

**INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR
PEOPLE LACKING CAPACITY**

Organisation: NSW Guardianship Tribunal
Name: Ms Diane Robinson
Position: President
Telephone: 02 9556 7600
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Guardianship Tribunal

The Honourable Ian West, MLC
Chair
Legislative Council Standing Committee on Social Issues
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr West,

Substitute decision making for people lacking capacity

I am writing to provide further submissions in relation to the inquiry into substitute decision-making for people lacking capacity. Having had the benefit of reading some of the submissions received by the Committee, the Tribunal now offers the following comments.

Role and functions of the Guardianship Tribunal

The Tribunal is a specialist legal tribunal. Its role is to protect and promote the rights and welfare of people living with a decision making disability. The Tribunal's jurisdiction has expanded since its inception in 1989 and it can make a range of legal orders to empower and support people living with a cognitive impairment.

The legislation which is relevant to the Tribunal's jurisdiction includes:

- Guardianship Act 1987
- Guardianship Regulation 2005
- NSW Trustee and Guardian Act 2009
- Powers of Attorney Act 2003
- Mental Health Act 2007
- Children and Young Persons (Care and Protection) Act 1998

The Tribunal makes orders in respect of the following:

- Appointment of guardians to make personal or lifestyle decisions
- Appointment of financial managers to make financial decisions
- Reviews of guardianship and financial management appointments
- Reviews of enduring guardianship appointments
- Reviews of enduring powers of attorney
- Medical consent when a person is incapable of providing informed consent
- Consent to special medical treatment
- Decisions about the involvement of people with disabilities in clinical trials

The Tribunal operates as a court substitute Tribunal. It hears and determines applications based on evidence provided to it by the person with the disability, their family and friends and their medical and health care/service providers. The Tribunal operates as a specialist disability Tribunal and provides an accessible and non legalistic environment to encourage the fullest participation of the person with the disability.

The host department for the Tribunal is the Department of Ageing, Disability and Home Care (DADHC). However the Tribunal operates independently of DADHC and is not influenced or directed by any DADHC policy. Only the NSW Supreme Court or the Administrative Decisions Tribunal has the power to hear appeals from the Tribunal and set aside a decision of the Tribunal.

The Guardianship Tribunal has been in operation for twenty years and is well-respected within the guardianship and disability sector. The NSW Tribunal has been the model for guardianship tribunals overseas and in other Australian jurisdictions. Tribunal staff and members have a wealth of experience and knowledge of the disability sector and of the key issues involved in the areas of guardianship and financial management.

Establishment of a Public Advocate for people with disabilities

The Tribunal supports the proposal that an independent public body provide individual and systemic advocacy for people with disabilities in New South Wales. An independent advocate could play a valuable role in promoting and protecting the interests of people with cognitive disabilities in NSW, particularly those people who are vulnerable to abuse and exploitation.

The following issues require careful consideration:

- Ensuring the independence of the Advocate from other decision making bodies, particularly whether or not one organisation should perform both the role of Advocate and Public Guardian.
- Providing adequate on-going resources to enable the Advocate to fulfil its function and role
- Clarification of the scope of the Advocate's role
- Clarification of the relationship between the Advocate and the Tribunal
- Ensuring an appropriate recruitment process for the appointment of the Public Advocate

Public Advocate bodies exist in other Australian states and perform a range of different roles. Given the resource implications, it will be important to determine whether or not comparable roles and functions are necessary in NSW.

Some submissions suggest that the role of the Public Advocate in Victoria may provide a useful model for reform of guardianship in New South Wales and, more specifically, the role of the Public Guardian. Resourcing issues aside, consideration needs to be given to whether this is an advocacy and guardianship model which is best suited to the needs and interests of people with disabilities in this State.

Expanding the role of the Public Guardian to include investigation of the need for a guardianship application

The Tribunal does not support the proposal that the Public Guardian should assume the role of investigating whether there is a need for a guardian to be appointed.

The Tribunal already performs this function efficiently and effectively and in a way which focuses on the rights and best interests of people with cognitive disabilities. The Tribunal's staff play a key role in diverting inappropriate applications from a hearing. It is therefore an unnecessary duplication of services to extend this role to the Office of the Public Guardian.

The Guardianship Tribunal employs a number of pre hearing diversionary strategies to deal with unnecessary or inappropriate applications. These include a programme of community education, the Tribunal's Enquiry Service and the work of its Co-Ordination and Investigation Unit.

The Enquiry Service provides information, referral advice and assists in the informal resolution of guardianship issues. In the 2008/2009 year the Tribunal's Enquiry Service managed 12,075 enquiries (an average of 47 per day).

Since its inception the Guardianship Tribunal has had a Co-Ordination and Investigation Unit which investigates applications to the Tribunal. Investigation officers assess every application and explore whether there are any means of resolving the issues raised in the application in an informal manner without the need for a guardian to be appointed. The Tribunal investigated 2,417 guardianship applications in the last financial year and a total of 8,466 new matters across its overall jurisdiction.

The investigation staff have an extensive knowledge and experience of the disability service system. They are able to suggest different service options or ways of resolving issues without a guardianship order. This may involve referring parties to external agencies or assisting them in the informal resolution of disputes.

The Tribunal's strategies work well. For example, in the 2006/2007 financial year the Tribunal received 2,365 new guardianship applications. In that year 1,636 applications went to hearing, reflecting the fact that at least 30% of applications were resolved informally or diverted prior to a hearing. Of the applications which proceeded to hearing, guardianship orders were made in 965 matters or 59% of cases. Orders appointing the Public Guardian were made in 569 or 24% of cases. A similar pattern emerges across the Tribunal's jurisdiction. In 2008/2009, the Tribunal finalised a total of 8,466 matters. Again at least 30% of applications were informally resolved without proceeding to hearing.

