

Supplementary
Submission
No 23a

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

Name: Ms June Walker

Date received: 22/09/2009

Without Prejudice

Ms. June Walker

21st September 2009

The Director,
Standing Committee on Social Issues
Parliament House
Macquarie Street
Sydney NSW 2001

Dear Director,

Inquiry into the provision for substitute decision making for people lacking capacity in NSW.

I would like to add further information to my submission dated 17th September 2009 and as the current NSW Guardianship President Diane Robinson has offered to answer questions relating to the work of the Tribunal, if possible, I would like the Committee to obtain answers from Ms. Robinson to questions I ask in this letter.

1. The Guardianship Tribunal's role of removing the basic human rights of a person with a disability:

During their inquiry into older people and the law, the LACA Committee held a public meeting in Hobart on the 5th of June 2007 and during this meeting the Committee Chairman, Mr. Slipper spoke with the President, Guardianship and Administration Board (AGAC), Tasmania; and Chairperson, of the Australian Guardianship and Administration Committee Ms. Anita Smith who made the following opening statement: **Smith made the following opening statement:**

The Guardianship and Administration Committee of Australia is made up of heads of tribunals and boards, such as me, the public guardians or public advocates in each state and territory, and the public trustees or their equivalents in each state and territory. We meet twice yearly. It is a professional body. It gives mutual support and aims for national uniformity in practices and cooperation between states and territories.

The reason we have an interest in an inquiry into older people and the law is that in each state and territory, of the numbers of people who become the subject of an application for guardianship or administration, in the order of 70 per cent are people over 65. That is often because of the consequences of dementia and related illnesses. As a guardianship and administration committee we are not strictly about people who are ageing, but it tends to have that effect.

To give you an understanding of guardianship and administration—in some states it is called 'financial management'—we always need proof that a person coming before us has a disability and that that disability has affected a person's decision-

making capacity. So we only deal with adults, generally, who have experienced some sort of loss of ability to make reasonable judgments.

If that should be proven on the evidence, then we might look at whether there need to be any decisions made on their behalf and appoint a guardian or an administrator to make those decisions on their behalf, should they need to.

2.

If done incorrectly, it has the potential to be a fundamental breach of human rights because you are taking away people's ability to make their own decisions in their own lives, so we always adhere to the principles of finding the course of action that is least restrictive of the person's freedom of decision and action, looking for a decision that is in their best interests, and one that reflects as far as possible their wishes.

Those three principles are consistent across all states and territories, **even though we have remarkably different laws between states and territories.**

Our interest particularly in this inquiry would be in the issues that you have addressed in the terms of reference about fraud and financial abuse.

There are other issues that have legal effect, such as issues about medical treatment, but, in the areas of administration or financial management, **fraud and financial abuse are things that appear before us, unfortunately, far too often.**

We would be keen to see some avenues to address that on a national scale.

2. Applications for 'financial management orders' to the NSW Guardianship Tribunal:

In her Annual Report of 2005-06 the NSW Guardianship Tribunal President, Diane Robinson states:

Lodging an application for the appointment of a guardian or financial manager for a person with a disability is a 'serious matter' as the person submitting the application is, in effect, **asking the Tribunal to take away a person's rights to make their own lifestyle or financial decisions and to give those rights to someone else.**

Questions for NSW Guardianship president Diane Robinson regarding the above:

In view of the Tribunal considering that lodging an application to be a 'serious matter', does the Tribunal also consider the following practises to be 'serious matters'?

- The provision of false or misleading information in applications.
- The Tribunal members (a) turning a blind eye or (b) fabricating excuses on behalf of applicants who provide false and misleading information in applications.

- The Tribunal members failing to give 'due weight' to evidence that should raise a **RED FLAG** to the possibility of prior financial exploitation. i.e A suspected financial predator's own solicitor friend has become the suspected victim's solicitor.
- The Tribunal members discriminating between parties to proceedings.
- The Tribunal members placing a person who is distrusted by a family member, in the trusted position of a 'private financial manager'.

3.

