeks assistance in managing their financial affairs. Consequently, NSWTG is very actively involved in, or has the potential to become involved in, the day to day management of the affairs of a large proportion of the community, who may be at risk due to mental illness, intellectual disability or other cognitive impairment.

Financial management

An understanding of the history of the origins and development of the Protective Jurisdiction in New South Wales may assist in considering the extent to which (if any) financial managers may become involved in court proceedings involving the managed person.

On the inception of the Supreme Court of NSW in 1823, the Court derived its' jurisdiction from the UK Charter of Justice, which itself was a reflection of the prevailing English law. At that time, English law had determined that the "Royal Prerogative" to deal with the estates of the mentally incompetent extended to the body as well as to the real and personal estate of the subject: *Beverley's Case* (1603) 4 Co Rep 123; 76 ER. 1119.

In *R.H. v C.A.H.* [1984] 1 NSWLR 694 the Supreme Court held that the jurisdiction given by the Charter of Justice was to exercise that part of the Royal Prerogative which related to persons of unsound mind as in force in England in 1823 and that such inherent jurisdiction still remained available to the Court. In that case, Powell J stated that "*the Royal Prerogative extended to the body, as well as to the estate, of the subject, and, as it was a general inherent prerogative, its limits have never been defined*".

To a large extent, the statutory enactments have removed the uncertainty surrounding the extent of the protective jurisdiction. There is an argument that circumstances not within the statutory provisions may still be within the inherent jurisdiction of the Court.¹

The statutory powers of a financial manager are defined by the *NSW Trustee & Guardian Act 2009* and previously under the *Protected Estates Act 1983*, shaped by specific orders and authorities bestowed by the Court or Tribunal. The role of a financial manager was stated succinctly by McColl JA in *In the Protective Commissioner v 'D' and ors* [2004] NSWCA 216:

¹ Porter B E & Robinson M B 1987. *Protected Persons and their Property in NSW*: 38-39.

“The manager stands in the shoes of a person who is unable to manage his/her affairs by virtue of circumstances beyond his/her control. The manager exercises a protective and benevolent function, protective in the sense that the manager’s task is to ensure the estate is managed in a manner to secure the protected person’s estate for that person’s continued maintenance. In this respect the 1983 Act and its predecessors reflected the “parental and protective” jurisdiction historically exercised by the Crown.”

It is apparent from the provisions of sections 32, 33 and 24 of the *Protected Estates Act 1983* that a manager’s powers were envisaged as purely financial in nature, the focus being the management and protection of the person’s financial property. This reflects the historical origins of the powers.

Indeed, the practice of the Court recognises that the person retains the right to make personal decisions. One of the general principles for the management of the affairs of a protected person is that *“the freedom of decision and freedom of action of such persons should be restricted as little as possible”*.² Thus a protected person may retain capacity to marry, if they understand the nature of the marriage contract. Similarly, the protected person may have sufficient testamentary capacity to enable them to make a will, if they are able in general terms to understand the nature and extent of their property and the persons with a claim on their bounty: *Crago v McIntyre [1976] 1 NSWLR 729*.

Difficulties arise when the protected person becomes enmeshed in the legal system and decisions have to be made as to the course of the proceedings. It is well accepted that a financial manager may make decisions on behalf of a protected person for the purpose of litigation: *R v P [2001] NSWCA 473*. Such litigation is generally required to have the potential to affect the person’s financial position.

Substitute decision-making cannot be applied to criminal proceedings in which an offender is required to choose whether to plead guilt or innocence. Such a decision, by its very nature, must always be a personal one.

Generally, the law recognises that either the defendant is fit to be tried, and so capable of making their own decision, or unfit to plead, the consequence of which is commonly retention in strict custody for an indefinite period. Consequently, a financial manager usually has little involvement in decisions concerning criminal proceedings involving the person under their protection beyond securing legal representation.

NSWTG clients in the criminal justice system

It is an unfortunate and common occurrence for financially managed persons to come into contact with the criminal justice system. Research has shown that offenders have higher rates of mental illness than the general community. Rates of the major mental illnesses, such as schizophrenia and depression, are

² Section 39(b) NSW Trustee & Guardian Act 2009

between three and five times higher in offender populations than those expected in the general community.³

Often offenders are not recognised as suffering a mental illness until some way into the justice system, if at all. If the offender is not identified as mentally impaired the resources aimed at providing treatment and reducing the cycle of reoffending will not be made available. It is not feasible to conduct a comprehensive mental health assessment of every person who comes into contact with the police and the courts. Consequently a great deal of the burden of initial identification and screening for mental illness falls on police at the time of arrest and in the watchhouse.

