

Performance Audit Report

**Office of the Protective
Commissioner**

**Office of the Public
Guardian**

Complaints and Review Processes



THE AUDIT OFFICE
OF NEW SOUTH WALES

AUDITING IN THE STATE'S INTEREST



BOX 12 GPO
SYDNEY NSW 2001

The Members of the Legislative Assembly
Parliament House
SYDNEY NSW 2000

In compliance with Section 38E of the *Public Finance and Audit Act 1983*, I present a report to the Legislative Assembly titled **Office of the Protective Commissioner and the Office of the Public Guardian: Complaints and Review Processes.**

A handwritten signature in black ink, appearing to read 'R Sendt'.

R SENDT
AUDITOR-GENERAL

Sydney
September 1999

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Executive Summary

Executive Summary

Guardianship and Financial Management

Where the Guardianship Tribunal or the Supreme Court determines that an adult lacks the ability to manage their own personal or lifestyle decisions and there is a need for such decisions to be made on their behalf, the Tribunal or the Court may appoint a guardian to make those decisions. Either a private guardian or the Public Guardian may be appointed as the person's guardian.

If an adult is incapable of managing their financial affairs and there is a need that someone else be appointed to manage their affairs on their behalf, either the Guardianship Tribunal or the Supreme Court may appoint a financial manager for them. Either a private manager may be appointed, subject to the supervision of the Protective Commissioner, or the management of the person's financial affairs may be placed in the hands of the Protective Commissioner. If the person is in a hospital gazetted under the Mental Health Act, either a Magistrate or the Mental Health Review Tribunal may appoint the Protective Commissioner to manage on their behalf.

Approximately 1,300 persons are under the guardianship of the Public Guardian; and over 10,000 persons had their estates managed by the Office of the Protective Commissioner, with their assets amounting to around \$1.3 billion.

Concerns Expressed

In undertaking this performance audit, The Audit Office has been aware of concerns expressed about decisions taken by the Office of the Protective Commissioner (OPC) and the Office of the Public Guardian (OPG) in relation to various individuals under their charge. It is not the legislated purpose of The Audit Office to review the merits of decisions or actions relating to individuals in these instances. These complaints should be dealt with through complaints handling and appeal arrangements. However, individual cases and complaints can be helpful to the extent that they might assist to indicate potential systemic problems. The Audit Office thus focused on aspects of systems operating within OPC/OPG that relate to decision making or dealing with complaints. Some of the cases which were the subject of complaints were used as reference material in this context.

Areas for Improvement

This report focuses on and makes recommendations relating to:

- documentation and transparency of decision-making
- transparency of trust accounts
- funding of the Office of the Protective Commissioner
- internal complaints systems
- external review.

The Audit Office found no evidence that the OPC/OPG decisions in respect of cases reviewed were flawed, but areas needing improvement were identified. For example, The Audit Office found that:

- currently there is no simple, inexpensive external appeal mechanism available to challenge or review decisions of OPC/OPG. Appeals are available to the Supreme Court. However, this seems to be widely regarded as intimidating, inappropriate to the nature of the matters involved, time consuming and expensive. The need for a simpler, quicker and more accessible external review mechanism is the most crucial issue identified by The Audit Office in this audit.
- decision making by OPC/OPG was not always transparent and/or clearly communicated to relevant persons. As a consequence, some decisions relating to lifestyle, medical treatments or financial matters may have been viewed with suspicion and concern by those involved or their families.

The Audit Office also considers that the current funding arrangements for OPC, whereby their operations are funded from clients' money without any detailed statement being provided to the clients, represent at least the perception of a conflict of interest. The Audit Office considers that there is need to establish a more transparent funding arrangement.

In addition, The Audit Office considers that there would be benefit in an independent body being appointed to review regularly the level of fees for services being charged to clients by OPC.

Combined, these improvements to appeal mechanisms, decision making transparency, and financial transparency in the management of protected persons and persons under guardianship should serve to raise the standard of confidence and trust in the activities of OPC/OPG. Other internal procedural improvements for OPC/OPG have also been canvassed in this Report.

The Audit Office believes that the issues raised in this Report are significant and need prompt attention. Both OPC and OPG have reacted quickly and positively to the matters raised, and have already actively considered the implementation of those recommendations which are within their powers. Continued efforts will be required within those Offices, and some matters will require attention and leadership at the legislative and policy level to be satisfactorily resolved in an appropriate timeframe.

Recommendations

1. Simpler, quicker and cheaper means of obtaining external review of the decisions of OPC and OPG should be developed and implemented as a matter of urgency.
2. OPC and OPG should improve the documentation and transparency of their decision-making, including recording details of reasons for all 'significant' decisions.
3. OPC should be fully reliant on its prescribed fees to fund its activities.
4. OPC's levels of prescribed fees should be regularly reviewed by an independent body for reasonableness and justification.
5. OPC's clients or their carers or designated family members should receive regular financial statements. In circumstances where this is considered impractical, a record should be made on the file detailing the circumstances.
6. OPC and OPG should continue to review and enhance their complaints handling systems, in line with best practice guidelines.

Response from Attorney General's Department

Thank you for the opportunity to comment upon the Performance Audit Report on "NSW Guardianship Authorities – Complaints and Review Processes".

The recommendations contained in the Report are consistent with the direction in which the Department is heading in the reform of the Office of the Protective Commissioner and Public Guardian.

The Office of the Protective Commissioner and Public Guardian has made significant improvements over the past three years to its operational management, in particular through the implementation of an ongoing Business Process Review. That Review was conducted by an established and independent consulting firm with considerable expertise in customer focussed management reform. As part of this process, policies and procedures have been reviewed and decision making standards are currently being developed to guide and improve the decision making of staff, to promote consistent interpretation and clarify processes for stakeholders. The Department is currently considering options for an appropriate external appeals mechanism and alternative funding arrangements including a review of fees and charges.

Your report has focussed on the importance of appropriate systems and processes to the open and transparent operation of the Office and the recommendations in the Report will clearly assist the Department in its continuing reform of the Office's client management processes.

The Department sees the Report's recommendations as being consistent with current reform strategies and fully supports the recommendations. The Office has commenced implementation of a number of the Report's recommendations through the Business Process Review, and the remaining issues will be considered further as part of our ongoing reform.

(signed)

*Laurie Glanfield
Director General*

17 September 1999

Response from the Office of the Protective Commissioner

The Protective Commissioner notes the comments of The Audit Office that it found in its Performance Audit no evidence that the OPC cases it reviewed were flawed and no evidence that would support the major concerns expressed in the complaints which The Audit Office received.

In particular, the Protective Commissioner notes and supports the specific recommendations made by The Audit Office in respect of the need to improve recording of reasons for decision and the need to continue improving the OPC complaint handling system.

As a consequence of a comprehensive review initiated two years ago with a view to responding to changing demographics and community expectations (which review included client, family and community consultations), OPC has been implementing significant changes to its business processes and particularly its decision making processes. Those changes have a particular focus on quality outcomes for clients.

Many of the issues identified and recommendations made in the Performance Audit are reflected in the issues being addressed through the Business Process Review.

One of the major initiatives, which will lead to greater transparency in decision making, is the development and introduction of individual client service plans for each client. These plans record the needs and wishes of clients and the views of people significant in their lives upon which financial plans and decisions are based. A key component is that all decisions made and reasons for decisions will be included in the plans. The plans are at present being piloted with a view to early full implementation. An important element in informing clients of decisions and of reasons for decisions is to provide advice as to the possible review or appeal of those decisions. How and when to best give that advice will be an important part of the final implementation.

The issue of providing regular financial statements to clients has been a vexed issue. On the one hand providing such statements is certainly something which a person could reasonably expect as part of a transparent and accountable service. On the other hand many clients, because of their particular disabilities, are quite vulnerable to exploitation and

the provision of financial statements could increase that vulnerability. It is hoped that the new client service plans will allow an easy identification of the clients who could be jeopardised by receiving statements. The provision of such statements will require enhanced information technology systems and it is anticipated that these will be in place later this financial year from which time regular statements will be made available probably on a six monthly basis.

As mentioned in the Audit Plan, the Protective Commissioner recognizes the need to restructure the funding of OPC. A Fees & Charges Review Committee was recently established to work towards developing a new funding structure. An objective of the review will be to develop a structure which better reflects fees for services as contrasted to the present commission based fee structure. The challenge will be to ensure that those clients with limited financial resources are able to continue to receive services applicable to their needs.

Because decisions are frequently made by OPC in the context of family disputes or on behalf of clients with limited insight into such matters as the extent of their resources, it is extremely important that a clear and accessible complaint mechanism be available. As indicated in the Audit Review, the need to provide a more user friendly process has been earlier identified by OPC and a Manager has been appointed for that purpose.

The Protective Commissioner strongly supports the need for an external appeals mechanism to review decisions of the Protective Commissioner and the Public Guardian.

(signed)

*Brian Porter
Protective Commissioner
15 September 1999*

Response from the Office of the Public Guardian

The Public Guardian notes the comments of The Audit Office that it found in its performance audit no evidence that the OPG cases it reviewed were flawed and no evidence that would support the major concerns expressed in the complaints The Audit Office received.

