TARS
THE AGED-CARE RIGHTS SERVICE
including
Older Persons' Legal Service

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1st December 2009

Mr Jonathan Clark,
Principal Council Officer
Legislative Council
NSW Parliament House,
Macquarie Street,
SYDNEY NSW 2000

Dear Sir

Re **Inquiry into substitute decision-making for people lacking capacity**

We refer to your letter of 11th November 2009 and now enclose our responses to the Questions On Notice and transcript.

Please direct any further enquiries to our CEO Ms Janna Taylor at the above address

Yours sincerely

Stephen Newell
Manager Legal Service/Principal Solicitor
The Aged-care Rights Service
Older Persons Legal Service

SUBMISSIONS

STANDING COMMITTEE ON SOCIAL ISSUES
Inquiry into substitute decision-making for people lacking capacity

QUESTIONS ON NOTICE
(Remaining from questions sent pre-hearing)

Question

3. In practice, how could substitute decision-making arrangements be constructed to accommodate the fact that a person's capacity may vary from time to time and situation to situation?

Reply

The Guardianship Tribunal can make specific orders and can also make provision for the order to be reviewed within certain time frames. The Guardianship Tribunal, can in relation to guardianship make three types of order; a continuing limited order, a temporary limited or plenary order or a continuing plenary order. A Guardianship Order usually provides a specific function and is usually made initially for only one year. The orders can then be reviewed and amended for up to three years. Alternatively the orders may be dismissed if the Tribunal is satisfied that the person in question is no longer in need of a guardian. Longer orders can be obtained if necessary.

When a donor grants a Power of Attorney to someone, the Attorney is appointed to "do on my behalf anything I may lawfully authorize and attorney to do". The appointment is always conditional upon the donor's right to revoke the appointment at any time provided the donor has the capacity to do so.

If the Attorney disputes the capacity of the donor to revoke the appointment they can make an application to the Guardianship Tribunal to review the appointment. The Attorney can seek a declaration from the Tribunal that the person lacked capacity for a specified period. An enduring power of attorney can not lawfully be revoked by the person whilst the person is declared to be incapable by such an order

If the Guardianship Tribunal is satisfied that the individual has capacity they can dismiss the application if not, they may decide to make a Financial Management order or reinstate the Power of Attorney. The Tribunal also has the power to commit part of the estate, but not the full estate, of the protected person to management. This means part of estate of a person (such as their pension) may be able to be left within their control and not the control of the private manage or NSW Trustee and guardian if the protected person demonstrates an ability to manage his/her affairs.

A person with a genuine concern for welfare of a person under financial management can apply for review of the financial management order to be reviewed. The Tribunal may revoke the order if satisfied the protected person has regained the capacity to manage their affairs.

In our experience at TARS we have found that in the main this ability of the Tribunal to review or revoke the appointment of an Attorney does accommodate the fact that a person's capacity may vary from time to time for a number of reasons. This process also applies to Guardianship appointments.

In the case of Guardianship matters the Tribunal has the power to make specific function orders which do reflect the fact that a person may have a degree of capacity or the capacity to carry out certain tasks and they can appoint different people to carry out different functions so there is a capacity of the Tribunal to vary orders through this review process.

Question

4. NSW has no legislative provisions for Advanced Care Directives, however NSW Health provides advice on how to develop a document that would be valid at common law.

   - *Could you comment on the status of advanced medical directives in NSW?*

     The Aged-care Rights Service ("TARS") has regular enquiries about making advanced care directives ("ACD") but apart from the personal and anecdotal evidence we provided to the committee verbally we are not in the position to comment on the status of advanced medical directives in New South Wales. We are of the view that Associate Professor Cameron Stewart who also appeared before your committee is better placed to do this.

   - *Do you believe there is a need for legislation relating to advanced medical directives?*

     The common law provides for the use of ACDs in NSW although legislation would provide a clearer framework, particularly if a ACD document formed part of the legislation, as it does in the Power of Attorney and Guardianship legislation.

     The recent common law decision in which an Advanced Care Directive was upheld to be enforceable was *Hunter and New England Area Health Service v A* [2009] NSWSC 761. This case sets out 11 principles to be considered in the enforcement of an advance care directive. It would be clearer if legislative guidelines were set out stating when an advance care directive is enforceable.

Both Queensland (*Powers of Attorney Act 1998,)* and South Australia (*Consent to Medical Treatment and Palliative Care Act 1995)* have legislation in relation to ACDs. South Australia has stand alone legislation whereas the Queensland legislation has the ACD incorporated in their Power of Attorney Act. Reference to both of these acts may be useful if a decision is made to pass legislation.

