

Office of the Public Advocate

Background Paper

Presentation to the Statutory Authorities Review Committee

Inquiry into the Office of the Public Trustee

25 May 2009

**The Public Advocate is an Independent Official accountable
to the Parliament of South Australia**

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Introduction

1. The Office of the Public Advocate (OPA) submitted a written response to the Statutory Authorities Review Committee's *Inquiry into the Office of the Public Trustee (the Inquiry)* on the 30 June 2008. The Public Advocate and Acting Assistant Public Advocate presented to the committee on the 25th May 2009 making a number of recommendations to the committee. This document contains background material brought together prior to that presentation. Its purpose is to provide information about practices in other jurisdictions relevant to substitute decision making for financial matters in South Australia that might inform the position of the OPA.
2. Many of the strategic and policy issues that underpin this area have been subject to review and debate in other jurisdictions. For this reason the OPA is pleased to provide this material to the committee, as not only does it provide a basis for a number of the positions put forward by this office, the summary and its reference links might be of general use.
3. OPA's general functions and powers are spelt out in Section 21 of the *Guardianship and Administration Act 1993* (the Act). These are reprinted in full at Appendix One. In summary, for mentally incapacitated persons, OPA should
 - keep under review all programmes designed to meet their needs
 - identify unmet needs or inappropriately met needs
 - speak for and promote their rights and interests (for individuals and groups)
 - negotiate on their behalf on issues arising from their incapacity
 - monitor and give advice on the exercise of powers and administration of this Act
 - perform other functions assigned to it under this or any other Act.
4. Under Section 21 of the Act, the programmes of the Public Trustee (PT) should be kept under review, in the same way that the OPA would review

and advocate to other providers such as disability and mental health services. Our work is informed and guided by OPA's mandated power and functions, and matters raised to us by clients and the principles of the Act.

5. Under Section 75 of the Act, guardians and administrators must work together. This is the context of the relationship between guardians working at the OPA and trustee officers working at the PT.
6. OPA also receives information from clients under administration of the PT who are not under our guardianship. For example many mental health clients have an Administration Order only to PT, as decisions about treatment are either made by the client themselves, or by mental health services under the provisions of the *Mental Health Act 1993*. Similarly many older people may have an Administration Order to PT, but give health consent themselves or have this provided by relatives or the Director of Nursing at their aged care residential facility. OPA's telephone enquiry services will receive calls concerning people in these situations, so in this way our office also becomes aware of administration matters for people who are not also under our office's guardianship.
7. OPA, the Guardianship Board (GB) and PT must observe the principles outlined in Section 5 of the Act (at Appendix Two), namely
 - taking account of the wishes of the person if he or she were not mentally incapacitated, (a paramount consideration)
 - seeking the present wishes wherever possible and giving consideration to those wishes
 - considering the adequacy of existing informal arrangements and the desirability of not disturbing those arrangements
 - making decisions that are the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.
8. It is noted that PT must also take into account the powers and duties of an administrator as set out in Section 19 of the Act and the obligations of a trustee as set out in the *Trustee Act 1936*.

9. A Systems Approach

OPA believes that many of the complaints and issues that have or will be brought to the attention of this inquiry are symptomatic of systems issues; including increasing demand, changing demographics, community attitudes and expectations and the allocation of adequate resources for the needs of people under administration orders.

Recent legislative reform and international conventions are good markers or benchmarks of current societal expectations and aspirations. Some of these are explored in this paper along with a brief snapshot of demographic factors influencing demand now and into the future.

Ad hoc developments or merely the passage of time, can lead to a lack of synergy between the various aspects of regulation, legislation and practice and between related service systems.

The resulting tensions need to be treated as opportunities for whole of system development and improvement rather than a series of discrete problems.

Section 1. Societal aspirations & community expectations

10. A brief review of current discourse and legislative reform provides information on contemporary philosophy, concerns and the aspirations of older people, people with a disability and society generally.

South Australia and Australia

11. South Australia's Strategic Plan¹ (Improving Wellbeing Objective) says 'South Australians should enjoy a good quality of life at every stage of life.....As we mature, we need to stay connected to the community and to the environment, even as our roles change and priorities shift. We need to be in charge of our lives and not unreasonably constrained in our options.'
12. Improving with Age:-Our Ageing Plan² for SA (Choice and Opportunity) says 'For individuals and communities, choice and opportunity are the pathways to independence, achievement and satisfaction. Although our choices may sometimes be limited by circumstance, our capacity to choose keeps us moving forward. Our right to choose defines our dignity. This is the philosophy that guides our Ageing Plan for South Australia'.
13. In 2007 the South Australian Government commenced a review of the laws, regulations and processes for advance directives. It aims to make clearer and simplify the ways by which South Australians can direct:
- the treatment they want to be offered;
 - where and how they want to live; and
 - how they want their finances managed when they are no longer able to speak for themselves.
- Advance directives need to work well in the health, community and financial sectors.
14. The Commonwealth *Disability Services Act 1986* regulates services for people with a disability. It refers to services generally and not just those that the Commonwealth currently provides. The principles and objectives state that every person with a disability should have the chance to

¹ South Australia's Strategic Plan, page 7

² Improving with Age' Department of Families and Communities, February 2006, page 4

- develop fully his or her physical, social, emotional and intellectual abilities
- use services which help him or her to achieve a reasonable quality of life
- participate in decisions which affect his or her life
- receive services in ways which result in the least possible restrictions of his or her life and opportunities
- make a complaint about services he or she receives.

15. In December 2008, the Federal Government introduced the *Disability Discrimination Act and Other Human Rights Amendments Bill*. A key aim of the recommendations is to make it clear that there is a duty to make reasonable adjustments for people with a disability.

16. In the foreword to the 2007 report 'Inquiry Into Older People and the Law'³, the Hon. Peter Slipper MP Chairman, Standing Committee on Legal and Constitutional Affairs wrote 'Throughout the course of the inquiry the Committee received evidence concerning a wide range of issues faced by older Australians in their interaction with the law. Some of these – such as substitute decision-making, fraud and financial abuse – attracted substantial comment in the evidence to the inquiry, whereas others – such as discrimination – received less attention. The Committee was impressed with the overall level of response to the inquiry – a level of response that clearly indicates the importance of these issues for older Australians.'

17. The Australian Federal Government recently ratified the *UN Convention on the Rights of People with a Disability (UNCRPD)*. It has since tabled a National Interest Analysis proposing that Australia become a party to the Optional Protocol to the Convention. This may have implications for the services and programs delivered by disability, related services and OPA, PT and GB.

18. Article 12 (reprinted in full at Appendix Three) of the Protocol is particularly relevant as it commits parties to

- 'provide access by persons with disabilities to the support they may require in exercising their legal capacity'

³ Older people and the law, House of Representatives, Standing Committee on Legal and Constitutional Affairs September 2007
Commonwealth of Australia 2007 ISBN 978-0-642-79013-2 (printed version)

- 'ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs.....'
- 'ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible....'

United Kingdom (UK)

19. The UK *Mental Capacity Act 2005* (proclaimed October 2007) introduced Lasting Powers of Attorney for health, welfare and financial affairs and new systems and structures for their implementation. The Act promotes positive attitudes to ageing, mental impairment and to personal autonomy. Section 2 of this UK Act makes it clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour which might lead others to make unjustified assumptions about capacity. In line with this 'deputies' will only be appointed by the court where it can not make a one-off decision to resolve issues.
20. The UK Act sets out an assumption of capacity, an obligation to take all practicable steps to help the person take his or her own decision and a requirement that capacity should be determined in relation to the specific decision needing to be made at a particular time. An accompanying statutory Code of Practice provides comprehensive guidance to all those working with and/or caring for adults who lack capacity, including family members, professionals and carers. It describes their responsibilities when acting or making decisions with, or on behalf of, individuals who lack the capacity to do these things themselves. Those who will have a duty of care to a person lacking capacity, such as attorneys, deputies, Independent Mental Capacity Advocates (IMCAs), professionals and paid carers must have regard to the Code.

While *best interest* is not defined, a checklist is given for the decision maker, who must:

- involve the person who lacks capacity
- have regard for past and present wishes and feelings, especially written statements
- consult with others who are involved in the care of the person

- not make assumptions based solely on the person's age, appearance, condition or behaviour.

United States of America (USA)

21. A new model '*Uniform Power of Attorney Act*' is being proposed in the USA. A national review of state power of attorney legislation had previously revealed growing divergence among the states' treatment of powers of attorney, an increase in the misuse of powers of attorney and a rising incidence of elder abuse.⁴
22. The *Older Americans Act 1965 (OAA)* was amended in 2006 to embed principles of choices for independence, strengthen multi-disciplinary elder justice and elder abuse activities and improve the coordination of federal elder justice activities and related programs.
23. In February 2009, the American Bar Association⁵ (Standing Committee On Legal Aid And Indigent Defendants, Commission On Mental And Physical Disability Law Section of Real Property, Trust and Estate Law) called on the federal government to provide needed support for training, research, information exchange, data collection, and standards development by state, local, and territorial governments in the field of adult guardianship. It highlighted the need for the collaboration of guardianship stakeholders with other networks such as the aging network under the *Older Americans Act*.
24. The same American Bar Association report states that the first *Elder Justice Act (USA)* was introduced in 2003 followed by other versions in 2005 and 2007. Generally, this Act seeks to ensure "adequate public-private infrastructure and to resolve to prevent, detect, treat, intervene in, and prosecute elder abuse, neglect, and exploitation." S. 2010, introduced in November 2005, stated that one purpose of the Act was to: 'promote the development of an effective adult fiduciary system, including an adult guardianship system that protects individuals with diminished capacity, maximizes their autonomy, and develops effective resources and an elder rights system'. The bulk of this Act has yet to be passed, although some of its clauses were included in the *Older Americans Act 1965 (OAA)* reauthorisation legislation in 2006.

⁴ National Notary Association, California, USA accessed at

http://www.nationalnotary.org/news/index.cfm?text=newsnotary&newsid=1794&wt.mc_id=978&newscat=25 on 19 May 2009

⁵ Joseph D. O'Connor, Chair, Commission on Law and Aging American Barr Association, February 2009 accessed at <http://www.abanet.org/aging/guardianship/lawandpractice/pdfs/111A> on 19 May 2009

25. Various USA states have introduced Bills to modify the law governing guardians, conservators or fiduciary agents for protected persons. Many have defined 'professional guardian' or 'professional conservator' as a person acting as a guardian or conservator for three or more non related individuals. Registration, certification and the meeting of both training and experience criteria are often requirements and these are supported by standards and codes of practice. Regular wellbeing reports or care plans must be filed with the responsible court.

Section 2. Demographics, Social Change & Demand

26. Increasing rates of ageing, disability and mental illness in the community as well as other social, demographic and economic influences will place great strain on all involved in adult protection. Some of these are explored below.
27. In South Australia, the population is growing older at a faster rate than any other state⁶ in Australia.
- the ageing of people with long term disabilities
 - rate of dementia for people aged over 85 is one in four, with actual numbers increasing substantially as the population ages (Oldest age cohort, 85+ will grow to 5% of population in OECD countries by 2050)
 - one in one hundred Australians aged 65 have symptoms of dementia
 - one in seven Australians over 65 has a mental health or behavioural issue.
28. The number and proportion of people at risk of losing mental capacity is likely to increase due to the following factors
- dementia
 - through medical technologies, better survival rates from motor vehicle accidents, head injury and stroke
 - new approaches to the management of cognitive disorders and disease
 - the impact of substance abuse & lifestyle (drugs, alcohol, depression/stress related disorders)
 - increase in mental health disorders
 - life longevity (increasing life expectancies for the general population and for people with an intellectual disability)
29. Change in family structures is making the needs of individuals and the role of providers more complex.
30. Blended families, vulnerable elderly women living on their own, single households, family breakdown, migration and mobility for work can reduce access to the level and quality of informal support available to a person with impaired decision making. The informal supports, where available, may also

⁶ 'Improving with Age' Department of Families and Communities, February 2009

be more complex, as in blended or separated families, and therefore open to more disputes. The emerging phenomenon of multi-generational households (beanpole households) will bring its own set of complexities.

31. Meeting the needs of people from different cultural and linguistic backgrounds will be a special challenge. The profile for whole of Australia shows that it is now one of the most culturally diverse countries in the world. The number of older Australians from culturally and linguistically diverse backgrounds will increase by 66% over the fifteen years between 1996 and 2011⁷ compared to only 23% for Australian born.
32. The demographics of South Australia indicate a similar pattern of cultural diversity amongst its aged population. One in five South Australians over 65 were born in predominantly non-speaking countries giving it the oldest population group with a language other than English. Many of these people may not be able to read or speak English or if they once could, with age may revert to their natural language
33. Community attitudes and trends, social and economic conditions, media and the legislative framework will also influence service usage.
 - There has been work undertaken on Advance directives in South Australia. As these and other instruments are promoted their maybe more appointments of the PT as attorney and as administrator and also when private attorneys fail to appropriately manage affairs.
 - A community and corporate focus on risk management increases the expectation that there will be formal legal arrangements in place particularly in the financial area – a mechanism to manage risk for banks, aged care facilities, service/utility providers.
 - Public and media attention to incidents of financial and rights abuses of the elderly will place more pressure on services. As South Australia's ageing cohort grows larger more attention will be given to this as an issue that has or might affect them.

