Submission
No 26

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

Organisation: Law Society of NSW

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THE LAW SOCIETY
OF NEW SOUTH WALES

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21 September 2009

Ms Rachel Simpson
Director
Standing Committee on Social Issues
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Simpson

Inquiry into substitute decision-making for people lacking capacity

I refer to the letter from the Hon Ian West MLC dated 8 July 2009 and to your letter to Ms Suttor, the Chair of the Law Society's Elder Law and Succession Committee, inviting the Law Society to make a submission to your current inquiry into substitute decision-making for people lacking capacity.

The Elder Law & Succession Committee has considered the Terms of Reference and also the contents of the Attorney General's letter to Mr West of 30 June 2009, and is pleased to have the opportunity to put the following matters before the Standing Committee to assist its deliberations.

Management of estates

In relation to the management of estates of people incapable of managing their affairs, the *NSW Trustee & Guardian Act* 2009 now sets out the legislative provisions in Chapter 4 of that Act.

Previously, some but not all of the relevant legislative provisions were contained in the *Protected Estates Act* 1983. Both under that Act and under Chapter 4 of the *NSW Trustee & Guardian Act* 2009, power is given to the Guardianship Tribunal and to the Court to appoint a suitable person as manager or the NSW Trustee (previously the Protective Commissioner under the 1983 Act).

The Elder Law & Succession Committee notes that a great many persons will be appointed as managers of protected estates other than NSW Trustee. In the Committee's view, it is inappropriate for legislation relating to the establishment of only

one entity involved in respect of management, namely NSW Trustee, also to be the legislative source of management by other persons. This is not a mere matter of cosmetics and the Elder Law & Succession Committee urges amendment of the legislation so that a separate statute deals with such management.

Financial management and trusteeship are not the same role. Financial management should be governed by separate legislation, and that legislation should be applicable to all entities involved in that area, not just the NSW Trustee.

Matters raised by the Attorney General

With respect to the three specific matters raised by the Attorney General, the Committee makes the following comments:

> *Should the NSW Trustee & Guardian Act be amended 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)?*
>
> Yes.
>
> *Should the NSW Trustee & Guardian Act be amended to allow the Supreme Court or the Mental Health Review Tribunal (MHRT) to vary or revoke an order (even where the person remains incapable of managing their affairs) on the application of a person who, in the opinion of the Supreme Court or the MHRT, has a genuine concern for the welfare of the protected person?*
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> The Committee suggests that the Supreme Court would already hold the inherent power to vary or revoke orders in the above circumstances. With respect to the MHRT being afforded the proposed power, the Committee assumes that the opportunity would be provided for submissions to be made to Tribunal were it determining whether to exercise such a power. Accordingly, the Committee has no objection to this proposal subject to the legislation requiring the Court or the MHRT, as the case may be, to make a further order upon the revocation of any existing order.
>
> *Should the NSW Trustee & Guardian Act be amended to allow the MHRT to appoint a private manager?*
>
> The Committee supports this proposed amendment, subject to the making of a separate statute dealing with the management of protected estates by persons other than NSW Trustee.

Other matters

Other submissions

A number of submissions have already been made to the enquiry dealing with questions and issues beyond those raised in the letter from the Attorney General to Mr West. This submission focuses on matters of concern for the legal profession.

> *Advocacy and inquiry*
>
> At present, there is an inquiry function carried out by the Guardianship Tribunal which, on occasions, appears to create confusion for persons unfamiliar with the

inquisitorial nature of the Tribunal including the relaying of information obtained from such inquiry during the course of a hearing by the tribunal.

Another option in terms of the inquiry function prior to a hearing is that this be conducted by a separate body to the Tribunal, such as a Public Advocate. This option, however, poses its own difficulties in the event that such advocacy and enquiry body is also the potential recipient of an order of appointment. In this scenario, such a body could be influenced by operational demands in determining which matters may be resolved informally and those which need to proceed to the Tribunal for determination.

The practical difficulty that often faces parties in proceedings before the Tribunal is adequate access to information, particularly where, quite properly, the holder of the information is required to resist the production of the information on grounds of confidentiality or privacy. Perhaps there should be a process whereby, when proceedings have been brought in the Tribunal, the Tribunal could grant leave for the parties to obtain information from identified sources which will be authorised by the Tribunal to produce such information. Medical records are a good illustration.

Procedural fairness

There is no reason why procedural fairness should not apply in respect of all aspects of the work of the Guardianship Tribunal.

Specific functions – person responsible

A suggestion that the concept of person responsible is expanded needs very careful consideration. There is much to be said for the present description of that role being confined to medical and dental consents and for a wider role to be the subject of specific provision in an Enduring Guardianship Appointment or arising under an order of the Tribunal.

End of life decision making should always be the subject of specific direction where a person has consciously turned their mind to that prospective decision and identified the person to make it on their behalf.

The suggestion that the definition of medical treatment be amended to include "withdrawal of medical treatment considered to be futile and not in the patient's best interest" also requires careful consideration and wide community consultation.

Registration of Enduring Guardianship Appointments

The Elder Law & Succession Committee does not support registration of Enduring Guardianship Appointments.

Form of enduring guardian appointment

The Elder Law & Succession Committee would also like to take this opportunity to highlight concerns raised by the legal profession about the process of appointing guardians and witnessing requirements under the *Guardianship Act* 1987.

Powers of Attorney and Guardianship Appointments are usually drafted at the same time, often in circumstances where the appointors are elderly or unwell. The appointor may be about to embark on an overseas journey and may be making the Guardianship Appointments mindful of the possibility that they may need to be implemented for use within a short time of departure.

There is often more than one appointee and, on occasion, the appointees may be the children of the appointors and who live in various locations, interstate or overseas.

It is possible for a principal to sign a Power of Attorney and have the attorney(s) sign the acceptance on a separate occasion. The requirements for accepting a Guardianship Appointment are far more cumbersome.

A Guardianship Appointment not only requires that the signature of each appointee be witnessed by a qualified person (an eligible witness), it also requires the witness to provide a certificate. This is a cumbersome procedure, particularly if you have numerous appointees living in different areas. The time involved in getting a completed document can be lengthy and may interfere with the operation of the appointments and, potentially, the intentions of the appointor.

There is delay and expense involved in sending documents to the various appointees to sign in the presence of a qualified person who must then sign the certificate in the terms currently required.

There is an obvious inconsistency in the application of the various provisions relating to the drafting of a Power of Attorney and the drafting of a Guardianship Appointment. In relation to Power of Attorney documents, there is no requirement for the appointee's signature to be witnessed or for a certificate to be signed by the person who witnessed the signature of the attorney.

It is suggested that the requirement for a Guardianship appointee's signature to be witnessed should be removed and, likewise, the certificate of the witness. The current requirements appear to serve no practical purpose. They operate to prevent the immediate operation of the Guardianship Appointment, and entail unnecessary costs and delay in relation to the completion of the document itself.

The Law Society looks forward to being of further assistance to the Standing Committee if there are additional questions or matters on which it seeks comment.

Yours faithfully

Joseph Catanzariti
President