It has been estimated that approximately 2-3% of the New South Wales population has an intellectual disability. By contrast, the most recent New South Wales prisons study suggests that people with an intellectual disability comprise at least 12-13% of the New South Wales prison population; that is, approximately four times that of the general population. Where a person has a “dual diagnosis”, that is, both an intellectual disability and a mental illness, they may find themselves falling between services designed for either group and thus be more difficult to identify.

Attempts to gain a more accurate picture of the numbers of people with an intellectual disability involved in the criminal justice system are affected by a number of factors, such as:

Lack of data: Statistics about offenders with an intellectual disability are often not available. It is often the case that offenders with an intellectual disability have had no contact with support services other than going to a special class or school, and at the time of entering prison are not receiving social security benefits on the basis of their intellectual disability.⁴

Non-identification: People with an intellectual disability may not be identified by police, lawyers, courts or custodial personnel. Some people are particularly skilled at concealing their disability; they may become “street wise” and appear quite competent after a number of contacts with the law. The fact that a person may not ever have been formally diagnosed means that there may be no records to alert criminal justice system personnel to the problem.

Use of different definitions of intellectual disability and different methods of data collection: The definition used for a particular diagnosis will affect the numbers. Some assessment classifications include “borderline” intellectual disability while others do not; some only measure IQ (intelligence quotient) scores, while other

³ Australian Institute of Criminology *The identification of mental disorders in the criminal justice system: Ogloff, Davis, Rivers and Ross*. ACI Issues Paper 334, March 2007

⁴ S C Hayes and G Craddock *Simply Criminal* (2nd ed, Federation Press, Sydney, 1992) at 34, referring to S C Hayes and D McIlwain *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (Sydney, November 1988) at 39

definitions include adaptive deficits. Different figures are also obtained depending on the choice of sampling and assessment techniques.

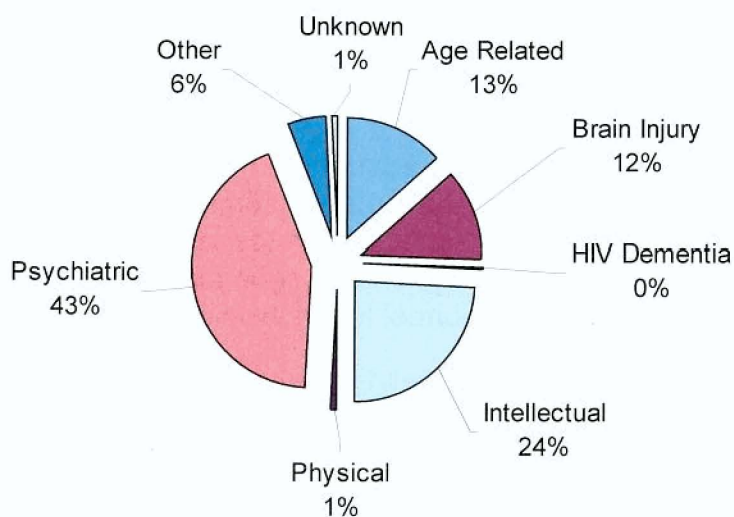
Inter-jurisdictional variations: Statistics obtained from different jurisdictions necessarily differ owing to the variations in sentencing, custodial or non-custodial options, parole practices and availability of community services.

Fifty five (55) NSWTG clients are currently residing within a criminal justice facility and many more have contact with the criminal justice system in some capacity. We do not have data to hand in respect of those clients who have been through or are involved in proceedings but are not currently residing within a criminal justice facility.

All NSWTG clients under financial management have a disability that affects their capacity to make financial decisions. Usually this is due to mental illness, brain injury, intellectual disability, psychiatric disability or dementia. The person cannot manage their financial affairs on their own, has no suitable informal arrangement in place to help them meet all their financial needs and has no other suitable person willing to be legally appointed as their private financial manager.

NSWTG provides a wide range of legal, technical, financial, disability and other services such as: protecting assets and legal rights, facilitating the buying and selling of a home, organising an adequate cash flow to pay bills, liaising with financial and legal institutions, managing a business and making investments.

NSWTG financially managed client base by Disability:



Case Studies NSWTG

The following case studies demonstrate the experience of four NSWTG clients in the criminal justice system. Their offences and the sentences they receive are inconsistent, their treatment within the criminal justice system is inconsistent.

Certainly, in many instances, if found unfit for trial their 'sentence' appears to be significantly longer than if they were tried and convicted.