⁷ Australian Institute of Health and Welfare (2004)

34. Queensland's Guardianship and Administration Tribunal reports that *'The administrator's role is becoming increasingly complex. This is often due to the intricate nature of the person's estate and issues such as privacy, accountability and risk. It is not unusual for an individual with a modest estate to have some shares, superannuation and money invested with various financial institutions and still be receiving a part or full pension from Centrelink or the Department of Veterans Affairs. This means that the administrator will have to deal with banks, share registries, Centrelink and the Australian Taxation Office to name a few. In addition, the changing nature of taxation, superannuation law and eligibility for welfare or income support can make a complex matter out of managing the financial affairs of a person with only a modest estate.'*⁸
35. The increasing complexity of personal finances accompanied by delay in intergenerational wealth transfer, further increase the risk of financial and other abuses, be it deliberate or inadvertent. This risk and acknowledged⁹ increasing rates of elder abuse, including financial abuse, magnified by the growing numbers of elderly persons is an area of significant concern and a pressure for the system.

⁸ Reported in Queensland's Guardianship and Administration Tribunal Annual Report 2005-6

⁹ The ramifications of an ageing population and the potential for abuses have been acknowledged in the South Australian Government's 'Improving with Age' and 'Our Actions to Prevent Elder Abuse' plans.

Section 3. Tensions

36. Tensions in the system can arise from many sources. Resources may not match demand (in quality and quantity); the style, values and culture of a service may not be consistent with consumers' expectations; and there may be an inconsistency between philosophy and practice.
37. As laws are reformed at different times they can often be out of step with each other and likewise, laws that have not been the subject of reform may reflect out of date values and practices.
38. Different sectors are at different stages of development. The disability and aged care sectors have been greatly influenced by Commonwealth Acts and funding, international developments and human rights conventions. In recent years they have undergone substantial structural and policy reform. This is not as true for the adult protection jurisdiction and in particular, PT. Consequently, the services and stakeholders that PT deals with might be considered to better reflect modern philosophy and practices - this then flows through to the consumers' experience of the different environments. The difference they may experience is the extent to which, within the service, there is
- A strong consumer and individual rights focus
 - Acceptance of the role of advocacy and individual advocates
 - A values base that emphasises normalisation and valued social roles
 - Support for full community participation and adjustments to services to enable this
 - A developmental approach
 - Respect for individual choice
39. A tension that is inherent in all protective systems is balancing the need for security and protection with denying freedoms and personal autonomy. Understanding that this tension exists is fundamental to the quality of service provision within the guiding protective frameworks.

40. Some very practical examples of where a tension may arise within our own interactions with PT are
- As trustees they must administer a person's affairs in their financial *best interests* with one object being to guard against a worsening financial position. On the other hand, the principles of the *Guardianship and Administration Act* promote substituted judgment- making the decision that the person would have made if they could have.
 - Respecting a person's autonomy to make decisions and to manage their own life where they can should extend to the freedom to try managing their own funds, with the help or training they need to do so, even when an order is still in existence.
 - A developmental approach for people with fluctuating capacity, or even varying levels of capacity, would require taking an incremental approach; this means providing varying levels of intervention alongside support and training so that people learn to administer their affairs and have the opportunity to do so wherever possible.
41. The GB assists the PT by appointing a *liaison person* who is expected to have personal knowledge of the finances and needs of the protected person. In some cases this knowledge is very limited. The involvement of the liaison person may also be transient (e.g. social worker in a hospital). The PT relies heavily on others for its information about where protected people are living, their clothing needs and personal spending needs. The role of the appointed 'liaison person' while important may not be effective as intended. Often there is confusion as to whether their role is advisor or decision maker, apathy or conflicted interests and little understanding of substituted decision making. In these cases the dependence of PT officers on them for information and guidance, and the deference that follows, may not be in the person's interest.
42. The PT 'aims to be a successful and respected specialist in the provision of Trustee Services. The business activities of the Public Trustee are dedicated to assisting South Australians to achieve peace of mind and security through the provision of trustee services, always acting in their best interests to manage their investments, legal and financial affairs'¹⁰. The PT also plays a special role

¹⁰ Public Trustee 2008 Annual Report

for people who are unable to manage their own financial affairs due to accident, illness, age or disability. There may well be tensions in assuming this role in a person's financial best interest versus their own wishes and personal autonomy, especially when the protected persons' decisions are considered unwise ones.

43. People under administration orders are not so of their own choice. They also have no choice over their financial managers, yet must pay fees for their service. Their resentment and perhaps constant testing of the arrangements must be quite challenging for PT staff and a barrier to an effective relationship. In a parallel situation, people on involuntary Community Treatment Orders under the *Mental Health Act 1993* do not pay for their medication.
44. The Public Accounts Thirty-Fifth Report¹¹ to the UK Parliament, in July 1999, said of the (then) Public Trust Office.....(it) 'is the monopoly supervisor of receivers and patients' funds, and those under its protection have no choice in the matter. It therefore has the strongest obligation to provide a high standard of service. We look to the Public Trust Office to make itself more accountable for the service it provides, for example by keeping under review aspects of its work that receivers and others interested in patients' welfare consider to be the most important and publishing the performance results.' Examples of the UK performance targets and others are attached at Appendix Four.
45. The funding arrangements of PT, the dividends paid to government and the status and funding of their special community service contribution may well interact to have a negative impact on the perceived quality of their service.
46. Increasing rates of abuse, especially financial abuse, is of growing interest and concern to the community and the sector. This is such a significant issue, with many inherent tensions, that it is discussed separately below.

¹¹ Public Accounts Committee Session 1998-99 accessed on 24 May 2009 at <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubacc/278/27802.htm>

Section 4. Vulnerable adults and the risk of abuse

47. At a recent conference on Elder Abuse¹², it was explained that delays in intergenerational wealth and a seven-fold increase in intergenerational wealth transfer (from \$9 billion per annum in 2006 to \$70 billion per annum in 2030)¹³ will provide a fertile ground for abuse and a significant challenge for the jurisdiction. Similarly, older Australians currently account for 22% of assets and this is projected to increase to 47% by 2030. Two key messages from the conference was the risk to the public and government of relying on *existing* guardianship and public advocacy services to mitigate financial abuse and that their capacity to do this needs to be reviewed in the context of new demands, past experiences and public expectations.
48. Lack of data on the incidence of elder financial abuse is an Australia wide problem. A recent Western Australia study has shown that there is poor recognition of what constitutes financial abuse and that those most at risk, aged over 70, were least concerned about it¹⁴. This lack of recognition, the (often) intra-familial nature of this abuse and fear of humiliation contribute to low reporting rates - though there is evidence that reporting rates are on the increase¹⁵. The UK has acknowledged similar data problems-particularly about the misuse of unregistered EPAs. It has been estimated, however, that in the UK *'between 15% of registered EPAs and 40% of unregistered EPAs are being abused'*¹⁶.
49. In response to the incidence of intentional and inadvertent misuse of older people's assets, the Queensland Guardianship and Administration Tribunal undertook research on the nature and characteristics of financial abuse. Based on the examination of 234 tribunal files (November 2002 to June 2003) it found¹⁷ about 26% were suspected of having abuse and that aged workers, the Office of the Adult Guardian and close family played an important role in bringing this to the Tribunal's attention.

12 G. Naughtin, Associate Professor - La Trobe University and Senior Manager, Brotherhood of St Laurence

13 Note that these figures were quoted pre the Global Economic Crises

14 'Responding to Elder Abuse Preventative and protective measures'-Research into Community Attitudes to Elder Abuse In WA -reported in ANPEA newsletter June 2008 Issue 3

15 Conference Presentation, G. Naughtin, Associate Professor La Trobe University, June 13 2008

16, UK Presentation, Office of the Public Guardian & The Mental Capacity Act 2005' updated 2 July 2008

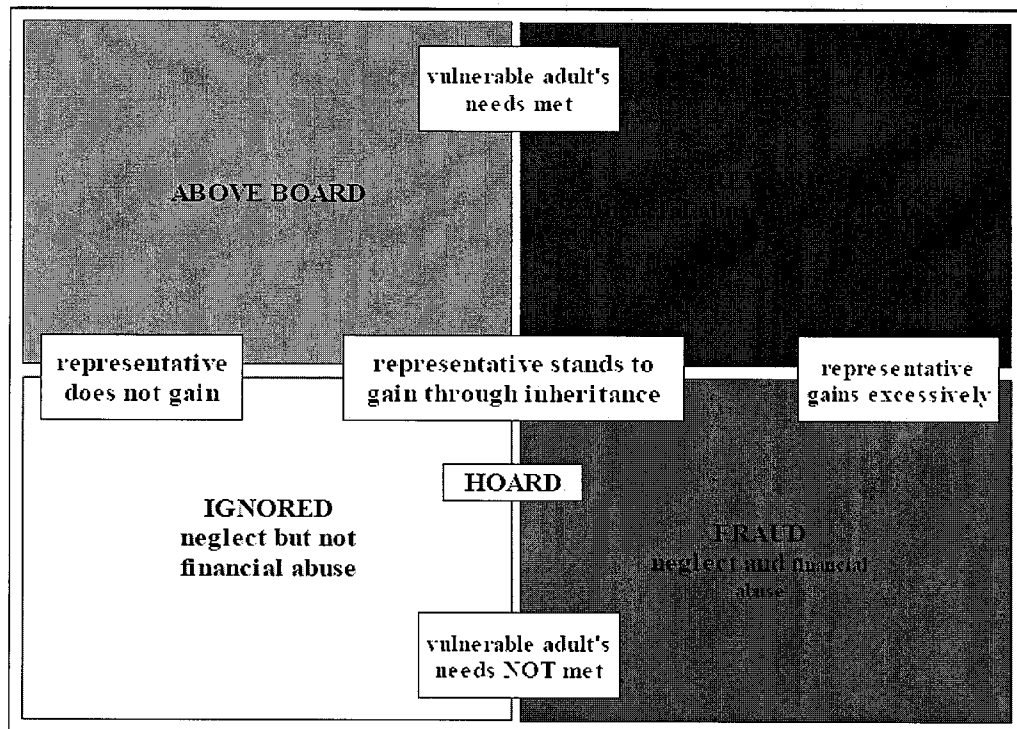
17 Reported in Queensland's Guardianship and Administration Tribunal Annual Report 2005-6

50. Western Australian research has found financial abuse to be a concern amongst elderly people from culturally and linguistically diverse backgrounds and that some of the 'qualities most admired and respected by these strongly diverse cultures – loyalty to the family, solidarity with community and respect for tradition – unwittingly contributed to keeping abuse hidden and often unreported.'¹⁸
51. The interface between financial abuse and quality of life is well documented. Financial abuse has many forms. Serious neglect can arise when a vulnerable person's money is not being spent to meet their legitimate needs, whether deliberately or inadvertently.
52. Adults with an intellectual disability or brain injury are particularly vulnerable to inadvertent abuse or a compromised quality of life by the non-allocation or withholding of financial resources to meet their needs and wishes. Even when their quality of life is not substantially compromised, their experience is one of secondary discrimination.
53. A system that is attuned to the above issues, that operates from the appropriate values base and is sensitive and responsive to 'triggers' from both financial and quality of life perspectives is an important safeguard. UK research has found that 'grooming' can and does occur with vulnerable adults as predators seek to gain access to their finances. Therefore the system must also be able to deal with this challenge, without compromising the autonomy of the individual.
54. The following table shows the relationship between some of the factors that need to be considered in the administration of the affairs of protected persons.¹⁹

¹⁸ Project commissioned by the Western Australian Public Advocate and reported at above conference quoting findings of 2007 OSIV (200^A) CALD Seniors – Community Participation Research Project

¹⁹ Salomons Canterbury Christ Church University College 'The role of the Public Guardianship Office in safeguarding vulnerable adults against financial abuse; Prepared for the PGO by Hilary Brown, Sophie Burns and Barry Wilson

Table 1



55. Poor take up of advance directives and when they do exist, mis-understanding of the role and obligations of attorneys, deceptions in the making or revoking of these instruments and limited independent monitoring of the personal and financial affairs under their protection – can all combine to exacerbate the risk of financial and other abuses.

Section 5. Lessons from Other Jurisdictions

56. In the United Kingdom (UK), the United States of America (USA) and Canada, the issue of adult protection and abuses of rights, decision making and personal finances among vulnerable populations has gained much attention. It is considered to be a cross cutting policy issue as significant as child protection. A brief review of reforms and services in these jurisdictions and elsewhere in Australia is provided below.