In particular the Public Guardian notes and supports the specific recommendations made by The Audit Office in respect of the need to improve recording of reasons for decision and the need to continue improving the OPG complaint handling system.

The Public Guardian has been putting into place a broad range of mechanisms to ensure substitute decisions made by staff of the OPG continue to reflect best practice. Part of this process has been the progressive introduction of a range of policies procedures and initiatives which guide staff in decision-making where significant decisions are to be made.

At the end of June 1999 there were 1433 people with disabilities under the guardianship of the Public Guardian. Throughout the financial year 1998-99 the Public Guardian was the guardian for almost 1760 people with disabilities. It is estimated staff of the OPG made more than 17000 guardianship decisions in 1998-99.

A significant number of policies to guide decision making by staff of OPG have been developed in consultation with a broad range of experts and key stakeholders. These policies relate to major decision areas such as a request for consent to the use of a restraint on an elderly person, a request to consent to the placement of a person in a boarding house, consent to requests in relation to medical and dental treatment including for people who are critically or terminally ill, and a request to consent to the transfer of a person from their own home to a facility such as a nursing home. The Public Guardian has widely and publicly disseminated these policies throughout the community, maintains these policies under continuous review, and has regularly reviewed these in response to stakeholder feedback.

These policies have been pivotal in guiding the decisions of staff of OPG and have been a principal means by which the Public Guardian has publicly declared OPG's position in relation to a number of significant ethical and social issues impacting on people with disabilities in New South Wales. These decision

making policies have all the more significance given the number of guardianship orders appointing the Public Guardian where substantial differences of opinion exist amongst family members or other stakeholders about what decisions should be made for the person under guardianship.

To further improve the transparency of the Public Guardian's decision making authority, this year the Public Guardian produced and disseminated a key guardianship interpretive document. This document identifies and comprehensively examines the authority of a guardian and the range of decisions a guardian may make under particular guardianship functions in a guardianship order. The key purposes of this project are to promote consistent interpretation of guardianship powers by the Office of the Public Guardian and the Guardianship Tribunal, and to ensure guardianship and its processes are clear and transparent for stakeholders. This document is a key policy reference for staff of the OPG in undertaking their decision making roles. The Public Guardian is not aware of any other guardianship jurisdiction which has attempted to do this. The Public Guardian has also adapted this document for use by private guardians to assist in their decision making.

Some twelve months ago staff of the OPG initiated a project to develop a set of guardianship decision-making standards. As a consequence of their work, and extensive external consultation, a set of decision making standards will be finalised shortly. These standards will stipulate the minimum requirements expected of guardianship staff in the performance of their guardianship duties. In addition these standards will give stakeholders affected by the actions and decisions of the Public Guardian knowledge of what they can and should expect as a minimum from guardianship staff of OPG. Areas covered by these standards include providing information about the Public Guardian, seeking views prior to making a decision, recording information about consents given, recording reasons for major decisions and contacts made, how decisions will be made, participating in guardianship reviews, and ongoing professional development. Interest has been shown in this work by other jurisdictions in Australia and the National Guardianship Association of the USA. There is no adult guardianship jurisdiction in Australia which currently has a formal set of decision making standards.

The Public Guardian has and will continue to provide on request written reasons for decisions made on behalf of a person under guardianship. However the Public Guardian accepts that this process should be improved and hence will be developing a policy and procedure to ensure this in relation to significant decisions. Incorporated into this will be an automatic notification of the complaint, review and appeal mechanisms available to the person. This policy and procedure will obviously be enhanced by the recent initiatives described above.

As noted in The Audit Office report the Office of the Public Guardian has recently reviewed its complaint handling procedure. The OPG is introducing a revised procedure which recognises that a concerned stakeholder may wish to make a complaint about how a matter was dealt with for example, or alternatively may wish to seek a review of a guardianship decision made by the OPG. In dealing with complaints and requests for reviews the OPG has developed procedures to enhance the objectivity of both these processes.

The Public Guardian strongly supports the need for an external appeals mechanism to review decisions of the Public Guardian and the Protective Commissioner.

(signed)

*Brian Porter
Public Guardian
15 September 1999*

1. Introduction

1. Introduction

There is an increasing number of individuals in our society who lack the ability to manage their own affairs. It is reported that, in most situations, this lack of decision making ability arises from specific disabilities such as:

- intellectual disability
- psychiatric disability
- brain injury
- age related dementia and other disorders.

Source: Guardianship Tribunal Annual Report 1997/98 p20

In NSW the system for dealing with the problems relating to impaired decision making ability entails the appointment by Tribunals and Courts of “substitute” decision makers. The individuals under care are referred to as protected persons and persons under guardianship respectively.

Guardianship Act

The Guardianship Act 1987 provides a formal, legal mechanism for substitute decision makers to be appointed, if there is a need, and if individuals are no longer capable of making important lifestyle decisions. Guardians are appointed to make decisions such as where a person lives and what treatment and services they should access.

Where the Guardianship Tribunal or the Supreme Court determines that an adult lacks the ability to manage their own personal or lifestyle decisions and there is a need for such decisions to be made on their behalf, the Tribunal or the Court may appoint a guardian to make those decisions. Either a private guardian or the Public Guardian may be appointed as the person’s guardian.

If an adult is incapable of managing their financial affairs and there is a need that someone else be appointed to manage their affairs on their behalf, either the Guardianship Tribunal or the Supreme Court may appoint a financial manager for them. Either a private manager may be appointed, subject to the supervision of the Protective Commissioner, or the management of the person’s financial affairs may be placed in the hands of the Protective Commissioner. If the person is in a hospital gazetted under the Mental Health Act, either a Magistrate or the Mental Health Review Tribunal may appoint the Protective Commissioner to manage on their behalf.

1.1 The Audit Office

For some time The Audit Office has been aware of complaints involving people who had been under the care of the Office of the Protective Commissioner (OPC) or the Office of the Public Guardian (OPG).

Complaints

These complaints suggested that the organisations may have had difficulty in the past in always meeting their obligations to clients and their families. It has been alleged that OPC and OPG have failed to protect the best interests of protected persons and persons under guardianship and their carers; have engaged in arbitrary decision-making without proper family consultation, and have been involved in financial mismanagement of property and estates.

It is not the legislated purpose of The Audit Office to review the merits of decisions or actions relating to individuals in these instances. These complaints should be dealt with through complaints handling and appeal arrangements. However, individual cases and complaints can be helpful to the extent that they might assist to indicate potential systemic problems.

Complaints, particularly when made public, are harmful to the organisations concerned and cause anxiety for protected persons and persons under guardianship, as well as their relatives and friends. For this reason The Audit Office decided to quickly bring forth a report on some key issues for the benefit of Parliament.

1.2 Audit Approach

This has been a short audit of limited scope. The audit examined the claims and associated documentation and focused on the related systems within OPC and OPG. Other organisations involved with the State's guardianship system have not been examined. The audit was concerned to establish whether there was evidence of significant problems in the management and systems of OPC and OPG. The merits of individual cases and the decisions involved were not matters for review by The Audit Office.

The audit obtained access to OPC and OPG files relating to around thirty cases where concern had been formally expressed to The Audit Office. The audit reviewed all documentation and files relating to ten cases, selected at random. It also reviewed summaries and some documents from files relating to the balance of cases. The audit also examined relevant OPC and OPG documentation, including Annual Reports, business process re-engineering reports, client survey report, and policy and procedures statements. This work was supplemented by interviews with staff of OPC and OPG, Guardianship Tribunal, Attorney General's Department, Ombudsman's Office and the Community Services Commission.

The Audit Office's examinations did not establish that a full performance audit was warranted at this time. However, some key issues requiring attention were apparent. It was decided that the community's interests were best served if these matters were drawn to attention and addressed quickly. A performance audit was conducted only in relation to specific systems in OPC and OPG. The option for a full performance audit will be considered in future performance audit programs.

1.3 Cost

The total cost of the audit is as follows:

| | |
|----------------------------|-----------------|
| Direct salaries cost | \$33,815 |
| Overhead charges | 10,145 |
| Value of unpaid staff time | 5,120 |
| Printing (estimate) | 3,500 |
| Total costs | \$52,580 |

1.4 Acknowledgments

The Audit Office would like to acknowledge the cooperation of the Office of the Protective Commissioner, the Office of the Public Guardian, Guardianship Tribunal, Attorney-General's Department, Ombudsman's Office, ICAC and the Community Services Commission.

2. NSW Guardianship System

2. NSW Guardianship System

The NSW guardianship system stems from the Guardianship Act 1987. Implementation of the Act requires the establishment of a Guardianship Tribunal and the Office of the Public Guardian. The Office of the Protective Commissioner was established at an earlier date. The roles and limitations of these bodies are outlined in the following sections.

