Submission
No 19

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

Organisation: The Aged-care Rights Service

Name: Ms Janna Taylor, Chief Executive Officer and Stephen Newell, Principal Solicitor

Telephone: (02) 9281 3600

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including
Older Persons' Legal Service

Enquiry into Substitute Decision Making for People Lacking Capacity

Submission from:

The Aged-care Rights Service (TARS)
CEO, Janna Taylor
Principal Solicitor: Stephen Newell
02 9281 3600
L4 418A Elizabeth St
Surry Hills NSW 2010
tars@tars.com.au
www.tars.com.au

This submission is authorised by J. Taylor, CEO, TARS.

SUMMARY

This submission is made based on the experiences and anecdotal evidence complied by TARS solicitors and advocates in the course of their work as an advocacy service taking enquiries from older persons who are the donors of Powers of Attorney and Enduring Guardianship appointments and also from clients who have been appointed under these instruments.

We also draw on the experiences gained by TARS staff from the general enquiries received on the issues of estate management and general guardianship matters involving people who have lost the capacity to manage their own financial and personal circumstances. These enquiries come from the older persons them selves as well as siblings, extended family members and concerned health care and community workers.

This submission is in 4 parts:

1. Introduction
2. Terms of Reference
3. Background, Case Studies, and Recommendations
4. Additional comments
5. Conclusion

1 INTRODUCTION

The Aged-care Rights Service ("TARS") is a specialist community legal centre providing advocacy in New South Wales for residents of Commonwealth subsidized nursing homes, hostels and recipients of Community Aged Care Packages and EACH Packages.

TARS provides advice and representation to residents of self care units and services apartments in Retirement Villages relating to matters arising out of the Retirement Villages Act 1999 (NSW).

TARS services include the Older Persons Legal Service ("OPLS") which provides legal advice, assistance and education for older people throughout NSW in areas of law such as: consumer rights, human rights, social security/welfare, power of attorney and guardianship.

The TARS education and promotion service provides education and information on the services offered by TARS, legal services offered by the Older Persons Legal Service to residents , relatives and staff of aged care facilities, residents of retirement villages, seniors community groups, retirees, professional groups, community workers.

TARS receives funding from the following Commonwealth and State departments to provide services to older people in New South Wales and residents of aged care homes and retirement villages:

- Commonwealth Department of Health and Ageing
- NSW Department of Commerce / Office of Fair Trading
- NSW Department of Ageing Disability and Home Care
- Commonwealth Attorney General's Department / Legal Aid Commission of NSW
- Commonwealth Attorney General's Department / Legal Aid Commission of NSW to run The Older Persons' Legal Service (OPLS)

TARS began in the 1980s when a group of community workers known as The Aged Care Coalition worked together to identify a means of improving the quality of life for older people living in supported accommodation. As a result of the Coalition's work The Accommodation Rights Service was established in 1986 under the auspices of the Redfern Legal Centre, and with the support of the then Housing Commission and NSW Department of Community Services.

In May 1990 TARS was registered as an incorporated association under the Associations Incorporation Act 1984 (NSW). From 1 July 1997, after the Aged Care Act came into being, The Accommodation Rights Service became known as The Aged-care Rights Service so that the name would better reflect the work being done with older people. TARS is overseen by a community based Management Committee. There are 14 staff employed by TARS consisting of administrative, advocacy/education and legal staff.

Terms used in this document

TARS	The Aged-care Rights Service
OPLS	The Older Persons' Legal Service (OPLS)
ATSI	Aboriginal and Torres Strait Islanders
CALD	Culturally and Linguistically Diverse
The Act	the Guardianship Act 1987
The New Act	The NSW Trustee & Guardian Act 2009
OPC	Office of the Protective Commissioner
OPG	Office of the Public Guardian
RV Act	The Retirement Villages Act (1999)
POA	Power of Attorney
CTTT	Consumer Trader and Tenancy Tribunal

2 TERMS OF REFERENCE

2.1 That the Standing Committee on Social Issues inquire into and report on the provisions for substitute decision making for people lacking capacity in New South Wales, and in particular:

(a) whether any NSW Legislation requires amendment to make better provision for:

(i) the management of estates of people incapable of managing their affairs; and
(ii) the guardianship of people with disabilities.