The South Australian Act considers important issues when caring for people who are dying such as the "relieving pain or distress" Division 2, s17 (1) and "not to prolong life in a moribund state without any real prospect of recovery or in a persistent vegetative state" Division 2, s17 (2).

Whilst the Guardianship Act makes provision for the appointment of guardians by persons and regulates the guardian's ability to make medical and dental decisions on behalf of the person under Part 5 of the Guardianship Act, Part 5 requires that the decisions be made "for the purpose of promoting and maintaining their health and wellbeing"(s32(b). It would appear a guardian cannot refuse medical treatment in absence of an enforceable Advance Care Directive. Therefore, people should be encouraged to consider making Advance Care Directives.

Advance Care Directives bind the guardian and provide guidance to the guardian.

A guardian cannot make a decision accepting treatment where a person lacks capacity if the person has demonstrated that he/she objects to the treatment expressly or under an Advance Care Directive. Under Part 5 of the Guardianship Act a person is taken to object to treatment if the person does not want the treatment to be carried out or "*if they previously indicated that they did not want the treatment carried out and has not subsequently indicated to the contrary*".

If the guardian or a medical professional wants to continue with treatment and consent is not provided an application must be made to the Tribunal on the determination of the matter.

If there was legislation about the form and enforceability of ACD's it would greatly assist the Tribunal in reaching consistent determinations.

- *Are doctors generally willing to comply with the directives?*

We are not really in a position to comment on this. Anecdotally we believe that they are complied with.

We understand that in 2008, various Aged Care Research Units within the Area Health Services in the State of NSW were given funding to provide public education on "Planning for the Future" which focused on Advance Care Decision

Making. We support this endeavour and again note that anecdotally education is a vital function in promoting compliance with the directives.

Your query would be better addressed if you approached these various medical units for an answer to this question

- *How do advanced care directives (ACDs) and guardianship or enduring powers of attorney interact?*

The Power of Attorney and Guardianship appointments, give substitute decision making powers to people that the donor believes will make financial and lifestyle decisions in their best interest, in the event that they lose capacity to make their own decisions. The Power of Attorney allows their attorney to make financial and legal decisions and the Guardianship appointment allows the appointed guardian to make health, accommodation and lifestyle decisions according to the functions listed in the document by the donor or in the *Guardianship Act* 1987. (s6E).

In some of the other States, the legislation combines the ACD with the Power of Attorney and/or Guardianship. We submit that the ACD legislation should be separate legislation although the Guardianship Act NSW (s 33 and s40) does provide for the appointed guardian to have regard to the views of the person to the medical treatment and these views may be set out in an ACD.

Question 6.

The Public Guardian has recommended that section *77 of the Guardianship Act 1987* should be amended to allow the Public Guardian to pro-actively investigate matters where it becomes aware a vulnerable person may be need of a guardian. Can you comment on this proposal?

Answer

Yes we agree with pro-active investigation. In our experience there is anecdotal evidence that attempts by concerned relatives and friends to investigate the circumstances of an elderly relative or friend in circumstances where there is an allegation of either financial or physical abuse, is frustrated by the lack of power or authority. Whether this authority is contained in legislation and given to the police or a body such as the Public Guardian is a matter which should pursued. It is clearly desirable given the lack of willingness or ability of the police to investigate these allegations.

We do support the need for the legislation to be amended to deal with issues of financial and physical abuse of older persons. The *Power of Attorney Act 2003* should be amended to protect vulnerable older people from financial abuse by clearly setting out the obligations of the Attorney and penalties for the breach of

these obligations. We note that the Queensland legislation contains these provisions. .

We also support the Public Guardian's recommendation for these reasons.

Question

Re Police using "all reasonable force"

We understand that the reason for the recommendation by the Public Guardian is because the current orders made by the Tribunal do not specifically authorize the Police to use "reasonable force" notwithstanding the provisions of s11 and 12. which apply when an application for a Guardianship order is made.

The concern appears to be that it does not continue after the order has been made and a person leaves the accommodation arranged by the guardian.

In these circumstances we do not oppose the amendment being sought by the Public Guardian as it is not outside the aims of the Act which clearly contemplates the use of "all reasonable force "by the Police in appropriate circumstances.

Stephen Francis Newell

Margaret Anne Small

Dated 1st December 2009