United Kingdom

57. The UK has experienced similar demand management and systems issues as those confronting South Australia - including public dissatisfaction with services and a Parliamentary Inquiry. In response, and over a significant period of time, the UK has implemented structural, service and legal reform to strengthen the adult protection system and improve services to the public.
58. Over a period of ten years, the UK experienced widespread public concern about the work of the Public Trust Office, the effectiveness of guardianship and related safeguarding services and failed improvement strategies. Between 1994 and 2005 various reports by the National Audit Office and Committee of Public Accounts were highly critical of the (then) Public Trust Office and guardianship system. In 2001 the (then) Lord Chancellor's Department introduced organisational changes - to overhaul the mental incapacity services and provide new integrated services. In June 2005 the National Audit Office, produced a report on protecting and promoting the financial affairs of people who lose mental capacity.²⁰ (Executive Summary attached at Appendix 5). Taking account of the new *Mental Capacity Act 2005*, it reviewed the 2001 organisational changes and made significant further recommendations for improvement in public guardianship and receivership services.
59. A new *Mental Capacity Act* was passed in Parliament in April 2005 accompanied by an implementation plan that allowed for nearly 3 years of preparation before its proclamation in October 2007. This Act introduced

²⁰ 'Public Guardianship Office-Protecting and promoting the financial affairs of people who lose mental capacity'- Report by the Comptroller and Auditor General, Session 2005-2006, 8th June 2005

Lasting Powers of Attorney for health, welfare and financial affairs and new systems and structures for their implementation. (e.g. a new Court of Protection, an Office of the Public Guardian replacing the Public Guardianship Office), Independent Mental Capacity Advocate Services, greater accountabilities and supervision for financial, health and welfare guardians and changes to the remit and roles of the Public Trustee and Official Solicitor.)

60. In the UK, Lasting Powers are registered on activation. An assessment of the supervision level required determines a Type I, II, 11A or III level of supervision. Type I cases are supervised more closely than Type II cases and a Type III cases would have minimal contact. The 11A level of supervision was introduced on 1 April 2009 after review and consultation found that... 'there is often insufficient information at the start of a deputyship to make an informed decision about the appropriate level of supervision. This new level will provide more flexible protection and support and offer a more robust approach ²¹'.
61. A Court of Protection Visitor is a person appointed to a panel by the Lord Chancellor. The UK Office of the Public Guardian (UK OPG) monitors their receivership clients by sending out Lord Chancellor's Visitors, who effectively provide the Court with a set of eyes and ears concerning what is happening "out there". They can also send out a Medical Visitor in cases where there is some doubt about the mental incapacity of the client at the time the instruments were put in place. The former is an additional safeguard for clients under the administration of the OPG and the latter a safeguard for any person under an activated enduring power (financial, personal or health).
62. The UK OPG (and its predecessors, the Public Guardianship Office and the Public Trust Office) does not invest clients' funds. This is undertaken by external fund managers appointed by the Court of protection or by selecting a manager from a panel of fund managers appointed by the Department of Constitutional Affairs.
63. The UK Act promotes positive attitudes to ageing, mental impairment and to personal autonomy: The principles set the tone and value base under-pinning the legislation but also clearly define people's rights. These are -
 - Assume a person has capacity unless proved otherwise.

²¹ UK Office of the Public Guardian website accessed on 24 May 2009 at <http://www.publicguardian.gov.uk/about/important-developments.htm>

- Do not treat people as incapable of making a decision unless all practicable steps have been tried to help them.
- A person should not be treated as incapable of making a decision because their decision may seem unwise.
- Always do things or, take decisions for people without capacity, in their best interests. *(Note this differs to South Australia's substituted decision making)*
- Before doing something to someone or making a decision on their behalf, consider whether the outcome could be achieved in a less restrictive way.

The first three principles emphasise being able to make decisions for one-self and the last two guide those who may have to make decisions on behalf of another person.

64. Independent Mental Capacity Advocates (IMCAs) were introduced as a further protection for vulnerable adults. An IMCA will be someone appointed to support a person who lacks capacity but has no one to speak for them, such as family or friends. They will only be involved where decisions are being made about serious medical treatment or a change in the person's accommodation where it is provided by the National Health Service or a local authority. The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge decision-makers on behalf of the person lacking capacity if necessary.
65. The UK experience demonstrates a complex environment that required an investment of time and resources over many years to make change and embed real improvement.

New South Wales

66. New South Wales currently has a Public Guardian and a Protective Commissioner, who work together to promote and protect the human rights of people with disabilities. The focus of the Office of the Protective Commissioner (OPC) has been on managing the financial and property interests of its clients, while the Office of the Public Guardian (OPG) makes

decisions about personal and lifestyle issues for its clients. One person has held both the position of Protective Commissioner and Public Guardian. The agencies, while co-located, operate independently with separate staff and under different legislation. These arrangements are about to change with a proposal and new legislation before NSW Parliament that merges OPC with the NSW Public Trustee. The new structural arrangements for the Office of the Public Guardian are unknown but assurances have been given that they will remain independent and are to be excluded from the merger.

67. *The Protected Estates Act* (NSW) provides for the appointment of a specified person, known as an 'Authorised Visitor', to visit the person with a disability. They are appointed from a panel of independent disability specialists who are trained health professionals with demonstrated expertise and extensive experience in the field of disability. His/her confidential report provides the Protective Commissioner with independent information as to how the best interests of the person are being addressed within the limits of his/her financial resources. The report also has the effect of being able to reassure the private manager that the best is being done for the person and therefore adds support to his/her role. Case studies on the role and outcome of authorised visits are attached at Appendix 6.
68. The Protective Commissioner has a Private Management Support Branch that provides information to private administrators on their role and duties, oversees their work and receives reports in relation to protected clients.

Victoria

69. The Victorian Public Advocate delegates authority to staff, investigators or guardians. The Office also coordinates the Private Guardian Support Program, the Community Guardians Program, the Community Visitors Program and the Independent Third Person Program.
70. Community Visitors is a volunteer program run by the Office of the Public Advocate. Community Visitors are trained volunteers who visit patients and residents in mental health facilities, people with a disability in Community Residential Units and vulnerable people in Supported Residential Services.

71. Community Visitors, in panels, make regular, unannounced visits to eligible facilities. They undertake general monitoring roles in relation to the appropriateness and standard of the facility, adequacy of care and treatment provided to a resident and management of a person's health and welfare. As their role involves identifying issues or problems from the resident/patients' perspective and responding to resident/patient requests or complaints, they can provide a safeguard for people under administration, but this is limited to residents of eligible facilities.
72. Victoria reports that about 80% of private guardians are also appointed as administrators. The Office of the Public Advocate has a Private Guardian Support Program and the State Trustees provides advice for administrators.
73. The States Trustee has two specialist programs, developed in conjunction with Victoria's Department of Human Services, for people who are unable to manage their own affairs because of mental illness, injury or disability. These are:
 - A Financial Independence Program that helps selected clients regain control of their own affairs by gradually giving back this responsibility. The level of financial independence that is returned is carefully assessed for each individual over a number of months.
 - An Intensive Support Program that assists people who are without a home, family or any form of support. It reconnects these vulnerable people with the community by making every effort to contact and assist them, rather than waiting for them to seek assistance.

USA

74. The earlier discussion on legislative reform has provided an indication of the philosophy and issues currently relevant to the USA jurisdiction. Of particular interest is the proliferation of private and not for profit guardianship and conservatorship (administrator) services in the USA. This has led to the increasing regulation of these services and the lay and professional people that provide them, accompanied by significant training efforts and the development and monitoring of practice standards.

75. While the efficacy of these has not been established, there are examples in the USA of not for profit organisations establishing trusts to invest money on the beneficiaries' behalf. They also organise services in line with persons care plans.
76. The American Bar Association report discussed and referenced at paragraph 23 describes many similar issues to those found in South Australia. As in the UK, poor data collection, lack of information on people under guardianship or administration and inadequate resources are reoccurring themes. It identifies the 'compelling need for training of guardians, lawyers, judges, adult protective services staff and the aging and social services systems' and recommends funding for research to inform how the system is working and the changes required to meet burgeoning needs as demographics change. The development of Standards is also recommended. This report is attached in full at Appendix 7.

Canada

77. In addition to representing persons placed under public tutorship or curatorship, the Curateur Public du Québec performs various functions in connection with private protection measures and also is responsible for managing protected person's estates²².
78. Their system allows for the appointment of an advisor to the person of full age which is suitable for individuals with a mild intellectual deficit or who are temporarily incapacitated by illness: people who are still able to look after themselves and their affairs. Adults under this type of protective supervision continue to exercise their rights and make decisions concerning themselves and their property. The advisor is simply there to help them with certain acts specified by the judgment, or if the judgment contains no specific instructions, by the Civil Code of Québec. Because advisors do not have decision-making powers, they do not have to render accounts or set up a Tutorship Council.
79. A Tutorship Council is set up during the legal process for opening of protective supervision. It usually consists of three members suggested by the family meeting and appointed by the court. The Council has a range of powers and responsibilities consistent with administration of the protected person's

²² <http://www.curateur.gouv.qc.ca/cura/en/majeur/index.html> Accessed on 21 May 2009

affairs. A secretary and two alternates are designated at the same time. Exceptional cases may arise where it is impossible to find three members. The court may then appoint one person or the Curateur Public (e.g. if all relatives live too far away) to act as Tutorship Council.

80. In 2008, Curateur Public du Québec, together with her principal government partners, began a review process with a view to improving the system of protective supervision for incapacitated persons. A variety of non-government partners are also involved in the special task force. Their website states, 'this mirrors the concerns of a number of Western countries that, confronted with socio-demographic changes, are considering the appropriate practices to ensure that incapacitated persons today and in the future benefit from the protective measures that will most adequately meet their needs'.
81. The Office of the Curateur Public du Québec is currently researching how to adequately encourage and support citizens to act as guardian or administrator for their family members. To this end, in early 2009 they conducted a wide-ranging quantitative and qualitative survey of about 450 private guardians and administrators in Quebec, including almost 60 in-depth interviews. This is yet to be published.

Section 6. Conclusions

82. The pressure and problems faced in the administration of protected estates are not unique to South Australia. The UK, for example, has implemented reforms involving legislative, structural and operational change over a number of years.
83. Many of the people served by the PT are amongst the most disadvantaged or most vulnerable in the South Australian community.
84. The demand for the administration of protected estates and allied services will continue to increase due to a variety of demographic and social factors.
85. Appropriate resources, both the quantum and type and mix, are a problem. The PT needs
- more experienced or specialist staff to deal with protected persons,
 - a greater capacity to meet with the protected person and develop with them an individualised financial care plan, and
 - an ability to respond in a stepped manner according to different people's needs and changing circumstances
86. Interstate and overseas strategies demonstrate the application of a stepped approach to intervention and fraud control and a range of complimentary safeguards such as visiting programs and independent advisers.
87. There is little disagreement that improved capacity within the system to monitor, detect, investigate and act on anomalies and breaches is required, including.
- Regular reports to the Board and to the protected individual (in a level of detail appropriate to the circumstances);
 - Timely auditing of those accounts, detection of anomalies and action;
 - Using risk indicators²³ to allocate level of intervention and monitoring; (Some examples are provided at Appendix 8)
 - An ability to increase or decrease supervision/review regime as and when required.

²³ Refer to UK Office of the Public Guardian Safeguarding Vulnerable Adults Policy November 2008 accessed on 21 May 2009 at <http://www.publicguardian.gov.uk/docs/sva-policy1-12081.pdf> and attached at Appendix Four

88. Strengthening the monitoring role where a private administrator is appointed must not become a disincentive to the voluntary efforts of relatives and community members.
89. Information, support and guidance must be provided to prospective and appointed private administrators or else the willingness of community members to voluntarily take on this responsibility might be diminished.
90. It is important to note that some people under administration orders do not always have nor need guardians. People with a mental illness for example may have their treatment dealt with under the *Mental Health Act 1993* and their finances only under an administration order. Likewise, older people may be under an administration order for their financial affairs but a Director of Nursing or relative will be authorised to give medical consent under the *Consent to Medical Treatment and Palliative Care Act 1995*. This places an even stronger obligation on the administrator to follow the principles of the Act and to keep the person with mental incapacity at the centre of their decision making.
91. South Australia's *Guardianship and Administration Act 1993* has many strengths compared to other states. Victoria's Guardianship and Administration Act is currently under review and there may be lessons from that process. The Public Advocate must keep South Australia's Act under review and where necessary suggest changes to the way it operates as part of the general function of the role. At this point, changes to our Act are not recommended as it is still generally robust and provides a good basis for administration and guardianship, nevertheless, it is inevitable with new developments overseas and interstate that recommendations will be developed.
92. It is difficult, however, to access relevant data to enable proper analysis and to set priorities for research and to keep the system under review.

Section 7. Recommendations

93. South Australia has the opportunity through this suite of related recommendations to achieve shared values and greater consistency across the legislative and operational spheres of the adult protection jurisdiction.

1. Administration of a protected person's financial affairs should be based on a financial care plan that embodies the principles of Section 5 of the *Guardianship and Administration Act 1993*.
2. There should be a stepped system of intervention sensitive to the needs and circumstances of the protected person. This should include
 - meeting with the person when administration commences and then on a yearly basis
 - gaining agreement about relevant others to be involved
 - developing a financial care plan inclusive of the person's goals and aspirations
 - yearly reviews (or sooner dependent on need)
 - graduated monitoring and supervision regimes so that administrators interventions are always proportionate to need and respect autonomy
3. Any new stepped system of financial care plans must take account of the needs of people in remote areas and in particular, aboriginal people.
4. The role and use of a 'liaison person' should be reviewed. Instead, better use should be made of key people and connections, as identified and agreed by the protected person, in the management of their affairs.
5. There is a need to examine current and alternative structural arrangements for providing trustee services to protected persons to provide a choice of provider including the possible role(s) of not for profit organisations in the delivery of such services.