2.1 Guardianship

Under the Guardianship Act, a person in need of a guardian is a person who, because of a disability, is totally or partially incapable of managing his or her person. The Act defines a person with a disability as one:

- *who is intellectually, physically, psychologically or sensorily disabled*
- *who is of advanced age*
- *who is a mentally ill person within the meaning of Chapter 3 of the Mental Health Act 1990, or*
- *who is otherwise disabled,*
- *and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.*

Source: Guardianship Act 1987 sec 3(2)

The Act further stipulates that guardianship activities in NSW should adhere to the following principles:

- a) *the welfare and interests of such persons should be given paramount consideration*
- b) *the freedom of decision and freedom of action should be restricted as little as possible*
- c) *such persons should be encouraged, as far as possible, to live a normal life in the community*
- d) *the views of such persons in relation to the exercise of those functions should be taken into consideration*
- e) *the importance of preserving family relationships and the cultural and linguistic environments of such persons should be recognised*

- f) *such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs*
- g) *such persons should be protected from neglect, abuse and exploitation*
- h) *the community should be encouraged to apply and promote these principles.*

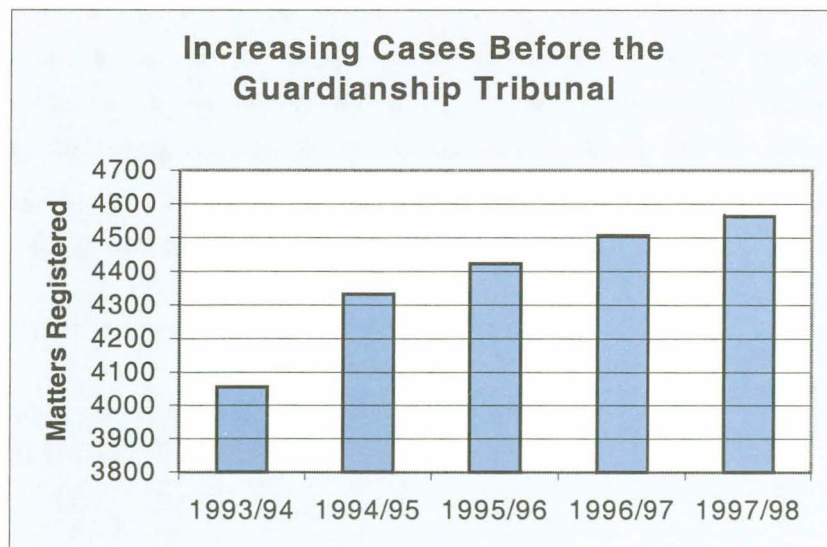
Source: Guardianship Act 1987 sec 4

2.2 Guardianship Tribunal

The activities of the Guardianship Tribunal were not examined by The Audit Office. This section is presented for explanatory purposes only.

The Guardianship Tribunal is a court-substitute tribunal. It has jurisdiction to appoint guardians and financial managers for people with disabilities sixteen years and over who are incapable of making their own decisions. In addition, the Tribunal may act as a substitute decision-maker in relation to medical and dental treatment proposed for adults unable to give a valid consent to their own treatment.

The Tribunal has dealt with an increasing workload in recent years:



During 1997/98 the Tribunal registered 4563 matters comprised as follows:

| Matters Registered by the Guardianship Tribunal in 1997/98 | |
|---|-------------|
| guardianship & financial management | 1241 |
| guardianship | 516 |
| financial management | 596 |
| medical/dental consent | 573 |
| review/other | 1637 |
| Total | 4563 |

Source: Guardianship Tribunal, Annual Report, 1997/98 p19

The Guardianship Tribunal is an inquisitorial body in that it plays an active role in obtaining the evidence upon which it relies when hearing and determining matters before it.

Before Making an Order

Before the Tribunal may make a guardianship order, it must be satisfied that the person has a disability which affects them in one or more major life activity to such an extent that they require supervision or social habilitation. Also, the Tribunal must be satisfied that the person is either totally or partially incapable of managing their person. The Tribunal must then have regard to:

- (a) *the views (if any) of:*
 - (i) *the person, and*
 - (ii) *the person's spouse, if any, and*
 - (iii) *the person, if any, who has care of the person.*
- (b) *the importance of preserving the person's existing family relationships*
- (c) *the importance of preserving the person's cultural and linguistic environments, and*
- (d) *the practicability of services being provided to the person without the need for the making of such an order.*

Source: Guardianship Act 1987 sec 3(1), 3(2) and 14(2)

Appointing the Public Guardian

If the circumstances are such that an order can be made appointing some person other than the Public Guardian, then the Public Guardian is not to be appointed.

The Public Guardian shall not be appointed the guardian of a person in circumstances in which another person may be appointed as guardian.

Any private person must meet the criteria set down in section 17 of the Guardianship Act before they may be appointed as guardian..

Source: Guardianship Act 1987 sec 15(3) and 17

Appointment of a Financial Manager

Before the Tribunal may make a financial management order in relation to a person, it must be satisfied that:

- a) *the person is not capable of managing those affairs, and*
- b) *there is a need for another person to manage those affairs on the person's behalf, and*
- c) *it is in the person's best interests that the order be made.*

Source: Guardianship Act 1987 sec 25G

Appointment of Private Manager or Protective Commissioner

Where the Tribunal makes a financial management order in relation to the estate of a person, the Tribunal may:

- a) *appoint a suitable person as (private) manager of that estate, or*
- b) *commit the management of that estate to the Protective Commissioner.*

Source: Guardianship Act 1987 sec 25(M)

Written Reasons for Decisions

The Tribunal is required to produce reasons for decision for every hearing that it conducts. This imposes an important discipline on panels of the Tribunal. They must be able to set out their findings on the facts of the case and their reasons for making decisions. This requirement is spelt out as follows:

A decision is to be confirmed, as soon as practicable after the relevant order is made, in a written instrument that is:

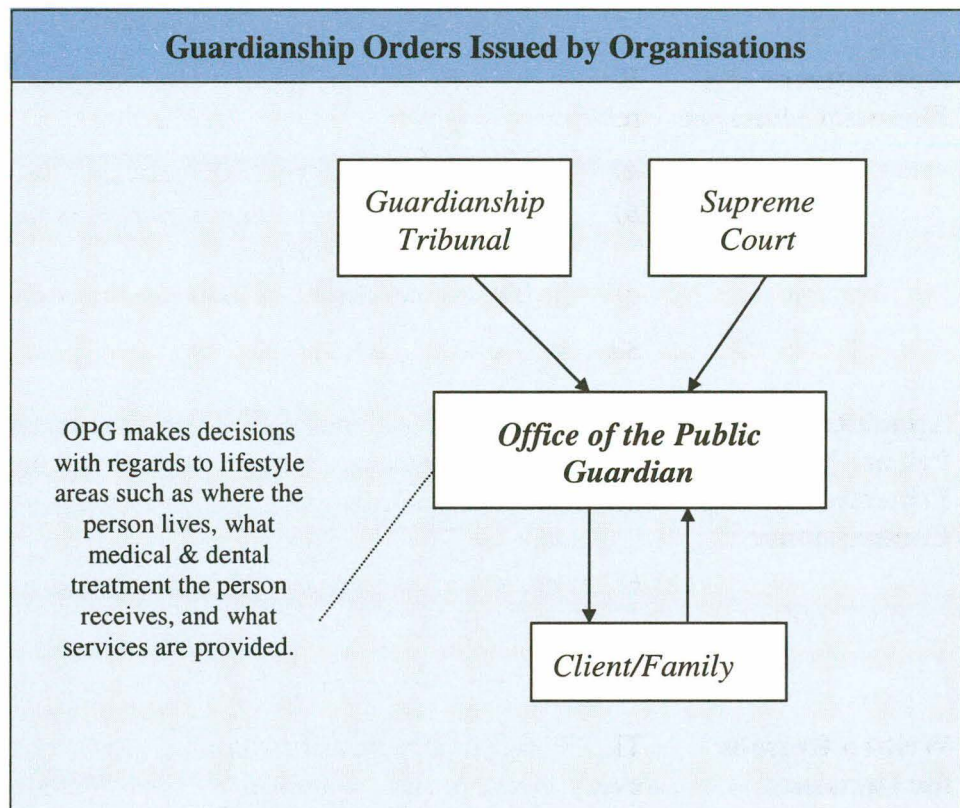
- a) *signed by the member who presided at the sitting of the Tribunal at which the decision was made*
- b) *furnished to each party to the proceedings.*

The Tribunal must also furnish each party to the proceedings with formal written reasons for the decision as soon as practicable after giving the decision....

Source: Guardianship Act 1987 sec 68(1)

2.3 Public Guardian

The Office of the Public Guardian is separate from the Tribunal. The Public Guardian is an independent public official who can be appointed by the Tribunal as a guardian for a person with a disability. The Public Guardian may also be appointed by the Supreme Court, as shown below:



The Public Guardian is only appointed when there is no other suitable or willing person to act as the guardian.

A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that:

- a) the personality of the proposed guardian is generally compatible with that of the person under guardianship*
- b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and*
- c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.*

Source: Guardianship Act 1987 sec 17(1)

The Public Guardian is appointed in more than 60% of all appointments of a guardian by the Guardianship Tribunal.