3. Who can make an application for a 'financial management order:

The NSW Guardianship Act of 1987 states that an application for a 'financial management order' can be made by:

- The Protective Commissioner, or
- Any person who, in the opinion of the Tribunal, has a 'genuine concern' for the welfare of the person who is the subject of the application.
- Someone with a genuine concern for the person with a disability may be a family member or a friend or their doctor, caseworker, professional carer or other service provider.

As stated previously:

- My father's GP was an applicant who was aware of my father's horrific, inhumane living circumstances and of his self neglect, yet he **falsely described Mr. X as the person who had frequent contact with and who took a personal interest in my father's welfare, without payment.**
- My sister H, who together with my sister R. until 6 weeks prior to lodging an application for a 'financial management order', had not contacted our father for over 18 years and were unaware of the prior 'will interference' also **falsely described Mr. X as the person who had frequent contact with and who took a personal interest in my father's welfare, without payment.**

Questions re the above:

As the Tribunal members would be aware that self financially interested parties, some of whom may be 'hidden' will declare a 'genuine concern' for a person who has valuable assets:

- What strategies does the Tribunal have in place to determine the reality of claims made by applicants?

As the subjects of applications have cognitive disabilities and valuable assets and may live alone and be isolated from the community and family members, other than people who have access to bank accounts etc,

- Who would really know whether or not a person associated with a person with a disability, had a 'genuine concern' for the person or whether or not, they were receiving payment for alleged services provided to the person?

4.

4. Regarding the Tribunal's role of protecting the subjects of applications from abuse, neglect and exploitation:

As during the LACA inquiry into older people and the law, former Guardianship Tribunal Deputy President Marion Brown stated that in the past the NSW Guardianship Tribunal conducted a survey of applications made to it, to identify what was the **most common form of abuse** that precipitated an application to the Tribunal and this survey showed that:

- **Financial abuse was by far the most common form of abuse experienced by older Australians, which resulted in an application being made to the Tribunal.**

Questions for Guardianship Tribunal President, Diane Robinson.

- How does the Tribunal ensure that an application for a 'financial management order' is not instigated in the 'best financial interest' of a 'hidden' perpetrator of a crime against a person with a disability?
- Would an allegation that a solicitor associated with an 'alleged' friend of a person with a disability, had become the person's solicitor, be relevant to decisions the Tribunal had to make?

- Would an allegation that an 'alleged' friend of a person with the disability, appeared to know more about the contents of the person's will than the person did, be relevant to decisions the Tribunal had to make?

As it is not the role of the Tribunal to ascertain the truth or otherwise of allegations made before it and as the Tribunal does not have the jurisdiction to determine whether wrongdoing occurred prior to its involvement

- How do the Tribunal members ensure that they are making legal decisions that are paramount to the rights, welfare and protection of the person with a disability?
- How do the Tribunal members ensure that they are not making legal decisions that are paramount to the best hidden financial interests and protection of a 'hidden' perpetrator of prior financial exploitation?
- How do the Tribunal members ensure that they do not place a 'hidden' self financially interested party in the trusted position of a 'private financial manager'?

5.

5. Regarding the provision of false or misleading information in applications:

Sections 105 and 106 of the NSW Guardianship Act of 1987 and a clause on the Tribunal's application forms indicate that **'It is an offence to provide false or misleading information in an application. Penalty up to \$500.00'**.

- What are the purposes of sections 105 and 106 of the Act?
- What other section of the Act provides protection to the subjects of applications.
- Would a penalty of up to \$500.00 deter a financial predator who stands to gain substantial amounts via the property and financial assets of a person with a disability, from approaching the Tribunal under false pretences?
- Under what circumstances would the Tribunal impose apply section 106 of the Act?
- In the last 5 years, how many penalties for the provision of false or misleading information have been imposed on applicants?

6. The question of Capacity:

At the Brisbane meeting of the 16th July, 2007:

Professor Jill Elizabeth Reeve, Head of School, Assets and Ageing Research Team, School of Social Work and Applied Human Sciences, University of Queensland, stated:

- The issue around capacity is **very difficult** and **very tricky** and it **can shift from day to day**.
- For a particular matter, someone may **not have had capacity yesterday** but they may **have it today**.
- Similarly, they may **not have capacity in the afternoon** but they may **have had it in the morning**.
- Those sorts of issues are **very tricky for other people to determine**.
- It means that the decision needs to be made in the context of an **ongoing relationship where people can see the pattern of what is happening rather than it just being a one-off event**.

