



**People with Disability Australia Incorporated**

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

31 March 2009

Mr Greg Smith, SC MP  
Shadow Attorney General  
Legislative Assembly  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Smith:

**MERGER OF THE OFFICES OF THE PUBLIC TRUSTEE  
& PROTECTIVE COMMISSIONER**

I write on behalf of a number of organisations concerned about the Government's November 2008 mini-budget decision to merge the offices of the Public Trustee and Protective Commissioner (OPC).

We are prepared to support strategic reforms in this area of government if that will result in significant improvements to client services and fundamental reform of the *Protected Estates Act 1983*. Reforms in this area are long overdue, but we are concerned that the current initiative will not achieve this. We are particularly concerned about the following:

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

You will be aware that the Independent Pricing and Regulation Tribunal (IPART) recently delivered a report to the government on its review into the fees charged by the OPC. IPART's report on this review, and the NSW Government's response to it were released in late February 2009.

IPART made a number of recommendations about fee levels to the Government, the principal of which are:

- That the annual cap on the management fee for directly managed clients be lowered from \$50,000.00 to \$15,000.00;
- That the current four per cent annual income fee for privately managed clients be capped at \$2,000.00 per annum.

We are pleased that the Government has accepted these recommendations. These changes will significantly reduce the level of cross-subsidisation of client services by high-net worth OPC clients. Currently, fees levied on clients with large estates and/or incomes pay for services for clients on low incomes (such as a pension or benefit).

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

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

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

#### • **Fundamental reform of the *Protected Estates Act 1983***

NSW is now in the position where its principal legislation in the area of supported financial management for persons with decision-making disability, the *Protected Estates Act 1983* (the Act), explicitly violates fundamental rights set out in Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which was ratified by the Australian Government in July 2008.

We are concerned that the Government is not using the merger of the OPC with the Public Trustee as an opportunity to fundamentally reform the Act so that it conforms to CRPD Article 12, *Equal recognition before the law*. Instead, the Government is only proposing amendments that will allow for the merger to take effect. In our view it is most inappropriate for the Government to be making fundamental changes to institutional arrangements without factoring in the reforms – and related resource requirements - that are necessary to bring NSW legislation into compliance with Australia's international human rights obligations.

We argue that there are many areas of the *Protected Estates Act* that violate, or which fail to fulfil CRPD obligations. This will require significant reform to many parts of the Act, not just a few provisions. In particular, the Act allows for financial management orders that do not comply with the principle of the least restrictive alternative as stipulated by CRPD. For example:

- the whole of a person's estate is committed for financial management, rather than, for example, a major asset in relation to which a person may require assistance with management;

- the estate is committed in perpetuity (unless estate management is terminated or revoked), rather than being committed for a time limited period subject to review.

Contrary to CRPD, the Act also presumes the incapacity of a person to manage their financial affairs, with the onus being placed on the person to prove otherwise.

In line with the intent of CRPD, the Act should also be amended to provide the framework for the delivery of least restrictive, individualised and client-centred services that would allow for a person's choices and lifestyle goals to be recognised and respected.

Not only does the Act violate CRPD Article 12, it is also at odds with the six principles set out in the NSW Attorney General's Department guidelines, *Capacity Toolkit*. While the Toolkit was produced prior to the adoption of the CRPD, the six principles aim to protect the human rights of a person whose decision-making ability may be in question. This Toolkit is available on the Department's website at [http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/pages/diversity\\_services\\_index](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_index)

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

While the Government has provided assurances that the OPG will continue to exist as an independent office with the same relationship with the new merged entity as currently exists with the OPC, it is still unclear what effect the merger will have on the OPG. We still consider the current merger proposal to present very serious risks to the status, independence, and activist culture of the OPG. In any event, even if there were to be no substantial change, the status quo is unacceptable, and ought not to be perpetuated in new institutional arrangements.

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

The provision of an independent statutory basis (and related institutional arrangement) for the OPG, outside the *Guardianship Act 1987* is essential to eliminate the conflict of interest inherent in current institutional arrangements (the Minister administering the *Guardianship Act 1987* and to which the Public Guardian must report under s 80 of that Act is the Minister for Disability Services, who is also responsible for the provision, funding and regulation of disability services). This change is also necessary to enable the cultivation of an activist, human rights culture within OPG (currently the Public Guardian is subject to significant pressure to conform to NSW Health and DADHC service provision priorities, even if these priorities conflict with clients' human rights).

The reforms outlined in this letter, and other critically important proposals for reform in this area of public administration have been advanced to government by its own agencies, and by other stakeholders, over a period of more than 10 years. None of these proposals have been acted on.

Public participation in the development of this reform agenda is essential both to ensure that it is comprehensive and that it is well supported among user groups. We believe that this matter should be referred to the Parliament's Social Issues Committee for Inquiry. We have asked the Attorney General to make this referral. However, he has informed us that he will not do so.

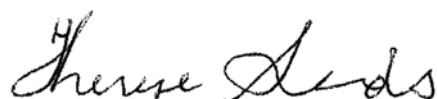
Consequently, we respectfully urge you to defer your vote on the Bill in relation to the merger, and that the Opposition collaborate with the cross-bench members of the Legislative Council to ensure that such an inquiry is established. In this respect, please note that we are writing simultaneously to the Leader of the Opposition and to cross bench members requesting their support for such an inquiry.

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

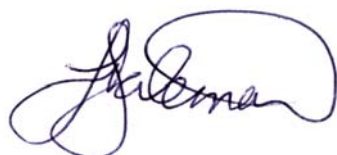
We also refer you to the position statement developed by People with Disability Australia in December 2008 for further information on this issue. The statement is available on our website at [www.pwd.org.au](http://www.pwd.org.au)

To organise a suitable meeting date please contact me on 9370 3100 or [thereses@pwd.org.au](mailto:thereses@pwd.org.au).

Yours sincerely



**Therese Sands**  
Executive Director, Leadership team  
People with Disability Australia



**Jenna Bateman**  
Chief Executive Officer  
Mental Health Coordinating Council

**Carol Berry**  
Executive Officer  
NSW Council for Intellectual Disability

**Janene Cootes**  
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