At the end of June 1998 there were 1263 people under the guardianship of the Public Guardian in NSW.

The Public Guardian has a number of roles to fulfil. They are:

- *acting as guardian for a person with a decision making disability when appointed by the Guardianship Tribunal or the Supreme Court. As well as making decisions for a person about issues such as where they should live, this role also includes actively seeking out improved life circumstances such as appropriate accommodation*
- *identifying patterns of problems for people with disabilities that emerge from assisting individuals, and seeking solutions to those problems*
- *providing information and support to family members and other individuals who have been appointed as someone's guardian by the Tribunal*
- *providing information and education for the community about guardianship issues.*

Source: The Public Guardian of NSW, Annual Report 1997/98 p4

Guardianship is being used more often to resolve matters relating to family conflict about the care, treatment and services required by a person with a disability.

Source: The Public Guardian of NSW, Annual Report 1997/98 p5

In making decisions on behalf of persons under guardianship, the guidelines issued to OPG staff are as follows:

How the OPG Makes Decisions on Behalf of its Clients

In the role of substitute decision maker, delegated guardians in the Office of the Public Guardian should:

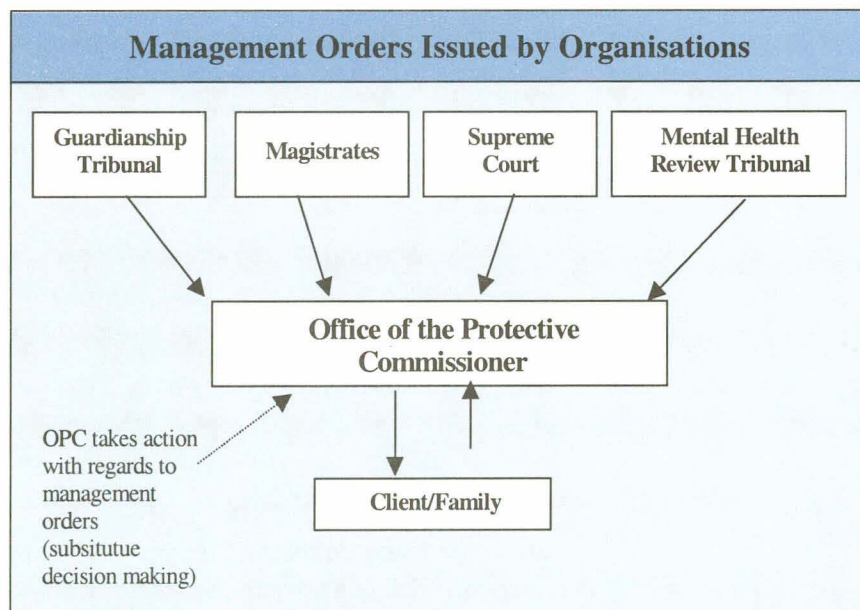
- comply with the principles listed in Section 4 of the Guardianship Act
- check to see that the Public Guardian has the relevant function in the guardianship order before making a decision
- check to see if the Guardianship Order contains any directions, special conditions or recommendations before making a decision
- seek the views of the client before making a decision
- seek the views of significant other people in the client's life before making a decision
- wherever possible, visit the client before making a significant decision on the client's behalf
- make an independent assessment of the risks and benefits of every decision
- monitor and review the outcome of their decisions
- take a holistic view of the client's best interests
- consider the level of expertise and credibility of people providing information in relation to a matter
- ensure that decisions are in line with current best practice
- collect information to facilitate systemic advocacy
- record decisions, and the reasons for decisions in such a way and with the necessary information so that they are open to peer and other review.

2.4 Protective Commissioner

The Office of the Protective Commissioner is also separate from the Tribunal. The Protective Commissioner is an independent public official (also classified as an Officer of the Supreme Court) who can be appointed to protect and administer the financial affairs and property of people who are unable to manage for themselves. The Protective Commissioner may also supervise private managers appointed by the Court or the Guardianship Tribunal.

For example, a person may be unable to access their finances, make a transfer to more suitable accommodation, complete the sale of their home, or finalise urgent legal action. In these circumstances, a person may need to have their financial affairs placed under management through a Management Order.

These Management Orders may be issued to the Office of the Protective Commissioner by a number of organisations, as shown below:



The Office of the Protective Commissioner provides a range of services for people who lack the ability to manage their own affairs. The Protective Commissioner can be appointed (under the Protected Estates Act 1983) by the Supreme Court, the Guardianship Tribunal, a Magistrate or the Mental Health Review Tribunal.

| New OPC Clients by Source of Order 1997/98 | |
|--|-------------|
| Guardianship Tribunal | 1024 |
| Magistrate's Orders | 82 |
| Supreme Court | 115 |
| Department of Community Services | 0 |
| Mental Health Review Tribunal | 127 |
| Voluntary Requests | 5 |
| Others | 3 |
| Total | 1356 |

Source: The Protective Commissioner, Annual Report 1997/98 p19

The Office of the Protective Commissioner has responsibility for over ten thousand protected persons, whom it calls 'clients'.

The Protective Commissioner's authority over the estates of protected persons is restricted by the Protected Estates Act to specific purposes including:

- a) *the payments of the debts and engagements of the protected person and the repayment of expenses chargeable to the estate of the protected person*
- b) *the maintenance, clothing, medicine and care, past and future, of the protected person and, in the event of the death of the protected person, the protected person's funeral expenses*
- c) *the maintenance of the spouse of the protected person or any child, parent, or other person dependent upon the protected person, or for whose maintenance the protected person provided when not a protected person or would be expected to provide*

- d) *the payment of all proper costs, charges and expenses incurred in or about the care, protection, recovery, sale, mortgage, leasing, disposal and management of the estate of the protected person.*

Source: Protected Estates Act 1983 Sec 28(1)

In managing the financial interests of protected persons, the guidelines issued to OPC staff are as follows:

How the OPC Makes Decisions on Behalf of its Clients

In making financial decisions on behalf of its clients, the OPC is guided by OPC decision making guidelines, as well as the Statement of Principles set out in the Guardianship Act 1987.

Decision Making Guidelines

When making decisions on client matters, OPC staff are to have regard to the following:

1. the person's own wishes
2. the person's immediate and long term needs
3. the financial resources available
4. requests, plans, and objectives of any Guardian of the person
5. the person's previous, current and hoped for lifestyle
6. the person's family commitments or obligations
7. arrangements made by the person when competent
8. rights and views of probable beneficiaries after person's death
9. other relevant factors.

Guardianship Act Statement of Principles

OPC decisions also have regard to the Statement of Principles set out in the Guardianship Act 1987. These principles set out the rights of people with disabilities and encourage the community to respect these rights.

(Note: The principles are set out earlier in this report in section 2.1.)

3. Concerns Expressed

3. Concerns Expressed

Concerns have been raised with The Audit Office in relation to the guardianship system as a whole and its implementation by the authorities; for example:

| Concerns Expressed by a Community Organisation (direct quotes taken from correspondence received) |
|---|
| Specific Concerns <i>family rights</i> <i>dismissal of family (rights) as whole unit</i> <i>family members' access rights</i> <i>forced divorce</i> <i>client's bequests</i> <i>client's, carers and dependant's rights</i> <i>medical abuse</i> <i>clinical trials, abortion, sterilisation and lobotomies</i> <i>psychotropic medications</i> <i>abuse in residential centres</i> <i>AMA vs Public Guardian (dismissal of medical practitioner)</i> <i>financial abuse</i> <i>OPC estate management staff</i> <i>questions re investment practice</i> <i>questions re legal costs</i> <i>client management waste</i> <i>carer's needs (expenses)</i> <i>questions re criminal activities relating to safety deposits and client's property</i> <i>legal abuse</i> <i>denial of legal representation</i> <i>denial of natural justice</i> <i>non observance of principles of current legislation</i> Complaints Mechanism <i>A hopeless exercise</i> Accountability <i>The only avenue of appeal against decisions made by the Guardianship authorities is the Supreme Court – Protective Division. This is well out of financial reach for most families. If they do make a challenge all legal costs incurred by the authorities are charged on to the clients.</i> |

These concerns are principally directed at the Office of the Protective Commissioner and the Office of the Public Guardian. However, claims are also made against the Guardianship Tribunal, Department of Community Services, the Public Trustee, existing legislation covering guardianship, protected estates and mental health, and against others, such as the NSW Legislative Council Standing Committee on Social Issues.

3.1 Assessment of Documentation

Much of the documentation from complainants was incomplete. The evidence did not generally include evidence of action by the relevant government agencies to investigate and, where possible, resolve the complaints. Many of the statements were of an extreme nature and contained allegations of illegal conduct.

To obtain a more complete picture, The Audit Office obtained access to OPC and OPG files relating to around thirty cases of concern. The Audit Office reviewed all provided documentation and files relating to ten cases, selected at random. The Audit Office also reviewed summaries and some documentation from files relating to the balance of cases.