6. Community education strategies are important because they
 - increase public awareness about the requirements and obligations for private attorneys and administrators and this is a protective factor against abuses, and
 - encourage people to use enduring powers so they can express a choice of attorneys.
 7. In developing financial care plans and in oversight of private administrators, recommendations from other jurisdictions about the systematic use of risk factor analysis and searching for 'early warning signs' can form the basis of planning. They would also help to determine and allocate the required level of support, monitoring and reporting.
 8. The use of a range of review mechanisms, including assessment by independent experts, (as with the authorised visitors in the UK and NSW) would be consistent with a stepped approach to safeguarding the quality of life of people under PT's protection or where PT have oversight of their administrators.
 9. Charging of fees for administration services should be reconsidered. Currently PT bundles together a number of roles for individuals under administration that could be seen as separate. While it may be reasonable to charge for some components of the service – such as investment advice – others, in particular, involuntary substitute decision making should be at no cost.
 10. Improved data collection, analysis and research capacity is needed to inform policy development, performance assurance and continuous improvement.
-

Appendix 1

Functions of Public Advocate

General functions of Public Advocate

- (1) The functions of the Public Advocate are—
- (a) to keep under review, within both the public and the private sector, all programs designed to meet the needs of mentally incapacitated persons;
 - (b) to identify any areas of unmet needs, or inappropriately met needs, of mentally incapacitated persons and to recommend to the Minister the development of programs for meeting those needs or the improvement of existing programs;
 - (c) to speak for and promote the rights and interests of any class of mentally incapacitated persons or of mentally incapacitated persons generally;
 - (d) to speak for and negotiate on behalf of any mentally incapacitated person in the resolution of any problem faced by that person arising out of his or her mental incapacity;
 - (e) to give support to and promote the interests of carers of mentally incapacitated persons;
 - (f) to give advice on the powers that may be exercised under this Act in relation to mentally incapacitated persons, on the operation of this Act generally and on appropriate alternatives to taking action under this Act;
 - (g) to monitor the administration of this Act and, if he or she thinks fit, make recommendations to the Minister for legislative change;
 - (h) to perform such other functions as are assigned to the Public Advocate by or under this Act or any other Act.

Principles

Guardianship and Administration Act 1993

Section 5—Principles to be observed

Where a guardian appointed under this Act, an administrator, the Public Advocate, the Board or any court or other person, body or authority makes any decision or order in relation to a person or a person's estate pursuant to this Act or pursuant to powers conferred by or under this Act—

(a) consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; and

(b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and

(c) consideration must, in the case of the making or affirming of a guardianship or administration order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements; and

(d) the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.

Optional Protocol UN Convention on the Rights of Persons with a Disability

Article 12

1. Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Appendix 4 Performance Indicators

Example One:

The predecessor to the Office of the Public Guardian's key performance indicators²⁴

The Public Guardianship Office's key performance targets			
The Public Guardianship Office's key performance indicators for 2003-04			
KPI	Description	Target for 2003-04	Outturn for 2003-04
1	We will increase the satisfaction of our customers in the delivery of our services.	Customer satisfaction rating of at least 50 per cent for both professional and lay receivers, as measured by our annual customer survey	55 per cent (weighted)
2	We will increase the proportion of effective visits by the Lord Chancellor's visitors.	Maintain a minimum of 6,000 visits to include all Receivership clients	6,675
		Visit all new clients where the Chief Executive of the Public Guardianship Office has been appointed receiver	368 visits to receivership Division clients completed
		To achieve 75 per cent effective visits during 2003-04	79 per cent
3	We will increase the percentage of accounts collected and reviewed on time, as a basis for effective action to meet clients' needs.	100 per cent reviewed within four weeks of receipt	100 per cent
		Collect 60 per cent within two months of the due date	72 per cent
		Collect 80 per cent within four months of the due date	91 per cent
		Collect 100 per cent within six months of the due date	100 per cent
4	We will deliver an improved service to clients.	Respond to 95 per cent of correspondence within 15 working days of receipt	97 per cent
		Give directions for the release of funds to the Court Funds Office or external receiver within ten working days for 95 per cent of requests received	95 per cent
		Dispatch 95 per cent of Court Orders and Directions within 25 working days	92 per cent
		Close 95 per cent of cases within 25 working days	95 per cent
		Register and return 95 per cent of Enduring Powers of Attorney (correct and with no objections) within five working days	99 per cent
5	We will demonstrate improvements in efficiency by meeting three financial performance targets.	To remain within budget	Not achieved
		To achieve a unit cost per case of not more than £535	£503
		To achieve fee income of £13.1 million	£12.3 million

Source: National Audit Office analysis of the Public Guardianship Office's performance data

NOTES

1 The target for 2002-03 was 100 per cent within five weeks.

2 The target for 2002-03 was 70 per cent within four weeks.

3 The target for 2002-03 was payment within 15 days.

²⁴ Appendix Four, Public Guardianship Office-Protecting and promoting the financial affairs of people who lose mental capacity'- Report by the Comptroller and Auditor General, Session 2005-2006, 8th June 2005

Accessed 24th May 2009 at
http://www.nao.org.uk/publications/0506/public_guardianship_office_pr.aspx

Example Two:

The new Office of the Public Guardian Business Plan 2008-09 pages 20 and 21

Key Performance Indicators (KPIs)

KPI 1: Lasting Power of Attorney/ Enduring Power of Attorney

Registering an Enduring or Lasting Power of Attorney provides important protection for clients. The period of notification of relatives or named persons allows any concerns of the Power to be aired either within the family or with the OPG or Court of Protection as appropriate.

On Receipt:

- a) (i) On receipt of an invalid or incomplete LPA or EPA, we will notify 80% of applicants within 10 working days.
- (ii) On receipt of a valid LPA, in 80% of cases we will notify the party or parties not making the application within 10 working days.

On Registering:

- b) (i) We will register 98% of LPA applications within 5 working days of the end of the statutory waiting period¹
- (ii) Where an attorney makes an EPA application within 10 days of notifying relatives, we will register 98% within 5 working days of the end of the statutory waiting period²
- (iii) Where an attorney makes an EPA application more than 10 days after notifying relatives, we will register 98% within 15 working days of receipt, or within 5 working days of the end of the statutory waiting period, whichever is the later.

KPI 2: Supervision of deputies

All deputyship cases will require a supervision regime based on a risk assessment. Risk criteria include: whether a deputy has been refused credit or is an un-discharged bankrupt; whether the deputy has any financial interests which conflict with those of the client; the value of the client's estate; the relationship of the deputy to the client and any objections which were made to the appointment of the deputy.

- a) 90 per cent of new deputyship cases will be assessed and a supervision level set within 30 working days of the court order being served on the Public Guardian.
- b) 100 per cent of ongoing deputyships with close supervision (type I) will have a formal reassessment of the supervision level within 13 months of the previous assessment.
- c) We will carry out a case review on no less than 4,000 type II cases during the year.

A case review could be a combination of:
review of annual report;
carrying out a visit;
review of supervision level following short-term intervention.

KPI 3: Contacting the OPG

The Contact Centre will act as point of communication for anybody contacting the OPG for advice and information about the OPG, the Court of Protection and other MCA-related issues. It will also act as the first point of contact for most deputies in relation to queries about their powers and duties.

- a) We will respond to 95 per cent of correspondence (including letters, faxes and emails) within 15 working days of receipt.
- b) 85 per cent of telephone calls to the Contact Centre will be answered within 60 seconds.

KPI 4: Investigations

When an investigations case is received in the Compliance and Regulation Unit it is allocated to a specific caseworker. At this point of allocation the 14-day target to set an action begins. The three-month target to complete the investigation is inclusive of the 14 days in which the action plan is put in place.

- a) We will put in place an approved action plan in 100 per cent of investigations cases within 14 days of receipt.
- b) 75 per cent of investigations will be completed within three months.

KPI 5: Quality of service

- a) To measure the quality of service people are experiencing in different areas of the organisation we will carry out targeted surveys throughout the year and report the findings in the OPG 2008-09 Annual Report. A baseline figure will be agreed with Ministers following receipt of the 2007-08 results and will be published in the Public Guardian Section 60 report.
- b) We will also devise measures concentrating on the quality of service delivered through the Contact Centre. The results will be published in the 2008-09 Annual Report.

KPI 6: Finance

Based on the statutory instrument for fees approved by Parliament, we will aim to achieve the following targets for full cost recovery.

- a) OPG 100 per cent full cost recovery.
- b) Court of Protection 83 per cent full cost recovery.

Full cost is defined as:
The total cost of carrying out the provision of services to the taxpayer, less social subsidy/fee remission; financial losses over and above a yearly notional premium; in-year bad debts write off and exceptional items.

Example Three:

NSW Government Response To Recommendations Made In The Independent Pricing and Regulatory Tribunal Review of Fees of the Office of the Protective Commissioner – September 2008 NSW Attorney General's Department²⁵

Recommendation 8

That the following six high-level KPIs be part of the first multi-year funding arrangement:

- The setting of measurable major milestones in the Office of the Protective Commissioner's strategic and corporate goals and periodic assessment of progress towards those goals (by June 2010).
- Development of a management information system capable of costing services and supporting strategies to improve services and increase productivity (by June 2010).
- Development of efficient cost benchmarks (by June 2010).
- Development of client service standards (by June 2010).
- Measures of responsiveness to clients' requests/needs (starting with timeliness, progressing to quality).
- Client and stakeholder satisfaction as measured by independent surveys and number of complaints and appeals.

Government position

The Government proposes that the entity that is formed by the merger of the Office of the Protective Commissioner and the Public Trustee will report annually on these six high-level KPIs for protected estates.

²⁵ Accessed 24 May 2009 at [http://www.lawlink.nsw.gov.au/lawlink/office_of_the_protective_commissioner/opc_ll.nsf/vwFiles/NSWGOVResponseIPART.pdf/\\$file/NSWGOVResponseIPART.pdf](http://www.lawlink.nsw.gov.au/lawlink/office_of_the_protective_commissioner/opc_ll.nsf/vwFiles/NSWGOVResponseIPART.pdf/$file/NSWGOVResponseIPART.pdf)

UK Office of the Public Guardian Safeguarding Vulnerable Adults Policy²⁶

Extracts

Policy Document Page 7

4.7 Indicators of financial abuse include:

- the vulnerable adult's change in living conditions;
- possessions sold;
- inability to pay bills/unexplained shortage of money;
- unexplained withdrawals from an account;
- unexplained loss/misplacement of financial documents;
- cut off from family/friends/social network;
- carer's enhanced lifestyle;
- sudden changes in bank account or banking practice;
- the recent addition of authorised signers on a vulnerable person's signature card;
- unauthorised withdrawal of funds using the vulnerable person's ATM card, or changes in patterns of usage;
- sudden or unexpected changes in a will or other financial documents.

Appendix One pages 21 and 22

Possible indicators of/causal factors in abusive situations

The following are some of the common factors which may signal that there is danger of abuse occurring/having occurred. Considerable caution should be exercised when referring to these indicators as they do not automatically indicate a potentially abusive situation, but sometimes warrant investigation by local authority adult care social services departments, especially where multiple combinations or signs are present. Expert assessment and advice in individual situations can be sought from local authority safeguarding adults/adult protection leads.

Predisposing factors which may lead to abuse

- Increased dependency of the individual, leading to a high degree of care being required
- Multiple dependencies within the family, e.g. young mother having to care for an older relative
- Multi-generational family structure where there are conflicts of personal interests and personal loyalties
- Where roles have been reversed, e.g. a domineering parent becomes dependent
- History of abuse within the family, e.g. domestic violence, abuse of children.
- Overcrowding or poor housing conditions

²⁶ UK Office of the Public Guardian Safeguarding Vulnerable Adults Policy November 2008 accessed at

<http://www.publicguardian.gov.uk/docs/sva-policy1-12081.pdf> 21 May 2009

- Financial difficulties – low income, debts
- Adult has difficult behaviour which causes high levels of stress for other people, e.g. has hit/abused others, disturbs others at night, exhibits odd or embarrassing behaviour.
- Other members of the family have ill health (physical or mental) or there may be alcohol or drug dependency
- There are personal problems within the person's household, e.g. marital, financial
- Carers are isolated due to the demands of caring and lack practical or emotional support
- Carers may not have the necessary understanding of the person's condition to enable them to offer appropriate and effective care.

Signs of abuse

Financial signs

- Unexplained or sudden inability to pay bills
- Unexplained or sudden withdrawals of money from accounts
- Disparity between assets and satisfactory living conditions
- Lack of receptivity to assistance requiring expenditure, when finances are not a problem
- Extraordinary interest by family members or other people in the vulnerable person's assets
- Power of Attorney obtained when the person is not able to understand the purpose of what they are signing
- Unexplained eagerness to make an application to the Court of Protection to become a Deputy
- Recent change of deeds or title of property
- Carer apparently only interested in the person's financial affairs and not about their care
- The person who manages financial affairs is evasive or uncooperative
- Reluctance/refusal to take up care assessed as being needed
- A high level of expenditure without evidence of the person benefiting
- The purchase of items which the person does not require or use
- Personal items going missing from the home
- Unreasonable or inappropriate gifts

Signs of neglect

- Physical condition is poor, e.g. bed sores, unwashed, ulcers
- Clothing in poor condition, e.g. unclean, wet, ragged
- Inadequate diet or malnutrition
- Untreated injuries or medical problems
- Inconsistent or reluctant contact with health or social care agencies
- Failure to engage in social interaction
- Refusal of access to callers/visitors
- Inadequate heating
- Failure to give prescribed medication or appropriate medical care
- Poor personal hygiene

Office of the Protective Commissioner, New South Wales

Authorised Visitors²⁷

An Authorised Visitor is appointed by the Protective Commissioner to provide independent expert advice to the Protective Commissioner in both his supervisory role with Private Managers and his decision making functions as a financial manager. This assists in ensuring that that substitute decisions which are made for clients are consistent with their needs and lifestyle.