In my father's case, he recognised his family right up shortly before his death in 2002, whereas, many people with dementia fail to recognise family members and others fairly early in the disease.

I have shown how deceptive individuals will claim that a person lacked capacity when it suits their own covert purposes and then 'allegedly take instructions' from the person at other times when it suits their other purposes.

6.

Example of a person with a decision making disability who, allegedly 'had capacity' or 'lacked capacity' when it suited the covert purposes of others:

As explained previously, the grounds used by Mr. X for the purpose of the 'will dispute' were:

- My father lacked the capacity to instruct a solicitor on the **2nd December 1994**.
- My father did not know or approve of the contents of the will of the **2nd December 1994**.

To support the above he also claimed:

- He didn't think that my father knew 'what was going on' at the NSW Guardianship hearing on the **17th February 1995**.

In October 1994:

Solicitor S.J. initially refused to provide me with a copy of my father's last will and claimed that **"my father instructed him he was not to release the will to me"**

On the 17th February 1995:

Mr. X did not object to my father being 'legally represented' as it suited his covert purposes for the Tribunal members to 'take advice' from my father.

In mid July 1999:

My father's GP, who, as Mr. X's 'star witness' during the 'will dispute' declared my father **lacked the capacity to instruct a solicitor on the 2nd December 1994**, rather than provide me in writing, with the name of the person who 'reported' to him that over \$20,000 or so had gone from my father's accounts, although he had 'concerns' about my father's cognitive ability... he allegedly **'took instructions' from my father.**

The AMA's involvement:

Some months after the Guardianship hearing the GP verbally advised me that Mr. X's was the person responsible for the false allegations of 'missing monies' that he directed at me in the Guardianship matter.

The AMA became involved when I advised them of the GPs failure to respond to my requests for him to provide me in writing, with full details of Mr. X's involvement in the false allegations of over \$20,000 having gone from my father's accounts.

The letter from the AMA as attached to my original submission shows how the GP conveniently twisted my request around by claiming **'Mrs. Walker has essentially asked me to explain why I stated the \$20,000 had gone from her father's accounts'**.

This was not what I asked him and I would hardly ask him 'why' he did this, when he had previously advised me verbally that Mr. X was the person responsible for his lies.

7.

Expert reports on my father's capacity to instruct a solicitor on the 2nd December 1994.

X's legal team obtained reports from:

A: An 'Expert Witness' who is a Forensic Psychiatrist'

- This Psychiatrist had never met my father and
- **Was not present when the disputed will of 2nd December was drawn up.**

B: A Hospital Geriatrician who is a world renowned 'expert in Elder Abuse' and a member of

the NSW Guardianship Tribunal.

- Saw my father for around 10 minutes, twice a week during his 7 week hospital stay.
- Had no contact with my father from 13th September 1994.
- After being contacted by my father's GP and my sister H, provided a report to the Tribunal without viewing her own notes and without being able to recall the results of a mini-mental test she performed on my father during his hospitalization.
- **Was not present when the disputed will was drawn up on 2nd December 94.**

C: My father's GP.

- Who, in late 94, was influenced to approach the Guardianship Tribunal (Board) by Mr. X.
- Provided (previous) solicitor S.J with a written report, contaminated by Mr. X's opinion, on my father's ability to manage his own affairs.
- Had not diagnosed that my father suffered from Parkinson's disease prior to his July 1994 hospitalization.
- Had not tested my father's capacity prior to or after the Tribunal hearing.
- **Was not present when the disputed will was drawn up.**

My Comments on 'expert' legal opinions:

The 'expert witnesses', whose services were procured by the plaintiff, were only provided with 'evidence' as supplied by the plaintiff's legal team, concluded:

- **My father 'lacked the capacity' to draw up the will of 2nd December 1994.**

The 'expert witness' used by the defendants, who were only shown 'evidence' provided by the defendant's legal team, concluded:

- **My father had the capacity to instruct a solicitor on the 2nd December 1994.**

Comments on the above:

I believe that an unarguable opinion regarding a person's capacity or lack of capacity cannot be obtained from 'expert witnesses' who were not present at the challenged time and were only sighting evidence that the opposing sides want them to see...