2.2 That the committee report by February 2010.

3 BACKGROUND, CASE STUDIES, AND SUBMISSIONS

3.1 Human Rights Issues

Australia has recognised the human rights of people with disabilities by signing the U N Convention on the Rights of Persons with Disabilities protocol, which came into force in Australia on 21 August 2009. Any Acts enacted after this date, relevant to people with disabilities should reflect these obligations.

3.2 Residents of Retirement Villages

Retirement Villages are residential complexes occupied by retired persons who have entered into a contract with the operator of the complex. The complexes offer a broad range of accommodation. The majority live in independent living accommodation where the presumption exists that the people who live in RVs are capable and competent members of the society who can make their own decisions in relation to every aspect of their lives and that there is no need for a substitute consent.

The *Retirement Villages Act 1999* (the RV Act) does not impose any obligation on the Operators or the Village Management to intermeddle in individual affairs except section 66 of that Act which requires the Operator to respect the rights of residents in relation to reasonable peace, comfort or privacy; residents' autonomy over the personal, financial and other matters, and possessions; live in an environment free from harassment and intimidation.

At TARS we have had in the past inquiries from residents regarding interference by operators alleging that the resident lacks the capacity to live independently. It is commonly a requirement under Retirement Village contracts that a resident must be capable of living independently and be self reliant. We advise these clients that living in a retirement village is the same as living in a private dwelling in that they are able to have support services such as assistance with meals, vital call, care and nursing services, cleaning to assist them to remain independent. These services are provided by community organizations as well as private providers.

It must always be impressed upon operators of retirement villages that there is a presumption of capacity and that presumption can only be rebutted by medical evidence. This is recognized to a degree in the *Retirement Villages Act 1999* and whilst we do not recommend any amendment to the legislation, we do raise the issue to increase public awareness of the rights of residents in these circumstances.

3.3 Amending the legislation to set out the rights and responsibilities of attorneys and guardians appointed under the legislation

At TARS we receive many calls from both donors and attorneys requesting advice about circumstances where the interests of the donor have been outweighed by those of the attorney and in circumstances where attorneys have improperly used funds of the donor for their own purposes. This is a form of financial abuse and can arise out of ignorance of the responsibility of the attorney to always act in the best interest of the donor.

Case Example

> *A daughter was her mother's attorney and guardian. She did not understand that there was a conflict of interest by proposing that she enter into a reverse mortgage over her mother's property to pay herself for in home nursing services provided to her mother as her carer. The attorney lacked an understanding of her obligations as an attorney. The attorney cannot use her mother's funds to gain a benefit. This creates a conflict of interest.*

As a general observation we note that the Queensland *Guardianship and Administration Act* 2000 provides in far greater detail, the express duties and obligations of guardians and administrators (Financial Managers) and includes sanctions imposed for breaches of those duties and obligations including revocation of the appointment and fines (see chapter 4 Parts1 & 2 of the Qld Act).

The Queensland legislation also requires a guardian or administrator to pay compensation to a protected person for a failure to comply with the Act (s59 *The Guardianship and Administration Act* 2000 (Qld)).

3.3.1 Recommendation

In our submission these provisions or similar provisions should be included in *The NSW Trustee and Guardian Act* 2009 and the *Powers of Attorney Act* 2003. This will in our submission, improve accountability in appointed guardians and attorneys' and encourage compliance with the duties and obligations set out in the legislation and also reduce instances of conflict of interest between the interests of the attorney and those of the donor. These provisions will provide clarity for Attorneys and Guardians and remove some of the misguided notions of some Attorneys and Guardians as to what their duties and responsibilities are under the appointments. It will also provide clarity for Tribunals in reviewing these appointments.

It may also assist this process if it were a requirement that the signature of the attorney under and Enduring Power of Attorney prescribed form be witnessed by a solicitor so that the solicitor can explain to the attorney their fiduciary obligations to the principal and to act in the principal's best interests.