An Authorised Visitor is a professional independent of the OPC. An Authorised Visitor charges on a fee for service basis. The client's estate meets the cost of the report.

The objectives of visits by an Authorised Visitor are:

- to provide a comprehensive picture of a client, his/her living environment, quality of life, social interactions, health status and needs
- to provide a professional opinion regarding the person's needs on which Client Service Officers can base decision making or to inform the Private Management Support Branch in its role of directing and authorising private managers
- to consult with significant parties and report on the client's wishes and views, their social circumstances, their physical, sensory, emotional, psychological, and intellectual status, their capacity to understand decision making and to contribute to this process, and current and future needs. The report includes recommendations for enhancing the client's quality of life consistent with his or her financial resources
- to provide Client Service Officers and Private Management Support Officers with information as to how their recommendations can be acted upon

CASE STUDIES How involvement of an Authorised Visitor improved a client's quality of life

Glenda's Story:

Glenda is 61, single and lives alone in her own home. Her family lives close by but her only contact is with her family and a service provider.

Glenda has a brain injury as a result of an accident 8 years ago. She is said to have poor memory, and is blind in her right eye.

Glenda's brother, Robert was appointed as her private financial manager several years ago.

Glenda had been receiving services from a support agency for over a year. A support worker from the agency assisted Glenda with household tasks she may not have completed and took Glenda out to do activities of her choice in the community. Initially the insurance company met the costs for this service. But when Glenda's compensation settlement came through, Robert, as the financial decision-maker for Glenda, decided to stop the services on the grounds of their cost.

²⁷ Accessed 220509 at
http://www.lawlink.nsw.gov.au/lawlink/office_of_the_protective_commissioner/opc_11.nsf/pages/OPC_authorisedvisitors

The Private Management Support Officer (PMSO) from the Office of the Protective Commissioner was advised by the care agency that Glenda had expressed to them her desire to have their continued support. They also informed the PMSO that the Private Manager, Robert had requested the agency cease providing services to Glenda. After speaking to Robert and hearing his views regarding the cost of the services and considering the advice from the Agency that Glenda needed and desired the services the PMSO needed to clarify the situation. The PMSO requested an Authorised Visitor to visit Glenda.

The Authorised Visitor was asked to provide an independent report on Glenda's views, needs and wishes.

In discussions with the Authorised Visitor, the agency stressed the importance of Glenda's family in her life, however they were concerned that Robert may have ignored Glenda's wishes. The agency stated their concern that if Glenda were left without care she would be doing nothing but drinking and smoking alone in her home. They believed she would also neglect her self-care. The agency had an informal contract with Glenda that she would have had a shower and is dressed in clean clothes by the time the support worker arrived. The worker would also check that the house was relatively clean and tidy or assist in this activity prior to going out. The agency was prepared to negotiate future cost with Robert.

The Authorised Visitor reported that Glenda was able to express her views and wishes and confirmed that Glenda was very keen for the services to resume and that she was unhappy that the service had been stopped.

The Authorised Visitor reported that Glenda on the day of the visit, presented as unkempt. Her clothes were dirty and it was suspected that she did not shower regularly. The house was also unclean. The Authorised Visitor was of the view that the care plan for Glenda put together by the agency provided Glenda with social contact and involvement in community activities. It also helped her initiate personal hygiene and domestic duties. These tasks were no longer happening and there was no organised plan for Glenda's care.

The Authorised Visitor stated that from talking to Robert, she felt he misunderstood his role as his sister's financial manager. He seemed to believe his role was to protect Glenda's money by reducing her spending as much as possible rather than considering that a budget and using the finances to enhance Glenda's life where possible. Robert told the Authorised Visitor he had been unaware of how much assistance the agency were providing Glenda and was surprised by some of the changes he had noticed in Glenda's physical presentation and behaviour since the agency ceased service provision.

On receipt of the Authorised Visitor's report the PMSO discussed the Authorised Visitor's concerns and recommendations with Robert who made contact with the care agency and arranged for the resumption of the services.

Louis' Story:

Louis is 50 years old. He has no family and the OPC manages his finances. Louis has schizophrenia. He lived in a boarding house in inner Sydney for twenty years. Five years ago, the OPC, after ensuring Louis had sufficient funds, requested an Authorised Visitor to visit Louis and provide a report on his current condition and living situation, to assist the OPC in planning for any present or future needs Louis may have.

Upon visiting Louis, the Authorised Visitor was concerned about the lack of care and assistance Louis was receiving in the boarding house, his isolation, general lack of activities and did not believe his needs were being adequately met. The Authorised Visitor was informed there was apparently no alternative accommodation available for Louis as he fell through the gaps of service provision for priority supported accommodation.

The Authorised Visitor sent a report to the OPC outlining Louis' current needs and where assistance could be accessed. Louis had some savings and a small amount of money left to him by his mother when she died. The OPC paid a caseworker to organise an appropriate service that could assist Louis three times a week to ensure his needs were met. Louis' quality of life improved significantly due to his needs being identified. The caseworker continued to monitor the appropriateness of both the need for service and the level of service provision for Louis.

In June 2001, the boarding house where Louis was living closed and Louis was moved to supported accommodation. Louis now has his own room and is receiving 24-hour care as part of his package. He no longer has to pay for augmented care as his care package meets his needs. The Authorised Visitor carried out a further visit 3 months after Louis moved to his new home to confirm his new living arrangements met his needs. Louis' condition was significantly improved, he had lost weight, his health had improved generally and he was interacting more with other residents and participating in social activities provided for him.

Stella's Story²⁸:

OPC has managed Stella's financial affairs for 4 years. Stella received a considerable sum of money from a compensation award as a result of an accident that occurred when she was a teenager. Stella is in her early twenties, single and currently living in her own home with her family. Her mother is her primary carer. Stella's accident caused a brain injury that affected her decision making ability. Her injuries resulted in the need for Stella to have 24 hour a day supervision. When OPC was appointed to help Stella manage her financial affairs, Stella said she wanted to buy a house and a car. She also said that she wanted her mother to continue to be her main carer. Stella wanted to remain active in the community and continue with her daily activity program. When Stella's compensation money came to OPC about a year ago, OPC organised for an Authorised Visitor to meet with Stella and her family. An Authorised Visitor is an independent health professional who provides a report to the Protective Commissioner to assist in decision making. The Authorised Visitor obtained Stella's and her family's views and wishes and provided a report outlining her present and future needs. Following receipt of the report, OPC's staff drew up a comprehensive plan. This plan is reviewed annually. Once the plan was completed OPC was able to approve the purchase of a suitable car, determine an appropriate carer's wage for Stella's mother and organise the purchase of a suitable property to meet Stella's needs. Stella is now living in her own home with her own motor vehicle and being cared for by her mother. Stella has an active life and continues to enjoy her daily activity program.

²⁸Office of the Protective Commissioner and Public Guardian, New South Wales Annual Report 2007

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Appendix 7
National Audit Office Report

Public Guardianship Office

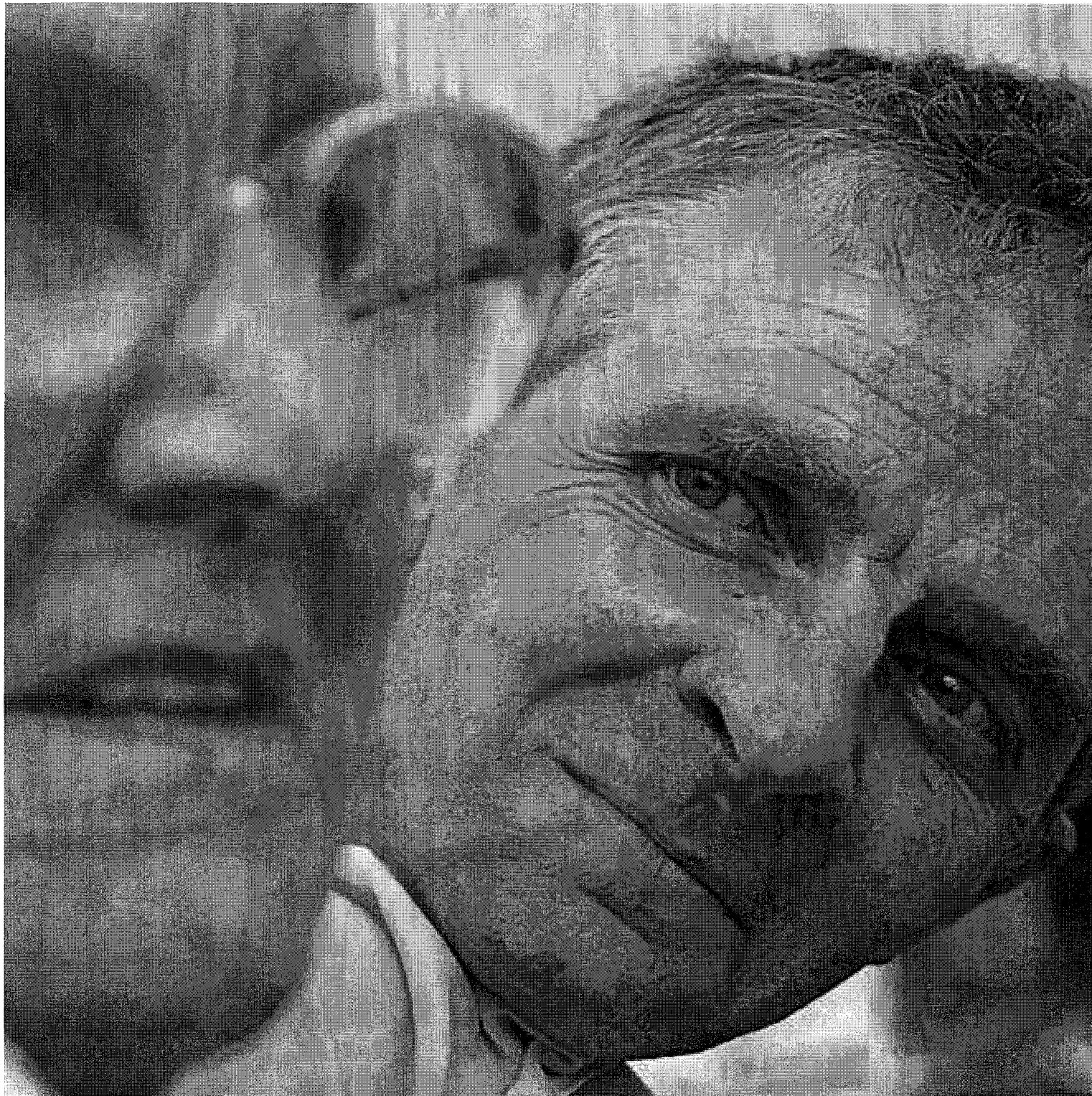
Protecting and promoting the financial affairs of people who lose mental capacity

EXECUTIVE SUMMARY

Report by the Comptroller and Auditor General,
Session 2005-2006,
8th June 2005

Accessed 24th May 2009 at

http://www.nao.org.uk/publications/0506/public_guardianship_office_pr.aspx



PUBLIC GUARDIANSHIP OFFICE

Protecting and promoting the financial
affairs of people who lose mental capacity

REPORT BY THE COMPTROLLER AND AUDITOR GENERAL | HC 27 Session 2005-2006 | 8 June 2005

The National Audit Office scrutinises public spending on behalf of Parliament. The Comptroller and Auditor General, Sir John Bourn, is an Officer of the House of Commons. He is the head of the National Audit Office, which employs some 800 staff. He, and the National Audit Office, are totally independent of Government. He certifies the accounts of all Government departments and a wide range of other public sector bodies; and he has statutory authority to report to Parliament on the economy, efficiency and effectiveness with which departments and other bodies have used their resources. Our work saves the taxpayer millions of pounds every year. At least £8 for every £1 spent running the Office.

PUBLIC GUARDIANSHIP OFFICE
Protecting and promoting the financial
affairs of people who lose mental capacity

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John Bourn
Comptroller and Auditor General
National Audit Office

11 April 2005

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EXECUTIVE SUMMARY



1 A person can lose their mental capacity at any stage in their life for a variety of reasons, for example following an accident or due to the onset of some form of dementia, such as Alzheimer's disease. When mental capacity is lost, the individual's ability to manage their own financial affairs can be restricted and therefore they may become reliant on others. The assets and income of such individuals can become vulnerable to misuse – whether through a deliberate fraud or imprudent use of the person's assets and income.

2 The role of the Court of Protection is to protect and to manage the financial affairs of people without the necessary mental capacity to do so themselves. The Public Guardianship Office is the administrative office of the Court of Protection and is responsible for implementing the Court's decisions. The Public Guardianship Office, an executive agency of the Department for Constitutional Affairs, was established in 2001 and took over some of the functions previously undertaken by the Public Trust Office. The Public Guardianship Office provides protection in two ways.

