Submission
No 38

# INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

**Organisation:**

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**Date received:** 16/10/2009

**Background To The Submission**

Our son is severely disabled and lives in a DADHC group home. He is not capable of operating a credit union or bank account and cannot not sign a Power Of Attorney.

In the past we had a right as his parents to open, operate and modify accounts in his name on his behalf. By right we mean that we were allowed to do this by the financial institutions involved.

One particular account, his house account had several signatories who were caregivers at the house. This situation became obsolete for various reasons and posed a risk so there was a need to tidy up the list of signatories.

Unfortunately, in the interim changes to laws governing financial institutions brought about by action against money laundering and terrorism meant that the credit union involved had introduced a policy that changes to the account could only be made by the account owner and if our son lacked the capability to operate the account we would then have to obtained a Financial Management Order from the Guardianship Tribunal in order to make those changes.

The Guardianship Tribunal is funded by DADHC and we assume it operates under the Disability Services Act. Our understanding is that DADHC policy still recognises our right as parents to manage the finances of our son. The financial institutions do not operate under the Disability Services Act but would be covered by federal and state anti-discrimination legislation. Judging from information on their websites they have a commitment to facilitating banking by disabled people and committees have been set up to monitor and manage the issues that arise.

When contacted the tribunal had a detached attitude. They did not see it as their responsibility to dictate financial institution policy and they would judge each case based on need. In cases where capability has changed there may be a need but in our case our son has lacked capability from birth and in the past his affairs have been managed informally. The Guardianship Tribunal on their website emphasise the preference for issues to be managed informally.

When asked if the policy being adopted by the financial institutions would result in an increased workload for the tribunal and what their attitude to this might be the person contacted did offer to obtain a legal opinion from their lawyers if we wrote a letter to the tribunal seeking such an opinion.

The credit union involved was keen to tidy up the list of signatories and the issue was resolved informally.

[redacted] from the credit union involved contacted the Guardianship Tribunal after I provided information from their website which emphasised the requirement to explore alternative solutions and demonstrate a need.

We are able to continue to access the accounts because we are already signatories and it was realised that an order might no be issued because we could not demonstrate a need. Even if the decision was made to issue an order it was also realised that an on-going fee paid to the Office of the Protective Commissioner would then be charged to administer the order.

However, even though as a result of receiving this information the immediate issue was resolved informally we are still being told that in future we cannot modify or close the accounts but only continue to access the accounts as current signatories unless a Financial Management Order is obtained. This in a sense leaves us in limbo and may cause problems if for instance we moved to another city or interstate. We may be able to prove need then but we will probably resent having to go through a formal legal process and incur an on-going fee if an order is granted.

In addition, we contacted staff at the local branch of our bank and also rang the bank helpline about opening a new account for a person who was not capable of operating the account. They have a similar policy but a copy of this policy is not available in their product disclosure literature and we were told to contact the branch manager if we wanted to request a copy.

The problem appears to be that legislation not only requires the identity of the account owner to be verified via a points test but also now only the account owner ie the person or persons in whose name the account is set-up can fully operate ie access, modify and close the account. Both the credit union involved and the bank contacted are now looking for some independent verification of the right to fully operate any account set up in the name of a person who lacks capability presumably to cover their legal responsibility in case they are audited. Their lawyers have obviously decided that a Power of Attorney or Financial Management Order from the Guardianship Tribunal are the only appropriate solutions.

Our son has a house account set up to receive his pension and to automatically pay an amount for the cost of his board and lodgings. When caregivers from the house had access to the house account we also set up another account not accessible to them then transferred any excess funds into this account and used the money to pay for other day-to-day living expenses. On a periodic basis any excess savings from the pension plus money gifted from other family members is rolled over in a term deposit at a higher rate of interest. This money will be used for any large capital expense such as new furniture, dental work and prepaid funeral.

Another option would be to hold money in trust in accounts opened by us but this would mean paying tax on any interest earned and we assume the money would then form part of any income or asset test applied to us. This is probably not a big problem with the house account which has a low balance and high turnover but the term deposit is another matter. In any case the creation and operation of new accounts would cause a problem because the existing accounts cannot be closed and the automatic payment set up could probably not be stopped. This might result in accumulated account or penalty fees being charged which would then have to be paid on an on-going basis.

Trusts and special trusts can also be set up but there are still on-going costs and monitoring required. This is not a practical solution unless large sums of money such as a compensation pay-out are involved. Apparently earnings from such trusts have to be distributed to avoid the trust being taxed but they would then still have to paid into a bank account and I am not sure if our sons pension could be paid into a trust. There are a set of requirements when setting up a Special Disability Trust which could serve as a model for deciding our right to manage our sons financial affairs.

The disability pension is paid by Centrelink and one of us is currently a document nominee with Centrelink. This means that person receives a copy of any correspondence for our son and has a legal obligation to advise Centrelink when any account balance changes by more than $1000. On a periodic basis that person also has to provide Centrelink with information to confirm our sons eligibility for various allowances.

After making further enquiries it was discovered that we could also become nominee payees. This would entitle us to change the destination of payment or even to have the pension paid into our own account in our own names and also means that Centrelink has the right to audit how the money is spent. Apparently, all that is required is a letter from a doctor stating that our son is not capable of operating the accounts and if this is acceptable to Centrelink we wonder why the financial institutions would not accept such a letter or the status of nominee payee as being sufficient.

We have already contacted various bodies such as the Intellectual Disability Rights Service, the Banking and Financial Services Ombudsman and even ASIC but not much interest was shown. We did not contact the Consumer Credit Legal Centre. Based on the reactions received there is currently no major problem but we would still like to raise our individual issue as at least one example of where changing financial institution requirements may have an adverse impact on the ability to continue to manage financial affairs informally with respect to the subject of this inquiry. Our current situation is also an example of where changing requirements are going to mean the use of the Guardianship Tribunal for a more mundane purpose which might not be appropriate.