I believe that in order to stamp out 'financial Exploitation via 'will challenges', it is crucial that **'expert witnesses' should be provided with evidence from both sides of the argument.**

8.

7. The subjects of applications being 'legally represented' at hearings:

Regarding people who have cognitive disabilities i.e. dementia, mental illness, brain damage, strokes, alcohol and drug abuse etc, being 'legally represented' at hearings, my father was represented by a solicitor at the Tribunal hearing on the 17th February 1995.

He was not tested for 'capacity' prior to or after the Tribunal hearing and no-one present at the hearing, including X, objected to this, therefore, the Tribunal members and all others involved believed that he had the capacity to instruct this solicitor on this date.

A Hospital Geriatrician, who is a world renowned 'expert' on Elder Abuse and was a member of the Tribunal, attended to my father's medical needs during his seven week hospitalization provided a report to the Tribunal, without viewing her own notes and without being able to recall the results of a mini-mental test she performed on him during his hospitalization, however, regardless of this, **she would not have been aware of the prior financial exploitation.**

Question regarding a person with a cognitive disability being legally represent at hearings:

- How does the Tribunal determine whether or not the person with a decision making disability has the capacity to effectively instruct a solicitor at a hearing?
- How does the Tribunal determine whether the person concerned is acting under the instructions of a third party?

8. The principles guiding the NSW Guardianship Tribunal:

The principle of **'taking the person's views into consideration'**.

In a report titled **'Fraud & Financial Abuse of Older Persons'** published by the Australian Institute of Criminology (AIC) in October 1999, in regard to the reporting of this offence, the writer states:

- **As is the case with domestic violence, reliance upon official crime statistics is problematic where older persons are concerned as many offences may not be reported to the police, particularly those which have been perpetrated by relatives or carers.**
- **This may be due to the close personal involvement of the older person and the offender, or to the fear of reprisal if the matter is reported to the authorities.**
- **There is also the concern that, if a carer is convicted and imprisoned, there will be no one left to care for the older person.**
- **In addition, in some cases, older persons who suffer from dementia and are unable to communicate effectively may not be aware that they have been defrauded and may die without the crime ever being discovered or investigated.**

9.

As stated by Dr. Margaret Singer in her report of 'Undue Influence and financial exploitation:

- A skilled perpetrator can cause the victim to develop strong loyalty to the perpetrator, a phenomena known as the Stockholm syndrome based on bank hostages in Stockholm who were brainwashed by their captives.
- **The client's attorney should be contacted and notified about legal changes that were made by the perpetrator's attorney.**

Questions for Guardianship Tribunal President Diane Robinson regarding:

Taking the person's views into consideration.

As the Tribunal members would be aware that a person with a cognitive disability does not always know what is in their best interest and may not be aware that they have been financially exploited or that they may fear reprisal etc if they complain or don't follow the instructions of an offender:

- How does the Tribunal determine the reality of the views of the person concerned?
- How does the Tribunal determine whether or not the person concerned is acting under the instructions of another party who may have an ulterior motive?

9. Parties to proceedings being legally represented at NSW Guardianship hearings.

During the LACA Inquiry into older people and the law of 2006-2007, at a public meeting in Hobart, during a discussion with the AGAC Chair Anita Smith, the Chairman Mr. Peter Slipper stated:

- "I understand that in some jurisdictions it is not possible to be represented without the consent of the tribunal"

AGAC Chair, Anita Smith replied:

- In Tasmania you have an automatic right to representation if you are the named subject of an application and you also have an automatic right if you are the applicant.

- Other parties would have to seek leave for representation, but it is certainly something that **we encourage because it is usually our experience that having legal representation works towards a better outcome for people, regardless of whom that person is representing.**

Question for NSW Guardianship President Diane Robinson:

- Why is the NSW Guardianship Tribunal so adamant that applicants and other parties to proceedings are not able to be legally represented at hearings?