3.4 The management of estates of people incapable of managing their affairs

A common complaint received by our service is that when the Office of the Protective Commissioner ("OPC") or The Office of the Public Guardian ("OPG") is appointed , there is little or no dialogue between those offices and the protected person who, whilst they may lack capacity to manage their financial affairs, still have the some capacity to understand their circumstances and can become very distressed if they find out through other channels that property is being sold or disposed of, even if it is for very good reasons.

We understand that there is no express legislative obligation to consult in this manner under the *NSW Trustee and Guardian Act* 2009. There is a discretion but not an obligation (s79).

Where there is an investigation into the sale of the property of a resident for the purpose of payment of aged care accommodation there should be an obligation imposed on the NSW Trustee and Guardian to consult with the resident and for a representative to visit the nursing home and meet with the resident to explain the decision-making process. The outcome of an investigation into a proposed sale by the NSW Trustee and Guardian should also be explained to the resident in simple terms.

Case Example

> *A client who was a resident in a facility first found out that his home was to be sold when he saw the advertisement for the sale in the local newspaper. The client had Parkinson's disease and a mild cognitive impairment.*
>
> *Another client who was a resident in a facility wanted her home to be sold but did not know what was being done about the sale or if or when it would be sold. The client had dementia.*

There is currently no legislative obligation for a representative of the NSW Trustee and Guardian to consult with the resident in aged care accommodation in this manner under the *NSW Trustee and Guardian Act 2009.* The NSW Trustee and Guardian has a broad discretion under section 72 whether to consult with the person under management and relatives of the person about a proposed course of action. There is no further obligation imposed under the legislation to explain the process and to explain the reasons for the decision to the resident.

Case Example

In one instance our client had a history of mental illness. Our client had been employed in their early years but as illness took over their mental health deteriorated and our client came before the Mental Health Board. Our client owned his home unit and had other properties that he had either inherited or purchased when working. Our client has no immediate family and is a younger "older person".

When the OPC took over our client's affairs all his assets were liquidated, including his residence. This meant that he became classified as an independent retiree without a residence and Health Care Card. Our client has instructed us that he was not consulted about the financial decisions made even though regular medication stabilized his condition. Our client has not been able to settle in any of the residential care in which he has been placed and has lived in 12 different places. All our client wants is to live in his own home.

Problems that our client identified in these circumstances were:-

- He appeared to have no individual "guardian"
- Service delivery had been unsatisfactory in that telephone calls were not returned
- Requests to live independently were ignored
- Late to very late payment of accounts or non payment of accounts (this has also been the complaint of other clients)
- Refusal to release small amounts of money to buy clothes or extra cigarettes

3.4.1 Recommendation

3.4.1.1 Whilst we acknowledge The New Act does go part of the way towards requiring consultation we submit that it does not go as far as the provisions of the Queensland legislation which requires the financial manager to consider the General Principles in Schedule 1 of the Act which include amongst other obligations an obligation to consult with the person under management (section 34 of the Qld Act). The Qld Act also sets out other considerations including respecting the autonomy and dignity of the individual and to participate in the community (refer Schedule 1 General Principles of the Qld Act).

3.4.1.2 To support the Attorney General's recommendation to amend The New Act, to allow the relevant Court or Tribunal to exclude parts of an estate from financial management (similar to section 25E of the Guardianship Act 1987). This proposal would allow clients such as this client in the above Case Example to contribute to the decision to retain their residence and some control over their daily life, keeping in mind that it is recognized that capacity is task specific and clients in circumstances such as this do have the capacity to understand at least in part, the circumstances in which they are currently living.

3.5 Financial Management of estates of people incapable of managing their affairs under the Power of Attorney Act 2003

Suggested Amendments to the existing Power of Attorney and Enduring Guardianship Forms

It is evident from the calls we receive at TARS that there is still confusion about the difference between a General Power of Attorney and an Enduring Power of Attorney.

3.5.1 Recommendation

We submit that some consideration should be given to the production of separate forms to avoid the confusion that currently exists as a result of the same document being used for both.

