

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

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The Director
Standing Committee on Social Issues
Parliament House
Macquarie St
Sydney NSW 2000



Dear Sir/Madam,

The Council on the Ageing NSW (COTA NSW) is a non government organisation and a peak body representing persons over 50 years of age in NSW. This submission addresses the terms of reference established for the Inquiry into substitute decision making for people lacking capacity.

COTA NSW commends the establishment of this Inquiry to examine the provisions for substitute decision-making for people lacking capacity in New South Wales, and in particular whether any NSW legislation requires amendment to make better provision for the management of estates of people incapable of managing their affairs; and the guardianship of people who have disabilities.

Defining capacity and disability

In the NSW Trustee and Guardian Act 2009 there is currently no definition of disability or capacity. From the outset, COTA NSW believes there is an urgent need to define capacity and disability to ensure clarity and consistency in the application of these terms.

COTA NSW recommends

- that the Committee note the definition of **capacity** in Schedule 4 of the QLD Guardianship and Administration Act 2000,

capacity, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter;
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

It is also critical that the term disability is defined as mental or cognitive disability which diminishes capacity. People with intellectual disability do not necessarily lack capacity and can make decisions for themselves and should be supported to do so.

COUNCIL ON THE AGEING (NEW SOUTH WALES) est. 1956

*PATRON: Her Excellency Professor Marie Bashir AC, CVO
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COTA NSW recommends

- that the Committee note the definition of **disability** in Section 123E of the Disability Services Act 2006 (Qld) which defines intellectual or cognitive disability as: **adult with an intellectual or cognitive disability** means an adult with a disability who has a condition attributable to an intellectual or cognitive impairment, or a combination of the impairments.

In relation to **(i) the management of estates of people incapable of managing their affairs**; COTA NSW notes:

- in the case of Tribunal matters, there should be an automatic right for every party to have legal representation including the party subject to the application;
- in the interest of consistency, the NSW Trustee and Guardian Act should be amended to allow a relevant Court or Tribunal to exclude parts of an estate from a financial management order;
- agreement in principle that the NSW trustee and Guardian Act 2009 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 genuine concern for the welfare of the protected person;
- some safeguards are required to ensure that the interests of the incapable person are protected at all times. There should be a monitoring mechanism to ensure that the accounts of an attorney are audited each year as they are with financial managers; and
- support for the view that the NSW Trustee and Guardian Act 2009 should be amended to allow the MHRT to appoint a private manager rather than the NSW Trustee and Guardian which should only be appointed as a last resort.

In relation to **(ii) The guardianship of people who have disabilities**; COTA assumes that the guardianship of people with “disabilities” is referring to people who are mentally incapable of managing their own affairs, therefore COTA notes:

- people with “disabilities” have an automatic right to legal representation before the Guardianship Tribunal;
- people with “disabilities” have the right to an independent advocate; and
- the need for an accessible complaints system.

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COTA NSW continues to work with older people in NSW to ensure their views and aspirations are reflected in our advocacy and policy work. We thank you for the opportunity to provide this submission and are available to assist with any further developments in the Inquiry into substitute decision making for people lacking capacity

If you have enquiries or comments on this submission please contact, Anne-Marie Elias, Policy & Communications Manager on 9286 3860 or anne-marie.elias@cotansw.com.au

Yours sincerely



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