The main similarity in experience for these clients is that they are in and out of prison regularly for reasonably petty crimes which build up over time to create a more serious history of offences. They are returned to prison as a measure to control behaviour, particularly if the person is homeless, with no guarantee of supervision. Their behavioural challenges are often a result of the lack of support and the unavailability of more appropriate treatment options. The offences range from assault occasioning actual bodily harm, destruction or damage to property, common assault, fare evasion, petty theft and larceny.

CASE STUDY 1

Client:

Ms C is a 29 year old female with a psychiatric borderline personality disorder, drug induced psychosis and mental and behavioural disorders due to multiple substance abuse. She was homeless and is currently in Silverwater Women's Detention Centre.

Background:

NSWTG was appointed financial manager by Order of the Guardianship Tribunal on 21 March 2007. Ms C had a history of multiple hospital admissions in Sydney and previously in WA where she had lived until 2005. She also has a history of abuse, significant loss, lengthy periods of drug and/or alcohol abuse, exploitation and abuse by others, coupled with low self esteem, impulsivity, psychiatric difficulties and risky behaviours, she is Hep C positive.

Limited information is available regarding Ms C's offences prior to her arrival in Sydney. However, hospital documents from July 2005 indicate that she was transferred to a Psychiatric Hospital in WA from a prison and that this was her seventeenth admission to this particular facility. It also states that she had multiple charges including disorderly conduct, possessing a weapon, behaving in a violent manner, possession of cannabis, breach of bail, stealing, and assault.

Offence details

02/02/2009	Ms C in prison for disorderly conduct.
27/02/2009	Ms C released from prison
20/7/2009	Ms C arrested for assault. Police take out AVO and client held in custody until court.
27/7/2009	Ms C appeared in court for charges of assault occasioning actual bodily harm, destroy or damage property and common assault. Bail was granted in this instance to comply with AVO and attend Community Mental Health for medication.
20/8/2009	Ms C in prison- no identification of which facility or what for.
18/1/2010	Ms C in Mulawa Correctional Centre
10/3/2010	Ms C called from prison and stated that the Magistrate had given her an extended sentence for 6 months no date of release given.

28/5/2010 Ms C released however it appears that as she had no accommodation she went directly to her ex-partner's house in Sydney, in contravention of an Apprehended Violence Order against her.

7/7/2010 Ms C returned to prison.

CASE STUDY 2

Client:

Mr D is a 41 year old male with a psychiatric illness. He is currently imprisoned.

Background:

Mr D is a single man who lives an itinerant lifestyle. He has a serious mental illness and long term, intractable polysubstance and alcohol abuse and is non compliant with medication. Mr D is the youngest of 9 children, 4 of whom reside in Australia. He is estranged from his family. At age 13 Mr D travelled by boat from an Asian country where was kept in a refugee camp for 2 years before coming to Australia.

Offence details

At the time that Mr D became the subject of financial management, the Reasons for Decision indicate that he had had many admissions to Rozelle and Bankstown Psychiatric Units and was also transiently in Long Bay Correctional Facility.

1989	Long Bay Mr D arrested on drink driving charge
1990	Long Bay Mr D charged with obtaining benefits by deception—transferred to Royal Prince Alfred Hospital
1993	Mr D set to Long Bay charged with handling counterfeit money
19/4/1995	Mr D involved in a motor vehicle accident as a pedestrian
8/8/1995	Mr D Charged for larceny
15/02/1996	Mr D arrested by Burwood Police and charged with break and enter
29/02/1996	Mr D Released on bail
01/04/1996	Mr D taken to Long Bay Correctional Centre and later taken to Rozelle Hospital
20/05/1996	Mr D in Long Bay until 29/5/1996 Period of various admissions to Hospital and long periods of homelessness
24/10/1997	Mr D in MRRC released 22/1/ 1998 Again period of various admissions to Hospital and long periods of homelessness. Constantly absent without leave from hospital.
09/06/2004	Mr D in prison and released to Caritas
21/04/2006	Mr D at Silverwater Remand Centre- for petty theft and assault
16/5/2006	Mr D released to Caritas
21/09/2006	Mr D in Silverwater Remand Centre –
5/3/2006	Mr D released to Caritas Numerous admissions to hospital possible July 2007 Hit by a train (no information available)

09/01/2008	Mr D in Silverwater – assault charges
22/01/2009	Mr D in custody at Silverwater Correctional Centre Bloomfield/Concord/Caritas admissions
13/05/2010	Mr D in custody at Silverwater Correctional Centre (MRRC)

CASE STUDY 3

Client:

Mr S is a 47 year old male with a psychiatric illness. He is itinerant and homeless.