The claims against OPC and OPG are based on cases which include the following complaints:

| Examples of Complaints (as presented to The Audit Office) |
|---|
| <p>Concerning OPC</p> <ul style="list-style-type: none"> • arbitrary requests for money without due explanation • no explanation of fees removed from account • frivolous spending (storing furniture, taking out leases both unnecessarily) • storing belongings and obtaining personal documentation unnecessarily • private carers given little financial support that they are entitled to • denial of requests by clients without explanation (trips, personal purchases refused) • inappropriate conduct (joking, “power trip”, missing items, no knowledge of client) • family conflict / impartiality of OPC <ul style="list-style-type: none"> ▪ intervention against client’s wishes ▪ allowing family member intervention against client’s wishes ▪ allowing clients to make decisions when they are unable to look after themselves • numerous decision changes, some often inappropriate for client needs • client application to be removed from OPC care granted – incur OPC legal costs. <p>Concerning OPG</p> <ul style="list-style-type: none"> • invasion of privacy and missing or lost items from home • forcing of medication, medical practices without informed consent • inappropriate live-in carers employed. |

Source: Summarised by The Audit Office from material provided by complainants.

3.2 Common Themes

In summary, there were common themes in many of the complaints:

- persons under guardianship who believed the appointment of a guardian to be an unnecessary intrusion, despite evidence of the need for such an appointment
- family members' concerned when control was to be taken away from the family
- family members who had a history of dispute with the protected person or with each other and who contested decisions seen to be to their disadvantage
- family members who were laying claim to the assets of the protected person
- family members who did not wish to see their future wealth 'eroded' by expenditure on the protected person
- family members who believed that the care of their parents should be funded totally by the taxpayer
- carers of protected persons who disputed expenditure requirements
- family members who had been upset by statements and mental lapses (particularly in relation to the disposition of their funds) of those under protection, who may have been suffering from psychiatric illnesses.

OPC and OPG are often the last resort for the individuals in question. Many of the cases involved intractable family disputes.

Many of the complaints examined during this audit were made by the potential beneficiaries of the estates of the protected persons. Some of these complained that assets of the protected person should not be sold to raise funds for the protected person's future care. Documentation reviewed by The Audit Office indicated that OPC had explored the alternatives as a normal course, and had reviewed the alternatives in the face of complaints. In some instances OPC had not communicated clearly to the potential beneficiaries the rationale for OPC's decision, but in any event the decision was unacceptable to those beneficiaries who feared some erosion of their probable future inheritance.

Some cases involved complaint from persons under guardianship, who resented the intrusion of the guardianship authorities into their lives and feared the loss of their remaining possessions. A review of the files indicated that OPG staff had sought to reassure such persons.

3.3 Medical Concerns

Consents for medical and dental treatment by substitute decision-makers are subject to strict criteria and safeguards under the Guardianship Act.

The main concern expressed to The Audit Office in this matter was a perceived potential for recent amendments to the guardianship legislation to be abused by the Guardianship Tribunal.

On 1 June 1998, the Guardianship Amendment Act 1998 came into force. The legislation was enacted to ensure that those unable to give a valid consent to their own treatment were able to obtain access to new treatments available only through clinical trial. The Tribunal's role is to act as a watchdog on behalf of those unable to consent to their own treatment. If the Tribunal is satisfied that all significant safeguards have been met, it may approve a trial as one in which those unable to consent to their own treatment may take part.

The Tribunal may approve ... a clinical trial ... only if it is satisfied that:

- a) the drugs or techniques being tested in the clinical trial are intended to cure or alleviate a particular condition from which the patients suffer, and*
- b) the trial will not involve any known substantial risk to the patient (or, if there are existing treatments for the condition concerned, will not involve material risks greater than the risks associated with those treatments), and*
- c) the development of the drugs or techniques has reached a stage at which safety and ethical considerations make it appropriate that the drugs or techniques be available to patients who suffer from that condition even if those patients are not able to consent to taking part in the trial, and*
- d) having regard to the potential benefits (as well as the potential risks) of participation in the trial, it is in the best interests of patients who suffer from the condition that they take part in the trial and*

- e) *the trial has been approved by a relevant ethics committee and complies with any relevant guidelines issued by the National Health and Medical Research Council*

Source: Guardianship Act 1987 sec 45AA

When these concerns were aired recently in the media, the President of the Tribunal responded with the following explanation:

Your article "For their own protection" on the work of the NSW Guardianship Tribunal (Herald, June 19) says that once people are under guardianship, experimental drugs can be used on them if they are unable to give consent.

This misses the point of the NSW law in this area. The purpose of the relevant law is to ensure that people who cannot give informed consent can nonetheless benefit from treatments available only through clinical trials.

This law, enacted with bipartisan support in the NSW Parliament, is full of safeguards to ensure that people who cannot consent to their own treatment are only included in clinical trials when there is a possibility that they will benefit.

The Guardianship Tribunal must include details of any such clinical trials in its annual report. The only trials approved so far are for new treatments for stroke, dementia, severe sepsis or hospital-acquired pneumonia.

In the past year, at least 30 people who could not give consent have been given access to these treatments as a result of consents being given by their spouses or other family members.

The same article suggested that young women under guardianship are "compulsorily" sterilised. In fact, the Guardianship Tribunal cannot consent to sterilisation unless it is satisfied that this is the most appropriate form of treatment to promote the person's health and well-being.

Second, the tribunal must also be satisfied that the treatment is necessary either to save the person's life or prevent serious damage to their health.

Source: President, Guardianship Tribunal, letter to Sydney Morning Herald dated 30 June 1999

3.4 Audit Observations

The cases examined by The Audit Office need to be viewed against the nature and general level of work undertaken by the OPC/OPG:

- cases often involve individuals in distressed circumstances
- around 10,000 people have their property and affairs managed by OPC
- around 1,500 are represented in their affairs by the Office of Public Guardian.

There were 57 formal complaints recorded by OPG in 1997/98. There were 43 formal complaints recorded by OPC in 1997/98. Given the nature of their responsibilities, complaints are not unexpected.

The Audit Office found no evidence from its review of documentation that would support the concerns expressed. The efforts of OPC and OPG staff appeared to resolve disputes in most instances.

Individual Cases

A detailed case analysis has not been undertaken. It is thus not possible to conclude on the merits of individual complaints one way or the other. However, substantial systemic flaws were not evident in the systems for handling guardianship matters. The Audit Office recognises that it is one thing to be re-assured when reviewing complete files some time after the events in question. For the individuals involved at the time, it would have been more difficult. Considering that these individuals were often in distressed circumstances, their understanding of the actions of OPC and OPG in the light of the alternatives available may have been limited by such deficiencies in operating practices which The Audit Office observed, for example:

- whilst the reasons for decisions could be understood from correspondence and minutes on file, reaching this understanding was a lengthy process
- individuals appeared to have little understanding of the extent (or limitations) of their estate and the balance of their Trust Account. Allowing for individual impairment, this would not of itself demonstrate that they had not been properly advised. But there was little record that they had been adequately advised

- some individuals appeared to (incorrectly) believe that their estates now belonged to OPC
- OPC and OPG had made little use of their formal complaints handling systems in addressing these cases
- there appeared to be no simple external process available to arbitrate disputed matters. The only means of appeal (other than back to the Tribunal) was to the Supreme Court, which was seen by those concerned as largely inaccessible.

Systems

Accordingly The Audit Office has focused on the systems in these areas. The next chapter examines these under the following headings:

- documentation and transparency of decision-making
- transparency of trust accounts
- funding of OPC
- internal complaints system
- external review.

The Audit Office believes that the issues raised in these areas are significant to the level of public confidence in the NSW guardianship system, and has therefore sought promptly to raise them publicly for attention.

4. Issues for OPC and OPG

4. Issues for OPC and OPG

4.1 Documentation and Transparency of Decision-Making

OPC and OPG are charged with the responsibility of making decisions which, on the facts existing at the time, are in the best interests of the protected person or person under guardianship.

The Audit Office observed that the reasons for decisions are often not black and white. Frequently the decision may be unacceptable to at least one of the involved parties.

Identifying Decisions

It is important that the main reasons for a particular decision being taken should be carefully identified, recorded, distinguished from alternative decisions and communicated to the relevant parties. This is particularly important when making significant decisions, and where it is known there is conflict or where there is a complaint. However, current practices do not always follow these precepts. Statutory requirements in other comparable human service areas address this question of recording decisions rather better than was seen in this audit. For example, the Administrative Decisions Tribunal Act requires that:

If an administrator makes a reviewable decision, an interested person may make a written request to the administrator for the reasons for the decision.

As soon as practicable (and in any event within 28 days) after receiving such a request, the administrator is to prepare a written statement of reasons for the decision and provide it to the person who requested the reasons.