We have also contacted [redacted]. One parent is currently seeing a solicitor to obtain a Power of Attorney for his son and he will keep us informed of his progress. Apart from managing his sons financial affairs he also wants to be able to write a will for his son. This is another issue that concerns us and we too would like to write a will for our son but this

cannot currently be done informally. In particular we have now recognised the need to consider a prepaid funeral so that the administration of the estate will not will not cause any problems in that regard. Getting a Power of Attorney is not an option for us because our son could never be judged as being capable of signing the document.

**A Short List of Some Issues and Concerns**

*1. We are concerned that there is a need to defend parent rights and minimise any constraints on acting informally.*

The new credit union and bank policy takes from us a right we previously enjoyed and directs us to a body that still recognises that right for a formal determination of our right when that same body has a stated preference to explore other opportunities and to manage issues informally if possible.

Having a severely disabled son is a stressful situation mainly because of the loss of control in many areas and it is comforting to at least be able to exercise control over his financial affairs plus look after his needs. Imposing constraints on this control is therefore an emotive issue and we would like to feel that we are honest people who can be trusted to do the best for our son.

*2. We are concerned that the change in policy forces us into a formal legal process for a more mundane purpose that may not be appropriate given the original reasons for setting up the Guardianship Tribunal and if formal recognition of our right is required by financial institutions there may be a need to facilitate the process of issuing a Financial Management Order or a need to consider a more suitable and less costly alternative.*

Our understanding is that the tribunal was set up to manage or arbitrate disputes, assess capability especially when that capability has changed and to get involved only when required to safeguard the rights of the disabled. When the tribunal was set-up we feel sure that people in our current situation would not have be expected to use the tribunal as they could easily manage the financial affairs of their children informally at the time. We feel that when making policy the financial institution lawyers lack this appreciation of the history and social issues surrounding disability legislation and the setting up of the tribunal. The law surrounding definitions of capability and the assessment of capability is complex, fragmented and subtle. As a result there is a definite need for formal determinations using the tribunal and disability legislation but only when absolutely necessary to protect the rights of the disabled.

The emphasis on looking for alternative solution and the preference for acting informally if possible (and this is and important and subtle point to make) is probably for the same reasons. Not only is there a need to minimise the tribunal's workload but our understanding is that the tribunal intervenes on a needs basis only because the rights of the disabled are enhanced when such intervention or interference in their affairs is minimised. That is to say the process of intervention in some ways can be regarded as discriminatory because of the formal decision making process plus the precedents that may be created and there is a need to minimise that intervention and balance the level of intervention against the benefits that are obtained from the intervention.

We appreciate that the financial institutions have a duty to look after their interests but we also have a duty look after our son's financial affairs and it is necessary that this job is done. We need to be assisted not hindered in taking action.

*3. We are concerned that having a son who lacks capability from birth limits our opportunities to manage his financial affairs compared with people who have partial or changing capability. There may be a need for special recognition and some allowance to be made for the limits imposed by this situation.*

A partially capable person can operate a bank account or delegate responsibility and a person who fears they may lose capability can make an Enduring Power of Attorney. Our situation is made more difficult because we cannot to that.

In the case of people who lose capability suddenly for example through having an accident the tribunal can make a formal decision because there is a need for assessment of the situation but for people who lack capability from birth there is more likely to be a substantial history of interactions with medical doctors, schools, DADHC, Centrelink etc which could form the basis for making a less formal decision or to facilitate informal decision making by recognising the right to act informally in this special situation and creating some criteria to satisfy in order to activate that right.

We would like to be able to make a will for our son informally.

*4. We are concerned that this submission should be viewed in the context of any other other inquiries into amendments to anti-discrimination legislation and the need to make the law surrounding capability and the assessment of capability more coherent and uniform.*

**Our Submission to the Inquiry**

Within the limits set by the terms of reference set for this inquiry and the areas possibly affected by any changes to legislation we submit that there is a need to consider the impact of changes in financial institution policy on our ability to manage the financial affairs of our son informally and the way in which this policy change impacts on the operation and use of the Guardianship Tribunal if there is a need by these financial institutions for a formal determination of our sons capability and formal recognition of our right to manage his financial affairs. We have described the problems which led to this submission and some of our concerns including the limits imposed by the special situation of being incapable from birth. We further submit that the inquiry should consider changes to legislation that would enhance our ability to act informally or facilitate the process of a formal determination of capability and a formal recognition of our rights while reducing any on-going cost associated with this process. Where a sensible change is obviously required but taking action is outside the scope of this inquiry we further submit that the matter should be referred to the appropriate body, committee or enquiry for further consideration.

**Additional information**

On checking information contained in submissions made by the Disability Council of NSW we realised that disability legislation is based on the concept that capability is assumed which then implies a need to assess the lack of capability. When thinking about our issue of substitute financial control we thought that there would be no issue if our son was capable or partially capable which then implies that if there is an issue it can then be assumed that he is incapable which then leads us to ask why is there is a need to formally assess capability and be formally granted the right to control his financial affairs especially if our right as parents to control his financial affairs is already recognised or can be recognised. That is to say why should the issue then be an issue at all.

We also came across a proposal to make an amendment to disability legislation to "make explicit that refusal to make reasonable adjustments for people with disabilities may also amount to discrimination". If our understanding of the concept of reasonable adjustments is corrrect in the light of the above comments can a case be made that the current financial instition policy needs to be reviewd an a better solution found based on the possibility that discrimination may have occurred due to a lack of reasonable adjustment.

GRAHAME AND DENISE THOMAS