Background:

Mr S has a psychological disability and a history of drug and alcohol issues. The Mental Health Review tribunal states that he became ill around the age of 16 and has a diagnosis of chronic schizophrenia. Mr S has a history of living an itinerant lifestyle. He is reported to function well when medicated however gradually ceases medication and this leads to anti-social behaviour and thus loss of accommodation, eventually leaving him on the streets.

In the Application for Financial Management it was stated that Mr S was banned from presenting at most banks branches and his account closed due to his disruptive behaviour.

Offence details

February 2003	Mr S in prison Silverwater for fare evasion and assault.
February 2004	Mr S in Junee Correctional Centre breached his parole and served another sentence.
22/3/2004	Order lapsed
8/7/2004	Mr S released from custody
October 2005	Mr S went to his family members' home requesting food ending up damaging property-taken by Police to the Kilo Centre. Mr S in and out of Hospital until 30/4/08 – Mr S then homeless. Mr S had further periods of hospitalisation.
23/11/2009	There was an incident of self harm which resulted in his transfer to Prince of Wales
19/4/2010	A further critical incident, Mr S again hospitalised.

CASE STUDY 4

Client:

Mr M is a 47 year old with an intellectual disability. He was in a Group Home and is currently imprisoned

Background:

Mr M is a 47 year old man who is reported as having an intellectual disability and a history of drug and alcohol abuse. Mr M has a history of living an itinerant lifestyle, absconding numerous times from hospitals whilst scheduled. He has no

family support (his mother has an AVO out against him) and is isolated socially. Mr M can be seen as intimidating due to his large and tattooed appearance. This makes him a target for police who continually move him on and charge him for minor offences such as public nuisance and begging.

NSWTG was appointed financial manager by Order of the Mental Health Review Tribunal on 23 March 1999. The Reasons for Decision states that he has anti-social personality disorder, chronic obstructive pulmonary and other medical conditions.

Offence details

21/08/2002	Mr M released from Goulburn Correctional Facility
6/6/2003	Mr M in prison from 6 June 2003
3/7/2003	Mr M released from custody
21/11/2003	Mr M returned to custody at Metropolitan Remand & Reception Centre, Silverwater.
20/12/03	Mr M released from custody
16/1/2004	Mr M returned to custody
26/1/2005	Mr M released from custody
8/2/2005	Mr M returned to custody
21/4/2005	M M released from custody
18/7/2005	M M returned to custody
26/10/2005	M M released from custody
22/11/2005	Mr M returned to custody
12/2/2006	Mr M released from custody in Silverwater
19/5/2006	Mr M returned to custody in the MRRC in Silverwater
17/08/2006	Mr M released from custody
17/09/2006	Mr M returned to custody
3/10/2006	Mr M released custody
2/11/2006	Mr M returned to custody
28/2/2007	Mr M released from custody
19/03/2007	Mr M returned to custody
4/10/2007 to 27/11/2007	Mr M in custody
24/12/2007	Mr M in custody
27/10/2008	Mr M released from custody
14/1/2009	Mr M held in custody
11/2/2009	Mr M released from custody
13/2/2009	Mr M arrested and in custody
18/2/2009	Mr M released from Silverwater
24/02/2009	Mr M returned to custody
19/05/09	Mr M released from Long Bay. There are over 18 recorded contacts with police until June 17(a period of 4 weeks)
8/8/2009	Mr M remanded in custody
29/8/2009	Mr M released from custody
8/9/2009	Mr M classified as a sexual offender and taken into custody
18/9/2009	Mr M in custody and refused bail. Imprisoned until eligible for parole in June 2011.

NSWTG records indicate that Mr M's offences include: maliciously destroying or damaging property, shoplifting, urinating in a public place, drinking in a public place, verbal abuse.

Assessment and Identification of cognitive impairment

For many NSWTG clients the presence of a disability is not identified by the Police with the result that the Commissioner's Protocols for interviewing people with cognitive impairments are not followed. As such they do not have a case manager or advocate with them during the police interview. In fact, the disability may never be identified during progression through the criminal justice system. Ms C in Case Study 1 was, on five separate occasions, not identified as having a disability at the time of her arrest. This impacted on how she was processed through the courts. Some clients do not wish to disclose their disability and for some clients, the presence of a cognitive impairment may be difficult to assess in one interview by a police officer.

Diversion

NSWTG experiences significant difficulties finding services which will accept clients with complex needs. This reflects the experience of the court in attempting to find services into which to divert people. Neither NSWTG nor the court has any power to compel agencies to provide appropriate and much needed services to clients. Continued advocacy can sometimes assist however often the client's disability is what compels them to reoffend again and can result in the client being exited from many services. The challenge of coordinating different services is also difficult, as is reflected across the sector.