The statement of reasons is to set out the following:

- a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based*
- b) the administrator's understanding of the applicable law*
- c) the reasoning processes that led the administrator to the conclusions the administrator made.*

Source: Administrative Decisions Tribunal Act 1997 No 76 Sec 49

Similarly, a regulation under the *Community Services (Complaints, Appeals and Monitoring) Act 1993* requires service providers to record reasons and provide a written copy to those affected by certain types of decisions:

If a decision of a class prescribed for the purposes of this subsection is made by a relevant decision-maker, the person or body that made the decision must:

- a) record the reasons for the decision, and*
- b) give a written copy of the reasons to each person considered by the decision-maker to have been directly affected by the decision.*

Source: Community Services (Complaints, Reviews and Monitoring) Act 1993 Sec114

The following classes of decisions are prescribed for the purposes of section 114 of the Act:

- a) any decision against which there is a right of appeal to the Tribunal ...*
- b) any decision by a service provider in respect of which notice of a complaint is given to the service provider*
- c) any decision by a service provider that is likely to have a significant impact on the quality or availability of a community service ...*

Source: Community Services (Complaints, Reviews and Monitoring) Regulation 1996 – Reg No. 116

The Audit Office considers that this provides a useful model for OPC and OPG.

To follow this example would require that OPC and OPG:

- develop clear policies and procedures around how decisions are recorded and communicated to clients
- advise affected parties when decisions are appellable
- record reasons for all ‘significant’ decisions, in case written reasons are requested by the client or affected parties or by a reviewing body.

And the following information should be clearly recorded on the file:

- reasons for the decision
- names of people consulted and views expressed
- names of people informed about the reasons for the decision
- checklist showing how the organisation's "guidelines" for making decisions was followed.

If guardianship authorities can clearly demonstrate that they have adhered to the correct processes in arriving at their decision, the actual decision made is likely to be more appropriate and, in the event of a dispute, much easier to communicate and investigate.

Accordingly, it is recommended that OPC and OPG should improve the documentation and transparency of their decision-making, including recording details of reasons for all 'significant' decisions.

4.2 Transparency of Trust Accounts

A system is needed to ensure that clients receive regular financial statements. The Audit Office found little evidence on the files that protected persons understood the extent (or limitations) of their estate and the balance of their Trust Account. This gave rise to unwarranted suspicion of OPC's estate management activities.

Involving Individuals

It also allowed little opportunity to involve those individuals in decision-making affecting their estate. This deficiency was noted as a significant area of concern in a recent client survey for OPC, which commented as follows:

In line with OPC stated principles clients have the right to be treated with respect, to be kept informed about their financial affairs and to be involved in decisions and planning about themselves and their estates.

Source: OPC Client Satisfaction Survey 1999 p3

Leaving the client out of the communication pattern and not involving them in decisions about management of their finances is both demeaning and depowering. Clients have the right to exercise choice and control. The degree to which this should occur will vary considerably between clients but it should be acknowledged and encouraged.

The Audit Office was advised by OPC that, in some instances, this is not practical because of individual circumstances and security concerns. However, The Audit Office recommends OPC's clients or their carers or designated family members should receive regular financial statements. In circumstances where this is considered impractical, a record should be made on the file detailing the circumstances.

4.3 Funding of OPC

The Audit Office encountered instances where individuals appeared to believe that their estates now belonged to OPC.

Common Fund

In reality, their funds are held on trust in a 'Common Fund'.

Section 53 (1) of the Protected Estates Act 1983 states that where the Protective Commissioner is appointed to manage the affairs of a protected person, the balances to the credit of the protected person in the trust fund shall be one common fund.

The value of the Common Fund has increased substantially, as shown in the following table:

| Increasing Value of the Common Fund | | |
|-------------------------------------|-------------------|-------------------|
| 1995/96 \$'000 | 1996/97 \$'000 | 1997/98 \$'000 |
| 630,682 | 747,725 | 849,449 |

In the past, investment has been restricted primarily to securities authorised by the Trustee Act, excluding for example investments in shares. This has now changed as a result of the *Trustee Amendment (Discretionary Investments) Act 1997*. This legislation introduced the "Prudent Person Test" for investment and management by Trustees. The objective of the Act was to provide an environment where client needs will be met through a diversified range of investment options designed to access income and capital growth assets, assess taxation liability, and stimulate cost effectiveness utilising industry best practice. The Common Fund will be replaced by several funds, offering alternative risk/growth profiles.

In addition to managing the Common Fund, OPC must manage other assets on behalf of the 'protected persons'.

In addition to, and not included in the Common Fund, the Protective Commissioner is required to exercise management functions on behalf of clients in respect of certain real estate and other unrealised assets such as shares, debentures and similar investments, jewellery and furniture, and other personal effects. The worth of these assets, except real estate, has not been formally assessed. The worth of real estate is considered to be \$362.7M (\$308.2M – 1997). An investment valuation system is in the process of being reviewed...

Source: OPC Annual Reports 1997/98 p80

OPC's Sources of Funds

To meet the costs of its own operations, OPC has two main sources of funds:

- fees charged for services provided to the protected persons, under Section 8 of the Protected Estates Act. Fees may be charged when income is collected, on realisation of an asset or when an activity is completed on behalf of a client. The fees may be prescribed by Regulation and were last reviewed in 1995
- a contribution from the Common Fund, under Section 57 of the Act; OPC has an internal goal that the contribution from the Common Fund should not exceed 1% of the value of the Fund.

The following table shows that the contributions to OPC from these sources have been increasing.

| Increasing Transfers to OPC | | | |
|---------------------------------|-------------------|-------------------|-------------------|
| | 1995/96 \$'000 | 1996/97 \$'000 | 1997/98 \$'000 |
| Fees | 7,436 | 8,465 | 8,843 |
| Transfer from Common Fund | 3,584 | 3,419 | 5,804 |
| (% of Common Fund) | (0.6%) | (0.5%) | (0.7%) |
| Investment and Sundry Income | 663 | 760 | 941 |
| Total | 11,683 | 12,644 | 15,588 |

Source: OPC Annual Reports 1996/97 and 1997/98

In terms of OPC's funding:

- OPC's prescribed fees for service cover only half the cost of its operations
- the *Transfer from Common Fund* appears to be OPC's way of meeting the shortfall between its prescribed fees and actual costs and in this regard the 1% internal goal of OPC amounts to an arbitrary (but legal) levy on the sum total of the Common Fund.
- OPC must manage other assets, in addition to the Common Fund

Improving Public Confidence

The Audit Office considers that reliance on the Common Fund to subsidise the costs of OPC's operations presents a potential for public distrust in OPC. Public confidence in guardianship authorities is paramount.

The Audit Office considers that OPC should be fully reliant on its prescribed fees to fund its activities.

Additionally, OPC's levels of prescribed fees should be regularly reviewed by an independent body for reasonableness and justification.

During the course of the audit the Protective Commissioner agreed that the current arrangements could be improved and has approved a complete review, outlined as follows:

There is a need for a complete review of all fees and charges of the OPC and also to consider alternate / additional funding arrangements. The review should consider the user pay principle, waiver of fees, legislative, policy and procedural implications as well as the application of information technology. Any review should compliment the OPC approach to developing an activity based costing model.

Source: Internal minute to Protective Commissioner dated 15 June 1999

4.4 Complaints Handling System

The Audit Office observed that OPC and OPG had made little use of their formal complaints handling systems in addressing the cases brought to its attention. This raises the question of the effectiveness of these systems.

OPC

The complaint review process at OPC is described as follows:

- *If the person is not satisfied after talking to the financial manager about the reasons for a decision, their supervisor can be contacted by phone or in writing.*
- *If the matter is unresolved after discussion, a written complaint can be sent to OPC's Review Officer describing the difficulty and asking for a further review.*
- *If still not satisfied, the client or their respective advocate can write to the Protective Commissioner. At this level, independent mediation can be arranged.*
- *There is a right to appeal any decision of the Protective Commissioner to the Supreme Court of New South Wales.*

Source: OPC Fact Sheet 3, Estate Management January 1999

OPG

The complaint review process at OPG is described as follows:

- *As the primary source of contact the officer responsible should attempt to resolve any concerns or complaints the caller has as they arise.*
- *If this either cannot occur or has been attempted and failed, the caller should be informed that they can speak with the person's guardianship supervisor to discuss the matter further.*
- *If the person takes up this offer the guardianship supervisor should attempt to address the person's concerns.*
- *If the person is still not satisfied after this or chooses not to contact the guardianship supervisor the person should be referred to the Complaints Manager, who is the Deputy Regional Manager/Regional Manager on Allocation for that week.*

Source: OPG Staff Induction Handbook

Guardianship Tribunal

Another avenue of appeal is to request that the Guardianship Tribunal re-consider a matter which it has already considered.

A review of a Guardianship order may be requested as follows:

The following persons are entitled to request a review of a guardianship order:

- a) *the guardian*
- b) *the person under guardianship*
- c) *the Public Guardian*
- d) *any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person under guardianship.*

Source: Guardianship Act 1987 sec 25B

The Tribunal:

- a) *may, on its own motion, and*
- b) *must, at the request of any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the appointor, review the appointment (or purported appointment) of an enduring guardian*

Source: Guardianship Act 1987 sec 6J(1)

An application for revocation or variation of financial management order may also be sought, as follows:

The following persons are entitled to apply for an order revoking or varying a financial management order:

- a) *the protected person concerned*
- b) *the Protective Commissioner*
- c) *the manager of the estate, or part of the estate, of the protected person*
- d) *any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the protected person.*

Source: Guardianship Act 1987 sec 25R

Best Practice

The Audit Office assessed these various arrangements against best practice standards for complaints handling systems.