The Tribunal operates as a tribunal of last resort and, in accordance with the guardianship legislation, makes orders only when necessary. It should be noted that the Tribunal has a statutory obligation to conciliate matters in accordance with section 66 of the Guardianship Act 1987.

Provide the Public Guardian with the capacity to assist people with decision making disabilities without a guardianship order

The UN Convention has highlighted the question of assisted decision making, as opposed to substitute decision making, for people with cognitive impairment. Substitute decision making will remain necessary for some people. This was recognised by the Australian government when it ratified the UN Convention on the Rights of People with Disabilities. Some people have significant cognitive disabilities, for example advanced dementia, severe brain injury or significant intellectual disability, which prevent them from being able to make their own decisions. They require substitute decision making to ensure their rights are protected and their needs are met. It would not be appropriate or suitable to engage in supported or assisted decision making for some people as their ability to engage in that process is severely restricted or nonexistent.

There will be situations when assisted or supported decision making is appropriate and should be encouraged. The notion of assisted or supported decision making enables a person with a disability to participate in the decision making process to the extent of their ability to do so.

However, it is crucial to define the philosophy, purpose and parameters of assisted decision making. An appointed guardian has a statutory mandate to make decisions in the best interests of a person with a disability. Is an assisted decision maker helping a person to make the decision in accordance with his or her views and wishes or to make what the assisted decision maker may see as the "best or right decision"? Many in the disability sector would argue that genuine autonomy includes the right to make poor choices or bad decisions.

What safeguards are there for a person with a disability who does not like the actions or suggestions of the person providing assistance? Currently a person under guardianship has the right to request the Administrative Decisions Tribunal to review a decision of the Public Guardian if the person is dissatisfied with that decision. Do similar rights of review need to be considered for the person obtaining assistance with decision making?

The Tribunal's submission is that any scheme for assisted decision making be given careful consideration so that proper protections and safeguards can be ensured. The disability sector should be fully consulted and informed as to how such a scheme would be resourced and how it would operate in practice.

Introduce community guardians to make decisions for people with cognitive disabilities

The Tribunal notes that section 77 of the Guardianship Act has been amended to allow the Public Guardian to delegate any of its functions to persons prescribed in the Guardianship Regulations. According to the Public Guardian's submission to the Committee, this enables the Public Guardian to establish a community guardian scheme.

The Tribunal notes its earlier submission which raised concerns about the lack of public consultation prior to that amendment and the fact that legislative safeguards are needed

to ensure proper standards and compliance with the UN Convention on the Rights of People with Disabilities.

In the Tribunal's view, there is a need for a wide-ranging consultation with all relevant stakeholder groups about the scope and nature of this proposal. People with cognitive disabilities are amongst the most vulnerable people in society and are often the victims of personal, physical, sexual and financial abuse. Perpetrators of such abuse are often not strangers, but may be people with a family or other relationship with the person with a disability. It is therefore crucial to ensure that anyone who has power to make decisions about people with disabilities, is subject to proper scrutiny and professional standards. This should apply in relation to their recruitment, training, monitoring and supervision.

The Tribunal supports the provision of additional guardianship services to people with cognitive disabilities however it is concerned that any services should have appropriate and rigorous safeguards to prevent abuse and to maximise high quality substitute decision-making.

Review the Guardianship Act to ensure compliance with the UN Convention on the Rights of People with Disabilities

The Tribunal supports the proposal that the Guardianship Act 1987 be reviewed in light of the UN Convention on the Rights of People with Disabilities. The Act has been in operation since 1989. Its guiding principles - to ensure that the welfare and interests of people with cognitive disabilities are given paramount consideration - remain appropriate, but it is important that NSW legislation is updated in accordance with human rights protocols. With Australia's ratification of the UN Convention it is now appropriate that all disability legislation, such as the NSW Guardianship Act, be reviewed and revised if necessary.

Review of Financial Management Orders

Some submissions have proposed the review of all financial management orders made by the Tribunal. The Tribunal would like to bring to the Committee's attention the following information about reviews of financial management orders:

- Every person whose estate is being managed under a financial management order has the right to request that the order be reviewed. A review may result in the order being revoked or varied or the appointed manager being replaced.
- These requests can also be made by the appointed financial manager, the NSW Trustee or any other person who has a genuine concern for the welfare of the person whose estate is being managed.
- When the Tribunal makes a financial management order, it may specify that the order be reviewed by the Tribunal within a certain period. This enables the Tribunal to review the need for a financial management order after a specified period of time. This may happen if there are only certain areas which need the assistance of a manager, for example selling a property or finalising litigation.

Once the decision has been made and there is no further need for an order, the Tribunal may decide on review to revoke the order.

- All financial management orders involve the NSW Trustee either as the financial manager or as the body which issues directions and authorities to a private manager. The private manager is required to submit annual accounts to the NSW Trustee and to seek further authorities from it, if they wish to take actions beyond the scope of the authorities they have been given, for example, if they wish to commence legal proceedings or sell real property. If the NSW Trustee has concerns about the action or inaction of a private manager, it is able to apply to the Tribunal for a review of the financial management order.

I trust these comments are helpful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Diane Robinson', written in a cursive style.

Diane Robinson

President

18 September 2009