- It registers **Enduring Powers of Attorney**, a legal device through which a person whilst mentally capable is able to specify how their financial affairs are managed, and by whom, should mental capacity be lost. At the end of December 2004 there were 87,653 registered Enduring Powers of Attorney. The Public Guardianship Office charges a fee of £120¹ to register an Enduring Power of Attorney.

- It oversees the work of **Receivers**, appointed by the Court of Protection to look after the financial affairs of people once they have lost mental capacity. The appointed receivers are either lay people, for example a close relative, or a professional, usually a solicitor, or an officer from a local authority. In a small minority of cases, currently around 250, the Court of Protection will appoint the Public Guardianship Office's Chief Executive as receiver. At the end of March 2004, the Office was responsible for overseeing 29,318 cases in all. The Public Guardianship Office charges fees for the services it provides.

3 The Public Guardianship Office's focus is on overseeing the work of receivers. Under the terms of their appointment, the Court of Protection expects each receiver to submit an annual account to the Public Guardianship Office showing what has been received and spent on behalf of the client. It also expects each client to be visited by one of a team of appointed visitors, to check that the client's needs are being met, within the first six months of a receiver being appointed and after that as the Court directs, but at minimum again after five years².

¹ Fee rate payable from 1st April 2005.

² The Public Guardianship Office plans to reduce this to three years in 2005-06.

4 The Court of Protection's oversight, under statute³, of a person appointed under an Enduring Power of Attorney differs from that of a receiver in that the client's choice of an attorney was made when the client had capacity. Once registered, an attorney does not have to submit accounts to the Public Guardianship Office unless required. Similarly, the client is not usually visited by one of the appointed visitors. The Court of Protection does, however, have powers⁴ to cancel the registration of an Enduring Power of Attorney if it has evidence which suggests that the attorney is not acting in the donor's best interests.

5 This report examines the Public Guardianship Office's targeting of risk; the steps it is taking to improve service quality; and the steps it is taking to raise the public's awareness of the Office's role and the options available to them in the event of losing mental capacity.

6 We last reported on this issue in February 1999, when this work was the responsibility of the Public Trust Office. Our report⁵ and the subsequent Committee of Public Accounts report⁶ were highly critical of the Public Trust Office's work. Our fieldwork for this report examined progress since 1999 (see Appendix 3).

Our overall conclusion

7 Since its establishment in 2001, the Public Guardianship Office has improved the quality of information it receives on receivers' management of the financial affairs of people with mental incapacity. The large proportion of accounts collected on time and increased numbers of visits undertaken to see clients have been essential steps in addressing the poor performance achieved by its predecessor, the Public Trust Office. This improvement was achieved during a period of disruption arising from the Public Guardianship Office's relocation to north London in late 2001 and early 2002.

8 With over 29,000 receivership cases to supervise, however, the resources the Public Guardianship Office can devote to scrutinising each case are necessarily limited. Even with a three fold expansion in the number of visits since 1997-98, for example, each client is only likely to be visited on average once every five years⁷, unless more frequent visits are judged appropriate by the Court, visitor or caseworker. If it is to be effective in protecting the financial affairs of people who lose mental capacity, the Public Guardianship Office should do more to target its resources, focusing on those cases where the risks are greatest. In particular:

- **The Public Guardianship Office should make much better use of the information available to it to help direct its scrutiny.** It currently lacks, for example, an overall picture of the circumstances in which abuse or mismanagement most often occur, how instances of mismanagement or abuse have been detected, and whether its regulatory controls are effective in detecting and remedying these problems. It is not necessarily the receiver or attorney who is most likely to financially abuse a vulnerable client, and not every vulnerable person will have a receivership or enduring power of attorney in place. The source of exploitation may come from anyone in contact with the client.
- **The Public Guardianship Office should raise its profile and make it easier for people to report concerns.** Relatives, friends, social workers and other professionals are, in many instances, well placed to spot the first signs of potential mismanagement or financial abuse but may not be sufficiently aware of the Public Guardianship Office's role to report concerns. The Public Guardianship Office developed and implemented a marketing strategy during 2004-05 and it has prepared a marketing strategy for 2005-06, designed to increase the public's awareness of the services it provides. In January 2005, it began to roll-out a marketing programme, previously piloted in Dorset, across England and Wales.
- **Building on the recent establishment of an Investigations Unit, the Public Guardianship Office should improve procedures for receiving, evaluating and following up potential concerns that come to its attention.**

3 The Mental Health Act 1983; the Enduring Powers of Attorney Act 1985; the Court of Protection Rules 2001 (as amended); and the Court of Protection (Enduring Powers of Attorney) Rules 2001 (as amended).

4 Part VII of the Mental Health Act 1983; and section 8 of the Enduring Powers of Attorney Act 1985.

5 Public Trust Office: protecting the financial welfare of people with mental incapacity (HC 206, Session 1998-99).

6 Thirty fifth report 1998-99.

7 The Public Guardianship Office has set itself an internal target of increasing the average visit frequency from five to three years from 2005-06.

9 For cases which are competently managed by receivers, both they and clients have a right to expect a quick and reliable service from the Public Guardianship Office that minimises regulatory burdens on the day-to-day administration of the client's assets. The Public Guardianship Office is able to report improvements in the quality of its service, particularly over the last two years – an improvement acknowledged by many of its stakeholders. Nevertheless, an inability to access case information quickly when receivers and others call with queries, and delays in dealing with some transactions, indicate that further improvements in quality of service are needed. The continuing lack of an electronic case management system – a planned system was cancelled in 2003 – is inhibiting improvement and efficiency. But our work suggests the Public Guardianship Office should also re-examine whether the current approach to organising its teams is best targeted at risk and meeting the needs of its customers.

10 The Public Guardianship Office faces a number of new challenges, such as the implementation of the Mental Capacity Act 2005 and shifting demographics and the impact of its marketing initiatives, which could lead to an increase and change in its workload. The Department for Constitutional Affairs needs to continue to support the Public Guardianship Office to prepare itself – to ensure that it has the right skills, the right resources and the necessary infrastructure – to meet the demands that will be made of it.

Our main findings

On protecting clients' financial affairs:

11 The Public Guardianship Office has improved its performance in collecting accounts from receivers promptly. In its 1999 report, the Committee of Public Accounts was critical of delays in the collection and review of accounts and concluded that the Public Trust Office was failing to ensure that the financial interests of patients were adequately protected. Our sample of case files indicated that in 2002-03 and 2003-04 the Public Guardianship Office had collected over 90 per cent of the accounts due within its target of six months⁸, compared to 80 per cent in 1998-99. Much of the improved performance was due to better arrangements for reminding receivers before an account is due and for chasing receivers when an account is late.

12 The Public Guardianship Office has expanded the number of visits to clients. Each visit provides the Court of Protection and the Public Guardianship Office's case workers, who will not, as a general rule, have direct contact with the client, with valuable information on the client's welfare and the effectiveness of the receiver. The number of visits taking place increased from 1,680 in 1997-98 to over 6,675 in 2003-04, and is forecast to reach over 7,000 in 2004-05. In a significant majority of the sample of cases examined by us, the client was judged by the visitor to be properly cared for and their assets competently managed. The effectiveness of the visits programme has, however, been weakened in some cases because of poor follow up of recommendations made by the visitors. The Public Guardianship Office recognised this area of weakness in 2003, and has sought to strengthen its procedures.

13 Our evidence suggests that the Public Guardianship Office needs to target its scrutiny more effectively at risk. The level of scrutiny applied to the accounts, for example, does not take into account the case history, the size of the assets involved, and the sustainability of spending decisions compared to the client's income and assets. The Public Guardianship Office has taken some steps to target its efforts. Since 2002, the Court of Protection and Public Guardianship Office have agreed that receivers should be given sufficient capital to allow them to meet the client's financial needs for 12 months without having to ask the Office's permission for further funds. In addition, in cases where assets fall below £16,000 the Office's practice is now to recommend to the Court that the receiver is discharged from the Court's supervision, unless there is good reason not to do so⁹. In 2002, the Public Guardianship Office also introduced an initiative to provide local authority receivers with a degree of autonomy – allowing the receiver access, for example, to client's funds held by the Court Funds Office without seeking the Public Guardianship Office's prior approval. It is now extending the project to other professional receivers, such as solicitors. There is scope for the Public Guardianship Office to take this thinking further by targeting the application of controls and scrutiny more effectively, for example by classifying existing cases according to risk and using this to guide the level of scrutiny applied. Until recently, the Public Guardianship Office's priority had been to bring its operational performance up to a reasonable standard. It reported that it recognised the need to target its scrutiny more effectively and is developing plans to improve its performance.

⁸ Where accounts had not been submitted, the Public Guardianship Office had taken action, for example, referring cases to the Court of Protection or taking other steps to ensure proper accounts are produced.

⁹ Where the receiver is discharged, the management of the remaining funds continues to be the responsibility of the receiver but the Court of Protection does not require accounts on an annual basis.

14 Currently, however, the Public Guardianship Office lacks full information on the nature and extent of the risks it is managing. The Public Guardianship Office does not, for example, have routine mechanisms for collating aggregate information on the main types of financial mismanagement or abuse occurring, the circumstances when these have occurred, how instances of mismanagement or abuse have been detected and whether its regulatory controls have operated as intended.

15 The Public Guardianship Office created an investigations team comprising three staff in January 2004 to deal with allegations of suspected fraud or malpractice, but further efforts are needed to pursue potential cases of professional misconduct. By November 2004 the Investigations Unit was dealing with 112 cases of suspected financial abuse. By March 2005, the Unit had been established on a permanent basis comprising six full-time members of staff.

On improving the quality of service:

16 Feedback from stakeholders and outturn against its own performance indicators demonstrate that the Public Guardianship Office has improved the quality of the service it provides, particularly when compared to the low level achieved previously by the Public Trust Office. The Public Guardianship Office's 2003-04 annual report stated that it had met or exceeded 13 of its 16 targets and, where comparable data existed, had improved upon the performance achieved in 2002-03.

17 The Public Guardianship Office still needs to tackle some important service issues. Our work suggested that administrative delays had sometimes led to clients receiving a poor service, particularly when a new receiver is appointed or when a major transaction requires approval. Amongst the 104 cases examined by us, the Order appointing a new receiver was issued on average over five months (147 days) after the initial application was made. Some of the delays were attributable, for example, to errors made by the applicants and objections to applications by third parties, but delays were also due to applications not being processed promptly. The Public Guardianship Office has now transferred experienced staff to tackle new applications, and reported that it had provided further training and was tightening its management procedures.

18 The Public Guardianship Office may not be organised in the best way to meet the needs of all its customers. Some of the lay and professional receivers we consulted were critical of the inability of staff to access relevant information and the lack of specialist expertise demonstrated by some caseworkers. Receivers cited that they often had to deal with a series of caseworkers in the course of a single transaction, for example selling a client's house, sometimes causing delay and increasing the risk of error. Caseworkers usually work in teams of up to four people and staff are moved between teams for developmental purposes and to provide cover, for example when others are on leave. It is therefore not always possible for individual caseworkers to maintain continuity with individual receivers. In addition, the paper-based case files were not always available when callers rang. Caseworkers also have a large number of cases to deal with and therefore their time needs to be carefully targeted. At the end of 2004 there were approximately 164 cases per caseworker. Allocating cases to established teams based on, say, type or level of risk might help teams build up relevant knowledge and improve the service provided to receivers.

19 Caseworkers' ability to provide a "personalised" service is inhibited by the Public Guardianship Office's lack of a suitable electronic case management system. In 2001-02, the Public Guardianship Office set itself a target to introduce a fully operational electronic case management system by 31 March 2003. Known as MERIS, the programme had three phases – Phase One was a case management system for managing Enduring Powers of Attorney; Phase Two was an electronic case management system for receiverships; and Phase Three was an integrated financial and management accounting system. The Public Guardianship Office contracted with LogicaCMG to deliver the project. As part of its routine responsibility for oversight, the Department for Constitutional Affairs reviews all of its IT projects to ensure that projects continue to be aligned with its priorities and continue to be affordable. Delays in the delivery of the first phase of the project and some concerns about the initial quality of the work gave the Department reason to believe that LogicaCMG would be unable to deliver the rest of the project within the timescale allowed, especially against a background of high demand for the Public Guardianship Office's services and its anticipation of changing requirements arising from expected legislation

on mental capacity¹⁰. The Department and Public Guardianship Office agreed that the best course of action was to reduce the scope of the project to exclude the element relating to the case management system for external receiverships, mainly Phase Two. In the Department's view, this allowed Phases One and Three of the project to be delivered successfully in 2004. The Public Guardianship Office reported that work is underway to secure and update its existing system to meet its other projected needs.

On raising awareness of the Public Guardianship Office and its work:

20 The public's awareness of the Public Guardianship Office and the services it provides is limited. Members of the public will often be in frequent contact with people subject to the Office's oversight and may be amongst the first to spot concerns. They may not, however, be aware of the Office's role and therefore may not contact it. In addition, the Office plays a part in raising awareness about the options available to all in the event of mental incapacity. Questions commissioned by us as part of a broader survey of members of the public suggested that 12 per cent of people had heard of the Public Guardianship Office; however, when questioned further only eight per cent of this group (around one per cent of the original sample) were able to provide a reasonably accurate description of what it did.