The Ombudsman's guidelines for complaint handling suggest that a tiered or stage approach is the most effective:

- *staff empowered with clear delegations to resolve complaints whenever possible at first contact*
- *staff log complaint details for later analysis*
- *more senior staff or designated complaint officer reviews/investigates unresolved complaints*
- *still unresolved complaints referred externally.*

Source: Ombudsman's Office, *Effective Complaint Handling Guidelines*, 1995 p5

Further guidance is available in the Australian Standard for Complaints Handling (AS4269 – 1995), which points to the need to ensure fairness in the complaints process by ensuring the complainant's right to:

- *be heard*
- *know whether the organisation's relevant product and service guidelines have been followed*
- *provide and request all relevant material to support the complaint*
- *be informed of the criteria and processes, including the avenues for further review, applied by the organisation dealing with complaints*
- *be informed of the response of the person or organisation complained of*
- *be informed of the organisation's decision and the reasons for that decision*
- *know that the complaint is being reviewed independently where possible, and*
- *confidentiality, if requested.*

Source: Australian Standard AS4269 – 1995 p7

Audit Observations Against these guidelines, The Audit Office observed that:

- both offices were revising their complaints procedures. OPC has recently appointed a manager to develop a comprehensive complaints recording and monitoring system. Both offices recognise that their systems could be made more user-friendly
- complaint procedures do not incorporate requirements to provide to the complainant all relevant material in relation to the complaint, to explain the reasons for decisions, or to show the complainant how the organisation's "guidelines" have been followed
- OPC's complaint register provided only a single line for each complaint, which captured little of the substance of a complaint. OPG had better records. Neither is proposing in future to identify on their registers the names of relevant staff members. This raises the question of accountability. There was little evidence of a complaint monitoring system in either organisation
- complaint procedures did not delineate authority levels and did not specify review by progressively more senior managers
- complaint procedures did not involve an external person, where matters could not otherwise be resolved. Whilst OPC has appointed a complaints manager, that person has no authority to review individual cases. Whilst both organisations have now proposed the use of panels, which may include an external member, there is no assurance of this.

The Audit Office supports the proposed use of panels, which were described in OPG as follows:

Reviews of Guardianship decisions will be undertaken by a panel consisting of, at least, a staff member from the region in which the person under guardianship resides and a staff member from another region. In some circumstances it may be appropriate to involve a person external to OPG as a third member of the Review Panel...

Reviews of Guardianship Decisions will be dealt with taking into consideration rights of all to a fair and open process.

Reviews of Guardianship Decisions will be completed within 28 days from the time the person requesting the review is notified of the Review Panel's composition.

Source: OPG Draft Complaints Policies and Procedures Manual June 1999

The Audit Office recommends that OPC and OPG should continue to review and enhance their complaints handling systems, in line with best practice guidelines.

4.5 External Review

The last tier or stage of the Ombudsman's guidelines for complaint handling suggested that after internal processes had been applied, matters still unresolved should be reviewed externally. This might be done in different ways, for example:

- *alternative dispute resolution procedure (such as mediation) tried*
- *complaint referred to external complaint agency (such as Ombudsman)*
- *complainant informed of appeal procedure or other legal remedy*

Source: Ombudsman's Office, *Effective Complaint Handling Guidelines*, 1995 p5

The Audit Office is advised that a dispute resolution approach is more appropriate for most disputes in this field, rather than a legal adversarial approach, because complaints in this area:

- generally involve the complainant continuing to live in the situation that has caused concern
- are generally not about probity or integrity, but about processes that have gone wrong or information that was not considered
- usually follow a series of incidents.

OPG's procedures make no reference to the avenue of external review.

OPC's procedures allow the possibility of independent mediation arranged through the Protective Commissioner. But there was little evidence of this in the cases examined. OPC's procedures also contain reference to appeal by the Supreme Court:

There is a right to appeal any decision of the Protective Commissioner to the Supreme Court of New South Wales.

Source: OPC Fact Sheet 3, Estate Management January 1999

The Audit Office is advised that appeal to the Supreme Court is:

- relatively complicated for those not legally trained
- relatively costly (OPC's costs are later debited to the individual's estate, regardless of the result of the appeal, which can more than double their costs of appeal)
- intimidating and unsuited to resolving the complex human relations problems observed in these cases.

Actions by OPC presently imply a judicial feature, as the statutory head of the presently combined organisations is classified as an officer of the court and exercises the delegated powers of the court under Part 3 Division 4 of the Protected Estates Act. The continued need for this status could be reconsidered, and a simple external review mechanism explored. Appeals to the court could of course still be available. To assist in considering what simple forms of external review might be possible for OPC and OPG decisions, The Audit Office held some short, general discussions with the Ombudsman's Office and the Community Services Commission (CSC).

The Ombudsman's Office currently has no jurisdiction in this area. The Ombudsman's Act, Schedule 1 lists conduct of public authorities which is specifically excluded from the jurisdiction of the Ombudsman. The schedule provides that the conduct of:

2(a) a court or person associated with a court

is such excluded conduct. The Protective Commissioner is such a person. The Protected Estates Act provides:

s.5(8) The Protective Commissioner and the Deputy Protective Commissioner shall in their capacity as such be officers of the Court

The Protective Commissioner may also issue a subpoena in the exercise of the functions of the Protective Commissioner, under Section 9 of the Protected Estates Act.

Were this judicial status to be altered, the Ombudsman's jurisdiction could be reconsidered. Subpoena powers for the Protective Commissioner, if needed, could be set out in legislation.

Other than the Office of the Ombudsman, another possibility could be to make use of the mechanisms of CSC and the Administrative Decisions Tribunal.

CSC already reviews complaints relating to the NSW Department of Community Services, NSW Ageing and Disability Department, services funded by the NSW Minister for Community Services and the Minister for Ageing and Disability, and the Home Care Service of NSW.

There is merit in considering an expanded jurisdiction for the CSC on the following basis:

- CSC would be well placed to investigate complaints against OPC and OPG as it already deals with many of the same issues with the same clientele, although CSC would need to acquire estate management skills
- CSC can also demonstrate a complaints system that works and enjoys the confidence of disability groups
- whilst CSC investigates the process which has led to a decision, it does not have the power to force a decision. As necessary, this is achieved through the Community Services Tribunal
- by July 2000 there will be a Children's Guardian for which CSC will apparently have review power, with the decisions of the guardian reviewable by the Administrative Decisions Tribunal. Similarly CSC could have review power over OPC and OPG with decisions reviewable by the Administrative Decisions Tribunal.

This could provide a two part process – initial review by the CSC and subsequent review, as necessary, by the Administrative Decisions Tribunal.

Such external arrangements would also assist in allaying concern that the present arrangement, whereby the head of OPC is also the head of OPG, may appear to some to present a conflict of duty (even though it appears to make practical sense as guardianship orders often include financial orders).

There are a range of complex matters of law and judicial authority to be considered in this area, and The Audit Office expresses no view as to what the most appropriate solution may be.

The Audit Office strongly recommends that there should be simpler, quicker and cheaper means of obtaining external review of the decisions of OPC and OPG.

Performance Audits by The Audit Office of New South Wales

Performance audits seek to serve the interests of the Parliament, the people of New South Wales and public sector managers.

The legislative basis for performance audits is contained within the *Public Finance and Audit Act 1983, Division 2A*, which differentiates such work from the Office's financial statements audit function. Performance audits examine whether an authority is carrying out its activities effectively and doing so economically and efficiently and in compliance with all relevant laws. These audits also evaluate whether members of Parliament and the public are provided with appropriate accountability information in respect of those activities.

Performance audits are not entitled to question the merits of policy objectives of the Government.

When undertaking performance audits, auditors can look either at results, to determine whether value for money is actually achieved, or at management processes, to determine whether those processes should ensure that value is received and that required standards of probity and accountability have been met. A mixture of such approaches is common.

Where appropriate, performance audits provide recommendations for improvements in public administration.

Performance audits are conducted by specialist performance auditors who are drawn from a wide range of professional disciplines.

The procedures followed in the conduct of performance audits comply with The Audit Office's Performance Audit Manual which incorporates the requirements of Australian Audit Standards *AUS 806 and 808*.

Our performance audit services are certified under international quality standard *ISO 9001*, and accordingly our quality management system is subject to regular independent verification. The Audit Office of NSW was the first public audit office in the world to achieve formal certification to this standard.