Section 22

The case studies above reflect that a client's current diagnosis or identification of a significant impairment can influence significantly the treatment a client is offered. The definitions of "mentally ill" and "mentally disturbed" in the *Mental Health Act* ("MHA") are certainly not broad enough to include some forms of cognitive impairment in order to allow the police to refer offenders with a cognitive impairment for treatment.

Section 22 powers are aimed at people with mental health problems for the purpose of redirecting them into the civil system set up under the MHA for treatment for mental illness. For clients of NSWTG it does not specifically take into account the treatment options for people with a cognitive impairment. The difficulty is that, unlike mental illness, the various forms of cognitive impairment are not usually amenable to treatment through medication and hospitalisation.

COMMENTS ON SPECIFIC ISSUES

Issue 5.1

Should a broad umbrella definition of mental health impairment, incorporating mental illness and cognitive impairment, be included in the

Mental Health (Forensic Provisions) Act 1990 (NSW) (“MHFPA”)? What practical impact would this have?

NSWTG sees benefit in an umbrella definition covering all forms of impairment in decision making. The term “cognitive impairment” is used as meaning an impairment that demonstrably affects a person's decision making capacity and increases their risk of offending. We are of the view that such a definition should logically include mental illness. NSWTG recognises the difficulties associated with such a definition, particularly the traditional psychiatric view which excludes cognitive impairment as a mental illness.⁵

NSWTG agrees with the Commission's suggestion that such a definition would be for the purpose of establishing the criteria for identifying defendants whose mental impairments may warrant special consideration during sentencing or as a qualifying condition for diversion, consideration of unfitness or use of the defences involving mental illness. NSWTG recognise the need for more specific eligibility criteria within the confines of each of these options.

Issue 5.4

Should the MHFPA continue to refer to the terms “mental condition” and “developmentally disabled”? If so, in what way could the terms be recast?

Acceptable language is constantly changing, usually driven by changing community expectation. The terminology “mental condition” and “developmentally disabled” are terms which are no longer considered suitable in the wider community, being emotionally laden and attaching negative imagery.

Legal language should be modernised to reflect current community expectations. NSWTG is of the view that the term 'mental condition' is outdated and may be better expressed as 'mental health condition' or 'psychiatric condition'. The term 'developmentally disabled' may be better expressed as 'people living with an intellectual or developmental disability' as more in keeping with current trends.

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? If so,

- (a) Who should conduct the assessment?**
- (b) What should an assessment report contain?**
- (c) Should any restrictions be placed on how the information contained in an assessment report should be used?**

(a) NSWTG is of the understanding that a magistrate or judge may order a psychiatric or other medical assessment, at their own discretion or at the request of the defence. However as this request is court driven, the assessment is carried out through Justice Health and the report automatically goes to the court. A poor report may result, if supplied by a jaded departmental medical officer or

⁵ The Diagnostic and Statistical Manual of Mental Disorders, fourth edition (“DSM-IV”)

psychiatrist assessing a defendant based on a half an hour interview, without background reports, while the defendant is incarcerated and presenting on their best behaviour in the hope of quick release. If a report is adjudged unfavourable to the defendant's case by his legal representative, then such a report may actually disadvantage the defendant.

Given that the report will impact on the way the defendant is treated within the criminal justice system, NSWTCG is of the view that it would be preferable for the defence to have some control over the use of the report.

Justice Health reports are at no cost to the client. However there may be circumstances where it would be advantageous for independent assessments to be carried out, in which case funding should be made available to cover the costs of such reports, in situations where the defendant is of limited means.

(b) The assessment report needs to be comprehensive and thoroughly informed, taking account of any relevant background medical or psychological reports that are relevant and available from the defence. If considered necessary by the defence, the defence should be given adequate time to obtain independent reports from a reputable, suitable expert, including reports on the defendant's physical health.

If the defence is dissatisfied with the quality or tenor of the assessment report their should be opportunity to order a second report from a person from an expert chosen by the defence, to address any issues considered unsatisfactory or in need of clarification.

(c) As discussed in (b) above, even though the court may order the report, it may not necessarily assist the defendant for the report to be directed to the court and disclosed in the proceedings. We are of the view that the decision to enter the report into evidence, or to assist in the defence or sentencing, should rest with the defence legal representatives. For those reasons, the assessment report should be directed to the defence, in the first instance and not to the court.

We appreciate the opportunity to respond and look forward to your further proposals for much needed reform in this difficult area.

Yours faithfully,



Imelda Dodds
Chief Executive Officer
NSW Trustee and Guardian