21 Forty two per cent of respondents to the survey questions believed that they had adequate financial arrangements in place to take care of their finances should they suffer from some form of mental incapacity. It is not, however, possible to determine how many people in the population have made provision for an Enduring Power of Attorney in the event of losing mental capacity. The number of people with a registered Enduring Power of Attorney was 87,653 by the end of 2004 and has risen gradually over recent years. But Enduring Powers of Attorney are only registered when mental capacity is lost and therefore this number does not indicate whether people are currently making adequate arrangements.

22 The Public Guardianship Office has recognised the need to raise public awareness of its work. The Office, however, reported that until recently its priority had been to take action to ensure the services provided to existing clients met an acceptable standard. In April 2004, the Public Guardianship Office drew up a marketing strategy to raise its profile with other organisations and the public. To ensure that it has the capacity to respond to the demands placed upon it, the Public Guardianship Office reported that it has decided to adopt a step-by-step approach. The strategy includes initiatives such as writing articles for literature distributed by the Department for Work and Pensions; distributing leaflets to a chain of care homes; attending conferences; and liaising with groups representing minority ethnic communities. In June 2004, the Public Guardianship Office piloted an initiative in Dorset to trial ways of raising awareness of the protection available in the event of mental incapacity, including working with local authorities and other groups to help distribute literature to those who might benefit. The activities piloted in Dorset are currently being rolled out nationally as part of the 2005-06 marketing strategy designed to increase public awareness of the services the Public Guardianship Office provides.

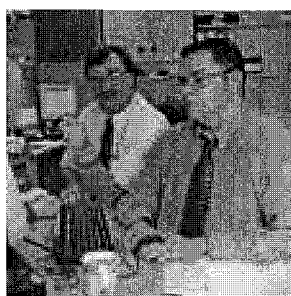
10 The Mental Capacity Act 2005.



RECOMMENDATIONS

Overall, we estimate that implementation of the following recommendations will be broadly cost neutral. The cost of implementation will be met from the resources released, for example, from the better targeting of regulatory effort. We make the following recommendations:

- i The Public Guardianship Office should collate aggregate information on the extent and nature of mismanagement and financial abuse that come to its attention; how the mismanagement was detected and whether its oversight procedures worked effectively. The information should be used to help target its resources on those controls that prove most effective and, where appropriate, help improve the advice and guidance given to receivers.
- ii The Public Guardianship Office should target its efforts on those cases most likely to present the greatest risks. To do this more effectively, it should examine the scope for classifying existing cases according to risk and using this to guide, for example, the depth of review required on the accounts, the frequency of visits, and scrutiny required on the draw down of funds. Receivers with a proven track record of good performance should benefit from a lighter regulatory burden.
- iii The Public Guardianship Office should provide the public and professionals, such as social workers and health staff, with a single contact point for reporting concerns they might have about potential financial mismanagement or abuse relating to the Office's clients. The Public Guardianship Office should introduce robust procedures for evaluating, investigating and, if necessary, taking prompt action to ensure concerns are remedied. Action may include alerting other relevant authorities, such as social services, to address concerns falling within their remit. The Public Guardianship Office should implement quickly the proposed "helpline" to enable third parties to report any concerns.
- iv The Public Guardianship Office should raise awareness of its role amongst those professionals most likely to be in regular contact with the clients, including social workers, general practitioners, nurses and other health workers. Building on its marketing plan and its recent leafleting of general practitioner surgeries, the Public Guardianship Office should, for example, contribute to relevant professional training programmes, bulletins and other events. And it should further develop its contacts with other public and voluntary sector bodies whose work brings them into contact with its clients.



- v The Public Guardianship Office should put in place arrangements to test whether the recommendations made by the Lord Chancellor's visitors have been acted upon where they have been accepted.
- vi Building upon the improvements made in the last two years, the Public Guardianship Office should review whether its current organisational structure is best suited to delivering the further quality of service improvements that are needed. The Public Guardianship Office should consider whether teams might be better organised to target key risks, for example by the type of receiver, the type of asset, the type of client or region of origin.
- vii Building on work currently underway, the Public Guardianship Office should put in place an adequate case management system to handle cases managed by external receivers. The system should be based on a sound assessment of current and future business needs; enable relevant staff to have access to key case documents; and, enable caseworkers to answer telephone queries from clients and receivers quickly and accurately.
- viii The Public Guardianship Office should have adequate procedures in place to measure any changes in the public's knowledge of its work. It should also monitor the impact of its marketing initiatives on the take-up of its services.
- ix As part of its evolving strategy, the Public Guardianship Office should examine the success of marketing initiatives implemented by similar organisations in the United Kingdom and overseas and use this to inform the development of its own strategy.

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Appendix 8
American Bar Association Report

Report to the House of Delegates

American Bar Association,

Committee on Law and Ageing,
Standing Committee on Legal Aid and Indigent Defendants
Commission on Mental and Physical Disability law
Section of Real Property Trust and Estate Law

Joseph D. O'Connor,

Chair, Commission on Law and Aging,
American Bar Association,
February 2009

Accessed On 19 May 2009 at
<http://www.abanet.org/aging/guardianship/lawandpractice/pdfs/111A>

Copy of report attached in full

NO RESOLUTION PRESENTED HEREIN REPRESENTS THE POLICY OF THE ASSOCIATION UNTIL IT SHALL HAVE BEEN APPROVED BY THE HOUSE OF DELEGATES. INFORMATIONAL REPORTS, COMMENTS AND SUPPORTING DATA ARE NOT APPROVED BY THE HOUSE IN ITS VOTING AND REPRESENT ONLY THE VIEWS OF THE SECTION OR COMMITTEE SUBMITTING THEM.

111A

**AMERICAN BAR ASSOCIATION
COMMISSION ON LAW AND AGING
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW
SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association encourages the federal
- 2 government to provide funding and support for training, research, exchange of
- 3 information on practices, consistent collection of data, and development of state,
- 4 local and territorial standards regarding adult guardianship.

REPORT

This recommendation calls on the federal government to provide needed support for training, research, information exchange, data collection, and standards development by state, local, and territorial governments in the field of adult guardianship. As background and justification for this recommendation, this report traces the growing need for adult guardianship; the reform of guardianship law and practice during the last two decades; federal action in the guardianship arena to date; the need for federal funding and support; and existing Association policy. Examples of federal funding and support might include resources for the training of guardians and judges, grants to develop promising practices in guardianship oversight by courts, and especially funding for research and technical assistance to improve adult guardianship data collection capacity. The federal government also might assist by identifying and highlighting workable state and local practices, and by encouraging collaboration of guardianship stakeholders with other networks such as the aging network under the Older Americans Act. The recommendation intentionally does not dictate specific strategies for action because, in the variable and evolving field of guardianship law and practice, flexibility and discretion is needed at the federal level to respond effectively to the critical needs of the field.

The recommendation is timely in that there is an increasing interest in federal action, and the American Bar Association should have a voice in any upcoming developments. The recommendation proposes the kind of proactive federal support for state efforts that has existed for years in the field of child welfare but which has been largely absent in the field of elder rights.

Adult Guardianship. Guardianship is a relationship created by state law in which a court gives one person or agency (the guardian) the duty and power to make personal and/or property decisions for another (the ward or incapacitated person). The appointment of a guardian occurs when a judge decides an individual lacks capacity to make decisions on his or her own behalf. Adult guardianship protects at-risk individuals and provides for their needs while at the same time removing fundamental rights. It is viewed as a last resort, after less restrictive alternatives have been exhausted or abused.

The need for guardianship is accentuated by ongoing demographic trends that will sharply boost the number of appointments in the coming years. The older population (age 65+) numbered 36.8 million in 2005. As baby boomers age, the older population will spiral upwards, reaching 40 million by 2010 and 55 million by 2020. Within the older population, the number of “old old,” age 85+, is growing especially rapidly and is expected to reach 6.1 million by 2010 and 7.3 million by 2020.¹ At the same time, Alzheimer’s disease and related dementias are becoming more prevalent. In 2007, it is estimated that more than five million people have Alzheimer’s disease in the United States; that there will be an additional 454,000 new cases a year by 2010, and that the number of new cases per year will increase significantly thereafter.²

¹ U.S. Administration on Aging, *A Profile of Older Americans: 2006*, <http://www.aoa.gov/prof/Statistics/profile/2006/profiles2006.asp>

² Alzheimer’s Association, *Every 72 Seconds Someone in America Develops Alzheimer’s: Alzheimer’s Disease Facts and Figures 2007*.

Moreover, guardianship also serves a younger population of adults with intellectual disabilities and mental illness. Today about 9.2 million Americans have intellectual and developmental disabilities,³ and this number will rise with new forms of medical treatment that extend the lives of people with these conditions.⁴ In addition, about 1.4 million people sustain a traumatic brain injury each year in the United States, and many experience functional impairments and changes in memory and problem-solving ability.⁵ Finally, adults of all ages may experience cognitive impairment due to chronic illnesses and substance abuse.

Reform of Guardianship Law and Practice. Following a seminal 1987 Associated Press Report, *Guardians of the Elderly: An Ailing System*,⁶ the last two decades have seen significant guardianship reform, including widespread revision of state guardianship statutes, preparation of extensive training materials, and attention to court practices. In particular:

- The 1988 “Wingspread” and 2001 “Wingspan” interdisciplinary National Guardianship Conferences made visionary recommendations concerning procedural due process, determination of incapacity, powers and duties of guardians, monitoring and accountability, and public guardianship.
- The National Guardianship Association has created widely recognized *Standards of Practice* and a *Code of Ethics*, as well as a national guardian certification program. In addition, a small but growing number of states have implemented certification programs.
- The National College of Probate Judges has established a set of *National Probate Court Standards*, a section of which address guardianship standards.
- The Uniform Guardianship and Protective Proceedings Act, originally Title V of the Uniform Probate Code adopted in 1969, was revised in 1982 and again in 1997. More recently, the Uniform Law Commissioners have approved a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act to address jurisdictional problems when more than one state is involved.⁷
- During the last 15 years, almost all states have revised their adult guardianship laws, and about half the states have made very substantial changes in their code, strengthening

³ President’s Committee for People with Intellectual Disabilities, Administration for Children & Families, U.S. Department of Health and Human Services, *Fact Sheet*, http://www.acf.hhs.gov/programs/pcpid/pcpid_fact.html.

⁴ The term “intellectual disability” is the currently preferred term for the disability historically referred to as mental retardation. See American Association on Intellectual and Developmental Disabilities, http://www.aaidd.org/Policies/faq_intellectual_disability.shtml.

⁵ Brain Injury Association of America, *About Brain Injury*, <http://www.biause.org/aboutbi.html>.

⁶ Bayles, F. & McCartney, S., Associated Press Special Report (Sept. 1987).

⁷ Uniform Law Commission, <http://www.nccusl.org/Update/>.

procedural protections, refining the determination of incapacity, emphasizing use of the least restrictive alternative and bolstering court oversight.⁸

Federal Role. A critical question is: what role, if any, should the federal government play in adult guardianship reform? Guardianship has traditionally been a creature of state law and practice. What is the rationale for federal intervention; and how would such intervention best be implemented? A brief history of federal action on the guardianship front is outlined below.

1. Federal Legislation. Congressional zeal to respond to the distressing problems profiled by the Associated Press led to the introduction of Federal legislation in 1988, 1989 and 1991, in both the House (Rep. Claude Pepper) and Senate (Sen. Olympia Snowe). These bills sought to set out guardianship standards for states, to be enforced by the withholding of withholding federal benefits. The bills did not pass, but their introduction unleashed considerable discussion within the legal and judicial community on the pros and cons of federal intervention.

2. Senate Special Committee on Aging. In 1992, the Senate Special Committee on Aging held a *Roundtable Discussion on Guardianship*⁹ to examine the need for Federal legislation and the possible Federal “hooks” for regulation. The clear consensus of the invited experts at the Roundtable was that coercing state reform under threat of Federal sanctions would not be helpful or appropriate. Instead, they said, the Federal government might aid states in data collection and offer financial support to test innovative approaches. One participant concluded that “a carrot in terms of Federal initiatives is going to work better than a stick. Federal legislation, no matter how well intended, that imposes rigid substantive and procedural standards or face loss of significant Federal benefits is likely to be resisted by the States. . . . I submit that Federal incentives rather than mandates should encourage these efforts. Through its grant-making capacities, the Federal Government should provide states with funds for self-assessment, for self-improvement. . . .”

3. Elder Justice Act. The notion of federal intervention into the adult guardianship arena was next raised almost decade later with the introduction of the first Elder Justice Act in 2003. Other versions of the Act were introduced in 2005 and 2007. Generally, the Act seeks to ensure “adequate public-private infrastructure and to resolve to prevent, detect, treat, intervene in, and prosecute elder abuse, neglect, and exploitation.” Some portions of the Elder Justice Act were included in the Older Americans Act (OAA) 2006 reauthorization legislation, but the bulk of the Act has not yet been passed. Some versions of the Act included specific language on guardianship. For example, S. 2010, introduced in November 2005, stated that one purpose of the Act was to:

⁸ Hurme, Sally & American Bar Association Commission on Law and Aging, *Guardianship Statutory Charts*, updated through December 31, 2007, <http://www.abanet.org/aging/legislativeupdates/home.shtml>.