10.

10. The principle guiding the Tribunal of:

- **Encouraging members of the community to apply the principles guiding the Tribunal:**

Prior to September 1994, I had never heard of Elder Abuse and I was totally unaware of the existence of Guardianship Tribunal–Board, however, as a community member and being the only family member who maintained contact with my father, in September 1994 I spent 4 weeks in Sydney at my own expense during which time I provided for my father's many personal needs and also arranged for his placement into hostel care in a Retirement Village without any assistance from other family members who were aware of my father's hospitalization and lived locally.

During my time in Sydney Mr. X and his associates subjected me to various 'mind games' which, after a visit to a Chamber Magistrate in Hornsby, I realized were aimed at having me approach the Guardianship Board.

Prior to discussing my concerns regarding Mr. X and his associate's involvement with my father with the Chamber Magistrate, I had contacted the NSW Fraud Squad and was advised:

- To spin my father a story and get some money out of him myself.

I also raised my concerns with staff at the hostel and was advised;

- We see this happening all the time and we can't do anything about it.

I have made you aware of the results of me raising my concern with the NSW Guardianship Board in 1995 and as the only person telling the 'truth' in the Guardianship matter concerning my father, I left the hearing feeling:

- I had been slapped in the face for daring to claim that Mr. X - OAM and his solicitor were involved in wrongdoing in connection with my father.

- Humiliated and degraded.

Conclusion:

While representatives from various business or Government organizations which deal with people with decision making disabilities will be able to discuss the 'Guardianship Law' and various 'legislative Acts' unless, as a non professional member of the public, they had personal experience with the NSW Guardianship Tribunal, they would have no idea that the legislation provides no 'real protection' to people with disabilities and no idea of the total lack of proper care taken by the Tribunal members when they make quasi legal decisions that impinge on the rights, welfare and protection of the subjects of applications.

11.

As the NSW Guardianship Tribunal is an independent Tribunal which makes legal decisions concerning the rights, welfare and protection of people with decision making disabilities, based on a low standard of proof prior to them removing a person's basic human rights and as, according to various past Ministers for Ageing and Disabilities, the Tribunal is not accountable to them, to put an end to the negligent practices of the tribunal which I have described in my submission and can be substantiated via the Tribunal's records, I would like the Committee to recommend that:

- The Tribunal becomes accountable to an independent body:
- The secrecy surrounding Tribunal cases is lifted.
- The Tribunal becomes open and transparent.
- Applicants are to be placed on oath when providing information to the Tribunal.
- Applicants who provide false or misleading information in applications are subjected to Police action and charges of perjury. (this occurs in Victoria)
- All parties, including professionals involved, should be treated as 'financially interested' parties
- Professionals who approach the Tribunal as a result of being influenced to do so by another party must reveal the name and details of the person involved.
- The Tribunal is to determine the names of all financially interested parties via obtaining current and past wills.
- The Tribunal should thoroughly investigate changes to wills, executors and powers of attorneys.
- As financial exploitation is often not exposed until after the victim's death, financial and legal records of involuntary clients who have a 'financial management order' placed over them, are to be retained by banks and solicitors until after they are notified of the persons' death.
- As the LACA Committee recommended that Powers of Attorneys be registered and I feel this should also apply to wills and solicitors involved with wills, with a provision

for family members to have access to details of the dates changes are made to wills and to dates changes of solicitors are made.

- The Tribunal ceases making legal decisions based on guesswork.

As people with decision making disabilities who become involuntary 'clients' of Guardianship Tribunals are, in the majority of cases unable to effectively 'protect' themselves, I hope that by providing details of my father's case, the rights of people with disabilities will become 'more important' to the Tribunal than getting through their increasing workload in a timely manner and that future involuntary clients of this legal Tribunal will be 'better protected' from both financial predators and from the flawed practices of the Tribunal itself which not only affect the rights of the person with the disability, they also affect the rights of the person's family.

Yours Sincerely,

June Walker.