

SOCIAL ISSUES COMMITTEE

21 OCT 2009

RECEIVED

Mr Jonathan Clark
Principal Council Officer
Standing Committee on Social Issues
Parliament House
Macquarie Street,
SYDNEY NSW 2000

Dear Mr Clark

Inquiry into substitute decision-making for people lacking capacity

I refer to your letter of 2 October 2009.

Please find enclosed a transcript of our evidence with some minor corrections.

I also enclose a written response to two questions taken on notice, which have been highlighted in the transcript.

Please let me know if any further assistance is required. Thank you for the opportunity to contribute to the inquiry.

Yours sincerely



Alan Kirkland
Chief Executive Officer

20 OCT 2009

Questions on Notice

1. **Would your position be to support the removal of section 14(2) and replace it with provisions that the tribunal needs only to be mindful of the human rights of the person before the tribunal? (see page 58 of transcript)**

Response:

It is possible that the Tribunal consider both the views of those identified in section 14(2), and individual human rights issues in determining applications for guardianship orders. As mentioned at the hearing, there is often an expectation that those people will be consulted; however the interests of the subject person should always be paramount.

It is also possible to amend section 14 (2) in order to make it more in line with human rights principles. In this respect the Committee could be guided by the principles and best interests set out in the UK legislation *Mental Capacity Act 2005*, see excerpts below:

PERSONS WHO LACK CAPACITY

The principles

1 The principles

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

.....

4 Best interests

- (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
 - (a) the person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

2. **Without examining the evidence in great detail at this time, I do not think we have received any comprehensive definitions between what the Guardianship Tribunal is using and what the court and the MHRT are using. Perhaps you might take it on notice and give some thought as to whether or not there is such an animal. (see transcript p 52)**

Response:

Section 25P of the *Guardianship Act 1987* (NSW) lists the factors the Tribunal must be satisfied of before revoking a financial management order in respect of a person. It states:

- (1) On reviewing a financial management order under section 25N, the Tribunal must vary, revoke or confirm the order.
- (2) The Tribunal may revoke a financial management order only if:
 - (a) the Tribunal is satisfied that the protected person is capable of managing his or her affairs, or
 - (b) the Tribunal considers that it is in the *best interests* of the protected person that the order be revoked (even though the Tribunal is not satisfied that the protected person is capable of managing his or her affairs).

A revocation application in the MHRT is subject to the patient ceasing to be a patient and there being evidence that the patient has regained the capacity to manage his/her financial affairs. The best interests test is not applied when the MHRT is considering revocation of a financial management order.

a. definition of capacity

The test for a person lacking capacity to manage their affairs is set by Supreme Court precedents: Powell J in *PY v RJS* [1982] 2NSWLR 700

whether it has been established on the balance of probabilities that the person appears incapable of dealing in a reasonably competent fashion with ordinary routine affairs of man; and that by reason of that lack of competence there is shown to be a real risk that either the person may be disadvantaged in the conduct of his or her affairs or that money or property may be dissipated or lost. It is not sufficient to establish only that a person lacks a high level of ability needed to deal with complicated transaction or to deal with simple or routine transactions in the most efficient manner

This authority is somewhat ambiguous and difficult to apply in practice. It does not offer much guidance where a person is capable in most areas of their life with the exception of complicated transactions or legal proceedings. It also does not offer guidance in relation to people who move in and out of capacity at different times.

There is a need to provide a definition of capacity that can be decision-specific and time-specific. For example, in the UK *Mental Capacity Act 2005*:

For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter

because of an impairment of, or a disturbance in the functioning of, the mind or brain.....

The explanatory notes to the MCA states in relation to the test:

This sets out the Act's definition of a person who lacks capacity. It focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates, not on any theoretical ability to make decisions generally. It follows that a person can lack capacity for the purposes of the Act even if the loss of capacity is partial or temporary or if his capacity fluctuates. It also follows that a person may lack capacity in relation to one matter but not in relation to another matter.

b. best interests test

Legal Aid NSW submits that a best interests test should apply in all applications for revocation of financial management orders, including when being considered by the MHRT.

In the case of the example "Y" provided in our written submission, the MHRT could have considered an application by the mother or the grandmother because they have 'a genuine concern for the welfare of "Y"'.

If the MHRT was able to consider the best interests of "Y", it could also have taken into account previous arrangements that were successful and less restrictive.