Performance Audit Reports

| No. | Agency or Issue Examined | Title of Performance Audit Report or Publication | Date Tabled in Parliament or Published |
|-----|--|--|--|
| 1 | Department of Housing | <i>Public Housing Construction: Selected Management Matters</i> | 5 December 1991 |
| 2 | Police Service, Department of Corrective Services, Ambulance Service, Fire Brigades and Others | <i>Training and Development for the State's Disciplined Services: Stream 1 - Training Facilities</i> | 24 September 1992 |
| 3 | Public Servant Housing | <i>Rental and Management Aspects of Public Servant Housing</i> | 28 September 1992 |
| 4 | Police Service | <i>Air Travel Arrangements</i> | 8 December 1992 |
| 5 | Fraud Control | <i>Fraud Control Strategies</i> | 15 June 1993 |
| 6 | HomeFund Program | <i>The Special Audit of the HomeFund Program</i> | 17 September 1993 |
| 7 | State Rail Authority | <i>Countrylink: A Review of Costs, Fare Levels, Concession Fares and CSO Arrangements</i> | 10 December 1993 |
| 8 | Ambulance Service, Fire Brigades | <i>Training and Development for the State's Disciplined Services: Stream 2 - Skills Maintenance Training</i> | 13 December 1993 |
| 9 | Fraud Control | <i>Fraud Control: Developing an Effective Strategy</i> (Better Practice Guide jointly published with the Office of Public Management, Premier's Department) | 30 March 1994 |
| 10 | Aboriginal Land Council | <i>Statutory Investments and Business Enterprises</i> | 31 August 1994 |
| 11 | Aboriginal Land Claims | <i>Aboriginal Land Claims</i> | 31 August 1994 |
| 12 | Children's Services | <i>Preschool and Long Day Care</i> | 10 October 1994 |
| 13 | Roads and Traffic Authority | <i>Private Participation in the Provision of Public Infrastructure</i> (Accounting Treatments; Sydney Harbour Tunnel; M4 Tollway; M5 Tollway) | 17 October 1994 |
| 14 | Sydney Olympics 2000 | <i>Review of Estimates</i> | 18 November 1994 |
| 15 | State Bank | <i>Special Audit Report: Proposed Sale of the State Bank of New South Wales</i> | 13 January 1995 |
| 16 | Roads and Traffic Authority | <i>The M2 Motorway</i> | 31 January 1995 |

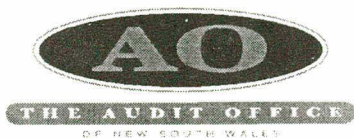
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| 17 | Department of Courts Administration | <i>Management of the Courts: A Preliminary Report</i> | 5 April 1995 |
| 18 | Joint Operations in the Education Sector | <i>A Review of Establishment, Management and Effectiveness Issues (including a Guide to Better Practice)</i> | 13 September 1995 |
| 19 | Department of School Education | <i>Effective Utilisation of School Facilities</i> | 29 September 1995 |
| 20 | Luna Park | <i>Luna Park</i> | 12 October 1995 |
| 21 | Government Advertising | <i>Government Advertising</i> | 23 November 1995 |
| 22 | Performance Auditing In NSW | <i>Implementation of Recommendations; and Improving Follow-Up Mechanisms</i> | 6 December 1995 |
| 23 | Ethnic Affairs Commission | <i>Administration of Grants (including a Guide To Better Practice)</i> | 7 December 1995 |
| 24 | Department of Health | <i>Same Day Admissions</i> | 12 December 1995 |
| 25 | Environment Protection Authority | <i>Management and Regulation of Contaminated Sites: A Preliminary Report</i> | 18 December 1995 |
| 26 | State Rail Authority of NSW | <i>Internal Control</i> | 14 May 1996 |
| 27 | Building Services Corporation | <i>Inquiry into Outstanding Grievances</i> | 9 August 1996 |
| 28 | Newcastle Port Corporation | <i>Protected Disclosure</i> | 19 September 1996 |
| 29 | Ambulance Service of New South Wales | <i>Charging and Revenue Collection (including a Guide to Better Practice in Debtors Administration)</i> | 26 September 1996 |
| 30 | Department of Public Works and Services | <i>Sale of the State Office Block</i> | 17 October 1996 |
| 31 | State Rail Authority | <i>Tangara Contract Finalisation</i> | 19 November 1996 |
| 32 | NSW Fire Brigades | <i>Fire Prevention</i> | 5 December 1996 |
| 33 | State Rail | <i>Accountability and Internal Review Arrangements at State Rail</i> | 19 December 1996 |
| 34 | Corporate Credit Cards | <i>The Corporate Credit Card (including Guidelines for the Internal Control of the Corporate Credit Card)</i> | 23 January 1997 |
| 35 | NSW Health Department | <i>Medical Specialists: Rights of Private Practice Arrangements</i> | 12 March 1997 |
| 36 | NSW Agriculture | <i>Review of NSW Agriculture</i> | 27 March 1997 |

| No. | Agency or Issue Examined | Title of Performance Audit Report or Publication | Date Tabled in Parliament or Published |
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| 37 | Redundancy Arrangements | <i>Redundancy Arrangements</i> | 17 April 1997 |
| 38 | NSW Health Department | <i>Immunisation in New South Wales</i> | 12 June 1997 |
| 39 | Corporate Governance | <i>Corporate Governance</i> <i>Volume 1 : In Principle</i> <i>Volume 2 : In Practice</i> | 17 June 1997 |
| 40 | Department of Community Services and Ageing and Disability Department | <i>Large Residential Centres for People with a Disability in New South Wales</i> | 26 June 1997 |
| 41 | The Law Society Council of NSW, the Bar Council, the Legal Services Commissioner | <i>A Review of Activities Funded by the Statutory Interest Account</i> | 30 June 1997 |
| 42 | Roads and Traffic Authority | <i>Review of Eastern Distributor</i> | 31 July 1997 |
| 43 | Department of Public Works and Services | <i>1999-2000 Millennium Date Rollover: Preparedness of the NSW Public Sector</i> | 8 December 1997 |
| 44 | Sydney Showground, Moore Park Trust | <i>Lease to Fox Studios Australia</i> | 8 December 1997 |
| 45 | Department of Public Works and Services | <i>Government Office Accommodation</i> | 11 December 1997 |
| 46 | Department of Housing | <i>Redevelopment Proposal for East Fairfield (Villawood) Estate</i> | 29 January 1998 |
| 47 | NSW Police Service | <i>Police Response to Calls for Assistance</i> | 10 March 1998 |
| 48 | Fraud Control | <i>Status Report on the Implementation of Fraud Control Strategies</i> | 25 March 1998 |
| 49 | Corporate Governance | <i>On Board: guide to better practice for public sector governing and advisory boards (jointly published with Premier's Department)</i> | 7 April 1998 |
| 50 | Casino Surveillance | <i>Casino Surveillance as undertaken by the Director of Casino Surveillance and the Casino Control Authority</i> | 10 June 1998 |
| 51 | Office of State Revenue | <i>The Levying and Collection of Land Tax</i> | 5 August 1998 |
| 52 | NSW Public Sector | <i>Management of Sickness Absence</i> <i>NSW Public Sector</i> <i>Volume 1: Executive Briefing</i> <i>Volume 2: The Survey - Detailed Findings</i> | 27 August 1998 |
| 53 | NSW Police Service | <i>Police Response to Fraud</i> | 14 October 1998 |

| No. | Agency or Issue Examined | Title of Performance Audit Report or Publication | Date Tabled in Parliament or Published |
|-----|--|--|--|
| 54 | Hospital Emergency Departments | <i>Planning Statewide Services</i> | 21 October 1998 |
| 55 | NSW Public Sector | <i>Follow-up of Performance Audits: 1995 - 1997</i> | 17 November 1998 |
| 56 | NSW Health | <i>Management of Research: Infrastructure Grants Program - A Case Study</i> | 25 November 1998 |
| 57 | Rural Fire Service | <i>The Coordination of Bushfire Fighting Activities</i> | 2 December 1998 |
| 58 | Walsh Bay | <i>Review of Walsh Bay</i> | 17 December 1998 |
| 59 | NSW Senior Executive Service | <i>Professionalism and Integrity</i> <i>Volume One: Summary and Research Report</i> <i>Volume Two: Literature Review and Survey Findings</i> | 17 December 1998 |
| 60 | Department of State and Regional Development | <i>Provision of Industry Assistance</i> | 21 December 1998 |
| 61 | The Treasury | <i>Sale of the TAB</i> | 23 December 1998 |
| 62 | The Sydney 2000 Olympic and Paralympic Games | <i>Review of Estimates</i> | 14 January 1999 |
| 63 | Department of Education and Training | <i>The School Accountability and Improvement Model</i> | 12 May 1999 |
| 64 | Key Performance Indicators | <ul style="list-style-type: none"> • <i>Government-wide Framework</i> • <i>Defining and Measuring Performance (Better practice Principles)</i> • <i>Legal Aid Commission Case Study</i> | 31 August 1999 |
| 65 | Attorney General's Department | <i>Management of Court Waiting Times</i> | 3 September 1999 |
| 66 | Office of the Protective Commissioner Office of the Public Guardian | <i>Complaints and Review Processes</i> | September 1999 |



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