⁹ U.S. Special Committee Print 1992.

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“promote the development of an effective adult fiduciary system, including an adult guardianship system, that protects individuals with diminished capacity, maximizes their autonomy, and develops effective resources and an elder rights system” (Sec. 3(7)).

However, in S.1070, introduced in April 2007, the only reference to “guardianship” and “fiduciary abuse” was in the definitions, and in the requirement that an Advisory Board prepare and submit to an Elder Justice Coordination Council a report including recommendations on “activities relating to adult fiduciary systems, including guardianship and other fiduciary arrangements” (Sec. 2022(f)(3)(B)(iii)). The clear trend of the successive versions of the Act has been to remove a focus on guardianship systems development, training, research and other aspects.

4. GAO Report. Meanwhile, in 2003, prompted by a high profile guardianship case in the District of Columbia, *In re Mollie Orshansky*,¹⁰ the Senate Special Committee on Aging again held a hearing on guardianship.¹¹ In his opening statement, the Committee Chair noted that “substantial sums of Federal money, including Social Security and SSI payments, disability and survivor benefits, Federal Pensions, and welfare benefits, are administered and potentially misused by guardians.” He asked the Government Accountability Office to conduct a study. The resulting report, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*,¹² stated that “although guardianship is a state responsibility, there are many incapacitated elderly people who receive federal benefits . . . and may need federal agencies to identify a representative payee” The report focused largely on the lack of coordination between state courts handling guardianship and federal agencies that appoint representative payees.

5. The Kohl/Smith Report. In December 2007, Senators Gordon Smith (Ranking Member) and Herb Kohl (Chair) of the U.S. Senate Special Committee on Aging released a report entitled *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*. The report concludes with a set of recommendations calling for “federal leadership” including:

- Passage of federal elder abuse prevention legislation;
- Mandated collection of data on guardianship, as well as a survey to generate nationwide estimates of the number and characteristics of adult guardianship cases;
- Implementation of the GAO recommendations regarding coordination among the Social Security Administration, the Department of Veterans Affairs and state courts on guardianship cases; and
- A GAO inventory of the recipients and objectives of all federal funding directed at elder abuse.

¹⁰ 804 A. 2d 1077(D.C. App., 2002).

¹¹ U.S. Senate Special Committee on Aging, *Guardianships Over the Elderly: Security Provided or Freedoms Denied?*, Serial No. 108-3, Washington DC (2003).

¹² U.S. Governmental Accountability Office, GAO-04-655 (July 2004).

At the press conference for the release of the Report, Sen. Smith presented a statement calling for action at the federal level “to ensure we are properly looking after the welfare of those who can’t protect themselves.”

Need for Federal Funding and Support. Federal involvement in the adult guardianship arena could fall into two broad categories. The first is legislation that aims substantively to direct and control state guardianship law and policy, perhaps by using the “stick” of withholding federal benefits. There is no impetus for such legislation. Moreover, holding back federal benefits hurts the very vulnerable people whom adult guardianship seeks to help.

The second kind of federal involvement is broad-based funding for implementing state laws through training, education, data collection and exchange of information on promising practices. Indeed, the real challenge in guardianship today lies in the implementation of the progressive state legislation and national recommendations put forth over the past two decades. While research is scant, continuing press inquiries and other anecdotal evidence indicates that adult guardianship practice is markedly uneven, varying dramatically from state to state, court to court and judge to judge; and that there is a troubling gap between law and practice. Many aspects of guardianship suffer because of the Balkanization of law, data, and procedures across state lines, and because of increasingly strained court budgets. Thus, there is a growing need for a federal role in offering resources and incentives for quality improvement and reform.

A federal role in offering support, visibility and the opportunity for replication could jump-start local efforts and foster systems change. Federal support is required to:

- Encourage *education and training* of stakeholders. All of the national guardianship recommendations, as well as the 2005 AARP monitoring study, have emphasized the compelling need for training of guardians, lawyers, judges, adult protective services staff, and the aging and social services systems.
- Provide for *research* on all aspects of how the guardianship system is working, and what changes are required to confront the burgeoning needs as the demographics change.
- Promote the development of strong *state standards* for good guardianship practice. This approach would encourage states to craft standards that best fit their needs, rather than adhering to any single federal standard.
- Address the dire need for the *collection of guardianship data*. There has been no reliable estimate of the number of adults under guardianship nationally since 1987; and most states lack such data as well. The lack of data on population size and growth hampers effective shaping of guardianship policy, practices, training and education.¹³

¹³ National Guardianship Network, *What Paper Project on Guardianship Data*, unpublished proposal (2007). See also GAO, 2004; and Wood, E., *State-Level Adult Guardianship Data: An Exploratory Survey*, National Center on Elder Abuse (2006), http://www.ncea.aoa.gov/NCEARoot/Main_Site/pdf/publication/GuardianshipData.pdf.

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In addition, federal funding also could:

- Aid in funding for stronger *court oversight* and replication of promising practices in guardianship monitoring. A 2005 AARP report showed that monitoring practices vary widely, that verification of guardian reports and accounts is frequently lacking, that use of technology in monitoring is minimal, and that funding for monitoring remains insufficient.¹⁴
- Support *public guardianship programs* for incapacitated, impoverished and “unbefriended” individuals who have no one else to serve and no funds to pay for professional guardianship services. The 2005 and 2008 National Public Guardianship Study reports concluded that most state public guardianship systems are vastly understaffed and underfunded.¹⁵

Thus, the need for federal funding and support is evident and substantiated. However, there still must be clear rationales or “hooks” for such federal involvement in state affairs. There are at least three such hooks:

- (1) While guardianship traditionally has been under the aegis of the states, significant federal pensions and other federal funds may be managed by guardians/conservators.
- (2) Guardianship involves fundamental human and civil rights protected by the U.S. Constitution.
- (3) Guardianship increasingly crosses state lines, thus becoming an issue that extends beyond the reach of individual state jurisdictions.

ABA Policy. The American Bar Association has extensive policy on adult guardianship reform, dated August 1987, February 1989, August 1991 and August 2002.¹⁶ The policy emphasizes the need for strong procedural due process in the appointment of a guardian, a functional determination of capacity, use of the least restrictive alternative in determining whether a guardian is required and in shaping the guardianship order, effective court oversight and monitoring, minimum standards of practice for guardians, and adequate staffing and funding for public guardianship programs.

In addition, the ABA has policy that “supports efforts to improve the response of the federal, state, territorial and local governments and of the criminal and civil justice systems to

¹⁴ Karp, N. & Wood, E., *Guardianship Monitoring: A National Survey of Court Practices*, AARP Public Policy Institute, #2006-14 (March 2006).

¹⁵ Teaster, P., Wood, E., Lawrence, S., Schmidt, W. & Mendiondo, M., *Wards of the State: A National Study of Public Guardianship* (April 2005); Teaster, P., Wood, E., Schmidt, W. & Lawrence, S., *Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?*, University of Kentucky and American Bar Association (January 2008).

¹⁶ The text of all of the ABA policies on adult guardianship is available on the Web site of the ABA Commission on Law and Aging at <http://www.abanet.org/aging/commissionprojects/home.shtml>.

elder abuse, neglect, and exploitation and urges implementation of the recommendations adopted by the National Policy Summit on Elder Abuse in 2001.” This language has allowed the support of many of the Elder Justice Act provisions.

Prompted by the introduction of the federal legislation in the late 1980s and early 1990s, the Association adopted specific policy on federal involvement in guardianship in August 1991. The resolution was sponsored by the Section of Real Property, Probate and Trust Law, and provides as follows:

“BE IT RESOLVED, That the American Bar Association supports the initiatives of the Section of Real Property, Probate and Trust Law and the ABA Commission on the Elderly and other organizations, such as the Conference of Chief Justices, the conference of Special Court Judges, the Conference of State Trial Judges, the American College of Probate Judges and the American College of Estate and Trust Counsel to encourage continuing improvement of the guardianship and conservatorship laws and procedures within the several states.

BE IT FURTHER RESOLVED, That in view of these initiatives the Association believes that the enactment of federal legislation is unnecessary at this time.”

This resolution was in response to the punitive and controlling federal bills in both the House and Senate, and was aimed at stemming substantive federal standards in an area traditionally reserved for the states. The proposed resolution is aimed not at such legislation, but at the need for federal resources and recognition to boost -- but not control -- the field and enhance practices.

Conclusion. The need for adult guardianship is rising with the increasing numbers of older people, individuals with Alzheimer’s disease and other dementias, people with intellectual disabilities and mental illness, and individuals with traumatic brain injury. Guardianship traditionally has been lodged in state law and the proposed recommendation would not change that. However, federal funding and support in training, research, exchange of information on practices, development of local standards, and consistent data collection would greatly assist in preserving the rights and meeting the needs of vulnerable incapacitated persons throughout the nation. The ABA Commission on Law and Aging requests that the House of Delegates approve the proposed recommendation.

Respectfully submitted,

Joseph D. O’Connor, Chair
Commission on Law and Aging
February 2009

General Information Form

Submitting Entity: Commission on Law and Aging

Submitted By: Joseph D. O'Connor, Chair

1. Summary of Recommendation.

The proposed policy encourages the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local and territorial standards regarding adult guardianship.

2. Approval by Submitting Entity.

The Commission on Law and Aging approved the proposed policy recommendation on October 18, 2008. The following entities have informed us that they have approved or have agreed to co-sponsor the proposed policy:

- Real Property, Trust and Estate Law – Section Council voted to co-sponsor.
- Commission on Mental and Physical Disability Law – Commission voted to co-sponsor.
- Section of State and Local Government Law – Executive Committee voted to approve.
- Section of Family Law – Section Officers voted to approve.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No. However, in August 1991, the House of Delegates passed a recommendation by the Section of Real Property, Probate and Trust Law which resolved that the enactment of federal legislation concerning adult guardianship “is unnecessary at this time.” This recommendation was in response to federal bills in the U.S. House and Senate, which would have mandated federal standards in an area traditionally reserved for the states. By contrast, the proposed recommendation is not aimed at substantive federal legislation to control the guardianship process in states, but rather at the need for federal resources and support to enhance practices.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Association has extensive policy on adult guardianship reform, dated August 1987, February 1989, August 1991 and August 2002. The policy emphasizes the need for

strong procedural due process in the appointment of a guardian, a functional determination of capacity, use of the least restrictive alternative in determining whether a guardian is required and in shaping the guardianship order, effective court oversight and monitoring, minimum standards of practice for guardians, and adequate staffing and funding for public guardianship programs. The proposed recommendation would provide critical support for the furtherance of all of these policies.

5. What urgency exists which requires action at this meeting of the House?

In 2007, the Chair and Ranking Member of the U.S. Senate Special Committee on Aging released a report entitled *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*. The report concludes with a call for support at the federal level for improving guardianship practices. The proposed recommendation would give the Association an opportunity to advocate for such support.

6. Status of Legislation.

There is no pending legislation.

7. Cost to the Association.

None.

8. Disclosure of Interest. (If applicable.)

N/A

9. Referrals.

The recommendation was referred to the following ABA entities on October 23, 2008:

STANDING COMMITTEES

- Client Protection
- Delivery of Legal Services
- Legal Aid and Indigent Defendants
- Pro Bono and Public Service

SPECIAL COMMITTEES AND COMMISSIONS

- Coalition for Justice
- Disaster Response and Preparedness
- Domestic Violence
- Homelessness and Poverty
- Center for Human Rights
- Mental and Physical Disability Law – Agreed to co-sponsor

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SECTIONS, DIVISIONS AND FORUMS

- Family Law – Approved.
- Criminal Law
- General Practice, Solo and Small Firm Division
- Government and Public Sector Lawyers Division
- Health Law
- Individual Rights and Responsibilities
- Judicial Division
- Real Property, Trust and Estate Law – Agreed to co-sponsor
- Senior Lawyers
- State and Local Government Law -- Approved
- Tort Trial and Insurance Practice
- Young Lawyers Division

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present to the House)

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Executive Summary

Commission on Law and Aging

a) Summary of the recommendation.

The proposed policy encourages the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local and territorial standards regarding adult guardianship.

b) Summary of the issue which the recommendation addresses.

The need for adult guardianship is rising with the increasing numbers of older people, individuals with Alzheimer's disease and other dementias, people with intellectual disabilities and mental illness, and individuals who sustain a traumatic brain injury and experience cognitive impairment. Guardianship traditionally has been lodged in state law and practice. However, the U.S. Senate Special Committee on Aging and the Government Accountability Office recently have examined guardianship issues and highlighted possible roles for the federal government.

Federal involvement in the adult guardianship arena could fall into two broad categories. The first is legislation that aims substantively to direct and control state guardianship law and policy. There is no impetus for such legislation.

The second kind of federal involvement is broad-based funding and support for implementing state laws through training, education, data collection and exchange of information on promising practices. Indeed, the real challenge in guardianship today lies in the implementation of the progressive state legislation and national recommendations put forth over the past two decades. A federal role in offering support, visibility and the opportunity for replication could jump-start local efforts and foster systems change.

c) How the proposed policy will address the issue.

The proposed policy supports the second kind of federal involvement – broad-based funding and the promotion of training, research, exchange of information, data collection and development of standards and the state and local levels. The proposed policy will allow the Association to advocate for such supportive federal involvement.

d) Summary of any minority views or opposition identified.

None identified.