Supplementary Submission No 6a

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

Organisation: NSW Council for Intellectual Disability

Name: Carol Berry

Position: Executive Director

Telephone: 02 9211 1611

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NSW Council for Intellectual Disability
Level 1, 418A Elizabeth Street
Surry Hills NSW 2010
Phone: 02 9211 1611 Fax: 02 9211 2606
mail@nswcid.org.au
ABN 25 001 318 967

Supplementary submission to Standing Committee on Social Issues inquiry into substitute decision-making arrangements for people lacking capacity

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Why we are making a supplementary submission

We have already lodged a submission to the inquiry. We have since read various of the other submissions made. We agree with much of what is in those submissions, in particular the need for much greater focus across the disability sector on providing maximum support to assist people, as far as possible, to make their own decisions.

There are some issues where we want to put our own perspective.

We also note one typographical error in our previous submission. Under the heading, *Prerequisites to the making of financial management orders*, the second paragraph should commence**, "**It is unclear what 2. above means" (correction underlined).

Which Minister should have responsibility for the guardianship system?

We would be opposed to Ministerial responsibility for the Guardianship Act and Tribunal being moved from the Minister for Disability Services to the Attorney General.

The Guardianship Tribunal fulfils a crucial and sensitive role in protecting the interests of people with disabilities. In doing so, it takes away fundamental rights and freedoms, and this process requires firm safeguards. Where courts take away rights and freedoms, they do so by a judge and sometimes a jury presiding over an often lengthy and adversarial process with cases presented by one or more legal representatives for each party. The Guardianship Tribunal does this work in a much more cost efficient way that also maximises the participation of the person with the disability and is sensitive to the family and social issues involved.

The Tribunal has a number of essential features that need to be maintained and protected:

1. Cases being heard by three members bringing a range of expertise and experience. This tends to ground Tribunal decisions in the realities of the disability sector and the life of the person with a disability. The requirement for three members has been taken out the Act for reviews of orders but continues for initial hearings. This feature should not be eroded further.
2. An investigative approach both in the preparation of cases by Tribunal staff and in the conduct of hearings. Legal representation is appropriately not the norm and unnecessary legalism can be minimised. The Tribunal can ensure that the real issues for the person are identified and explored in as non-adversarial and conciliatory a manner as possible.

3. The Tribunal providing written reasons for its decisions. These are an essential justification for the taking away of rights, a tool for transparency and accountability, and a guide for those implementing and later reviewing the Tribunal's orders.
4. The Guardianship Tribunal not being part of a broader tribunal so that it can maintain and continue to develop a culture suited to its unique work and avoid its resources being diverted to other priorities.
5. An accessible, expert and multi member appeal structure.

In some other States and Territories, these features have been departed from leaving the rights and interests of people with disabilities inadequately protected in the guardianship process.

In NSW, the above features have largely remained intact for twenty years. To a significant degree, we attribute this to the understanding of, and support for, the role of the Tribunal by successive Ministers for Disability Services in both Labor and Coalition Governments.

We would be very concerned about the Tribunal being moved into the Attorney-General's portfolio. Tribunals in that portfolio tend to have a much more legalistic and adversarial approach than the Guardianship Tribunal. We do not criticise this; those tribunals generally have very different roles from the Guardianship Tribunal. However, if the Guardianship Tribunal was moved across to Attorney Generals, we could readily envisage the Tribunal losing some of its essential features.

There is always room for evaluation and improvement of bodies like the Guardianship Tribunal. However, we see it as a largely effective and highly regarded body and we see this as significantly flowing from its being placed within the Disability Services portfolio.

Regulation of restrictive practices

There is a long history of people with disabilities being subjected to inappropriate use of physical and chemical restraint and inappropriate restrictions on their freedom of movement. Over the last 20 years, quite a lot has occurred aimed at preventing inappropriate restrictions and instead developing positive approaches to addressing behaviour of some people with disabilities which places themselves and others at risk of harm. Best practice guidelines have been developed. The Department of Ageing, Disability and Home Care has developed policies and procedures for disability services.

The Guardianship Tribunal has also taken a role in substitute consent for restrictions. We see this role as having had a significant positive effect in encouraging positive practices and regulating restrictive practices. This includes in relation to some people with intellectual disability whose freedom of movement is restricted to help them keep out of trouble with the law and out of gaol. One of the strengths of the guardianship system in this area is that its legislative focus is on the interests of people with disabilities, not on protection of the community – this means that the Tribunal and any guardian has to be satisfied that there is a benefit to the person from being restricted and this commonly calls for any necessary restriction to be complemented by positive approaches to minimising and addressing inappropriate behaviour. We see this approach as comparing very favourably with that in the Mental Health Act which is focused on both the protection of the individual and of the community.

The range of systemic strategies needed to counter inappropriate use of restrictive practices should be periodically reviewed. As part of this, we do see a case for more specific legislative regulation. We feel that any new legislation should build on the strengths of the guardianship approach rather than replacing it.

A community guardian scheme

We support in principle the development of a scheme where the Public Guardian can engage, train and supervise suitable community members to carry out some the of the Public Guardian's role for individuals. In appropriate cases, a community guardian may be able to provide a more personal service and one more grounded in the life and culture of an individual under guardianship than can be provided by a staff member of the Public Guardian. And we see this as the case across the range of cases handled by the Public Guardian, not just those involving comparatively settled situations.

However, careful consideration is needed of how such a system should be safeguarded in legislation and practice so as to ensure that it does not become a cheap, substandard and unaccountable system of guardianship. Legislation might specify that the appointment of a person as a community guardian be approved by, for example, the President of the Guardianship Tribunal. To be eligible to be appointed, a person should be required to have a demonstrated understanding of and commitment to the principles in s4 of the Guardianship Act. The Tribunal could be given a capacity to specify that only a staff guardian could be used in a particular case.

In order to recruit well qualified people and ensure accountability, it is essential that community guardians be paid, at least at a comparable level as official community visitors to disability services.

Resourcing of reform

Many important legislative reforms to the guardianship and financial management system would require substantial budget enhancements to make them effective. This needs to be squarely acknowledged and the enhancements provided simultaneously with legislative change.

Contact -
Carol Berry,
Executive Director