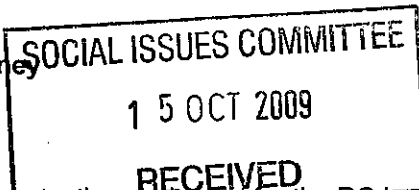
Answers to Questions on Notice from Professor Terry Carney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Specific Qs

Q6: A power probably is needed. The 3rd party 'gatekeeping' protection envisaged for the PG is probably adequate protection, though it would be wise to consider at least some 'after the event' notification to say the GT, so that there is at least the accountability of retrospective adverse comments on its authorisation; or some other model which reconciles the protection of an important civil liberty interest with the practical exigencies which give rise to a need for the power.

Qs7&8: Yes to both. Both answers were adequately explained in my oral evidence I think

Q10: This power is needed, as an *interim power* (or unavoidable default if what follows cannot be engineered. Every endeavour should be made to find, support etc a private manager, such as under the Victorian 'community guardian' scheme (or others discussed last week at the conference [and its website for some papers]: *'Rights, Responsibilities and Rhetoric: Unpacking policy and practice issues in Mental Health Law, Guardianship & Trusteeship'* Adelaide, 8-9th October 2009.

Q11: Yes, private managers should always be the goal (and responsibility of officials to recruit/train/support). But it should be the responsibility of the GT to appoint, *not* the MHRT: see on the latter our Beaupert, F., Carney, T., Tait, D. Topp, V. 'Property Management Orders in the Mental Health Context: Protection or empowerment? (2008) 31, iii, UNSW Law Journal 795-824

All witness Qs

Q1: The principle of 'dignity of risk' (endorsed for 2-3 decades in international human rights insturments and professional literature of relevant caring professions) dictates that it be based on 'wishes'. Article 12(4) of the *Convention on Rights of Persons with Disabilities* is to the same effect (supported decisionmaking etc) now reinforces this, and makes NSW accountable for its realisation (it is a binding treaty for Australia, and this principle is not one of the 2 reservations Australia lodged when ratifying---there is a good collection of papers in the 2008 Special Issue of the journal *Law in Context)*

Q2: Yes it is a spectrum.

But it is a 'functional' question (not a medical or 'test instrument-based' question--see my evidence), and it is one that needs adressing only when an imminent and sufficient need presents

Fluctuation is best accommodated by a 'responsive' (quick, informal, no cost) ability to amend a pre-existing least restrictive authority. It is *not* acheived by writing overly broad/cautious powers

Q3: Yes, there is a need for legislation akin to the Victorian *Diability Act* 2006? (the new Commissioner, VCAT, and Medical officer model which replaced the former Disability Panel, based on VLRC report) or some similar model.
It is quite unsatisfactory to let the current NSW position go on, tho it is the kind of reform that needs careful research (as with Vic LRC report)

Q4: By virtue of quite recent Sup Crt and ADT decisions, ADs have a kind of 'back-door' status.
In my view they should be formally recognised (so the public at large knows what is possible--ie overt or 'front door' is preferable to reliance on lawyer's assurances about what the common law interpretation may be of existing provisions designed for other ends...).
Drs will generally comply, but the real problem is apprising them of existence of the instrument when it requires to be acted on; so it needs to be 'worn like a USB stick' or placed on a smart card.
The interaction is complex, but generally unproblematic in my opinion (rather there is a public education, or 'one-stop form' issue about encouraging those who will use them to be aware of the need to execute)

Q5: See my evidence (ie widen coverage to all vulnerable citizens in NSW; clothe with eg Victorian powers)

Hope the above is of some assistance to the work of the committee.

Cheers,

Terry

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