3.6 Revocation of an Enduring Power of Attorney Appointment under the Power of Attorney Act 2003 ("the Act")

The revocation procedure for Powers of Attorney may need to be revisited in an effort to resolve the often vexed issues of whether a donor has the capacity to revoke to Power of Attorney and what evidentiary issues are involved in that procedure. We are cognizant of the need maintain a balance between the need to notify third parties (such as Banks and Financial Institutions) and creating additional formal obstacles to older persons who wish to revoke an appointment. There is a need to avoid making the process too complex.

An attorney must not continue to act as an attorney where he or she has knowledge of the termination or suspension of the notice (s49(1) and (2)).

The *Power of Attorney Act 2003* does not specify the method of revocation and therefore it follows that a Power of Attorney can be revoked verbally or in writing provided the principal has capacity to make this decision. The revocation is not required to be witnessed by solicitor.

An issue arises where the attorney receives notice of a revocation of the Enduring Power of Attorney but the capacity of the principal to give the revocation is uncertain or the principal lacks capacity. What is the position of the attorney on receipt of such a notice? Particularly where the attorney is responsible for paying the bills for the person and those accounts are forwarded to the attorney.

Section 36(5) of the *Power of Attorney Act 2003* provides that a tribunal may make an order that the principal lacks capacity because of mental incapacity during a specified time and that an enduring power of attorney cannot lawfully be revoked by the principal while the principal is declared incapable by such an order. What is the position where such an order is not in place?

Case Example

> *An elderly woman had an enduring power of attorney appointment in appointing her nephew her attorney. The woman developed dementia and the nephew fell into dispute with her grandchildren. A revocation of the enduring power of attorney*

document was sent to the bank. The document was signed and dated by the client. The revocation was not witnessed by a solicitor. There was uncertainty as to the authenticity of the document as there was no witness to give evidence as to the making of the document or the capacity of the client at the time. There was a question over the authenticity of the signature. The Tribunal decided to use its discretion under s37 of the Power of Attorney Act 2003 and treat the review of the operation of the enduring power of attorney as an application for a financial management order under Part 3A (Financial Management) of the Guardianship Act 1987.

Currently, the Guardianship Tribunal does not have the power to review a revocation of an enduring power of attorney appointment. The tribunal must rely on its discretion to treat such matters as an application for a financial management order. The difficulty is that an appointed attorney must decide if they should continue to pay bills for the person if there is a question over the capacity of the donor to revoke the appointment.

3.6.1 Recommendation

Suggested amendments to the *Powers of Attorney Act 2003* may be a requirement that the revocation of an enduring power of attorney be in writing and witnessed by a solicitor so that the authenticity of the document and the capacity of the person making the document can be verified as required. The onus for assessing capacity would be similar to that required to be satisfied by the solicitor when witnessing the appointment.

We also submit that the Guardianship Tribunal be given the power to review a revocation of an Enduring Power of Attorney appointment. The review should be able to determine whether the person had the capacity to make the revocation at the time it was made. We note that we are often called by older persons and their families in dispute over the purported revocation of a Power of Attorney or lack of notice given to third parties who have been dealing with an Attorney and who rely on the purported authority of that attorney. We submit that the Tribunal should be given the power to make a determination because clarification is often required on an urgent basis.

4 ADDITIONAL COMMENTS

4.1 Independent Public Advocate

We are of the view that there is a need for Public Advocate for all people who lack capacity.

4.2 ATSI and CALD clients

4.2.1 Recommendation

It would be especially appropriate to have a community based advocate who can act in a pre-emptive manner without having to comply with the requirement of an inflexible order, appointed for ATSI and CALD clients. It would be better if the community advocate be under the auspices of the Attorney General's Department and appropriately evaluated to ensure independence, better service delivery to the relevant communities and better knowledge of their cultural and linguistic needs.

This is especially important for Regional, Rural and Remote communities.

5 CONCLUSION

TARS welcomes the opportunity to put forward these comments. The issues under examination are timely in our view. The whole concept of substitute decision making and capacity of people to manage their affairs is of growing concern both to legislators and to advocates who are required to wrestle with the complexities of advising people in these circumstances.

Should you have any enquiries arising out of this submission please do not hesitate to contact us