Submission
No 6

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

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

Our focus

We focus this submission on people for intellectual disability for whom we are a peak advocacy group. The Guardianship Act is the predominant vehicle for substitute decision-making for people with intellectual disability.

We favour the Guardianship Act and Tribunal procedures being as straightforward and non-legalistic as possible, so as to make them understandable to people with disability and people in their lives, and so as to promote a problem solving and conciliatory approach to Tribunal cases. We feel that the Committee should be cautious about proposals that would make the Guardianship Act and Tribunal procedures more intricate and legalistic.

General principles

The existing principles in s4 of the Guardianship Act remain sound. However, consistent with the UN Convention on the Rights of Persons with Disabilities, an additional principle should squarely state that, as far as possible, an impairment in decision making capacity should be met by support and informal arrangements rather than by appointment of a guardian or financial manager.

Prerequisites to the making of guardianship orders

Once the Guardianship Tribunal is satisfied that a person has a disability and is partially incapable of managing his or her person, it needs to decide whether to make a guardianship order. In practice, this usually comes down to the question of "need for an order" as opposed to the person's limited capacity for decision-making being met by informal support from families, advocates and service providers. This approach accords with the UN convention as interpreted by Australia.

However, the Act is not clear that this practice is correct. Section 14(2) of the Act spells out various factors that the Tribunal shall have regard to when deciding whether to make a guardianship order. These factors are basically restatements of factors covered by the general principles in s4 plus a requirement for the Tribunal to consider the views of any spouse or carer. The spouse and carer are in any event parties to the proceedings and so entitled to be heard.

The Administrative Decisions Tribunal has held that s14(2) calls for a process of considering and weighing up the various factors in the section (*IF v IG*

[2004] NSWADTAP 3 at paras 26-28, 31). This interpretation cuts across the human rights principle that a person's decision making rights should only be taken away as a last resort.

It would be both clearer and consistent with Australia's human rights obligations to replace s14(2) with a simple requirement that the Tribunal be satisfied that there is a need for a guardianship order to be made. The Tribunal would still need to consider the principles in s4 where relevant and parties would have a right to be heard, but in the end the question would be whether there is a need for an order as opposed to informal support with decision making.

Prerequisites to the making of financial management orders
Once the Guardianship Tribunal is satisfied that a person is incapable of managing his or her affairs, it has to be satisfied that

1. the person needs someone else to manage their affairs and
2. it is the person's best interests that a financial management order be made. (s25G)

It is unclear what 2. above means. (In *Re R,* Supreme Court Equity Division Protective List 17 August 2000, Young J was inclined to see need as flowing automatically from the person not being able to manage the affairs (paragraph 31). The contrary view is however arguable so that one should look at the adequacy of informal arrangements such as a power of attorney in considering the issue of need. Note *DW v JMW* [1983] 1 NSWLR 61 at 68.)

It would be both clearer and consistent with Australia's human rights obligations to replace s25G (b) and (c) with a simple requirement that the Tribunal be satisfied that there is a need for a financial management order to be made.

Review of financial management orders
At present, these are only reviewed on application or if the Tribunal has specified that a review will occur.

It would be desirable for these orders to be periodically reviewed as a matter of course as are guardianship orders. If this change is to occur, it is essential that the Guardianship Tribunal be fully resourced for the task. Otherwise, the reviews would not be meaningful processes and/or the Tribunal's already overstretched resources would be spread too thinly.

Role of the Public Guardian
The Public Guardian has no mandate to assist an individual unless appointed as guardian. This leads to cases where the Public Guardian is appointed (or reappointed) as guardian not because the person needs someone to have formal decision making authority but because the person needs the advocacy that the Office of the Public Guardian provides as a complement to its decision-making role. In other Australian jurisdictions, the Public Guardian or equivalent has a legislated capacity to advocate for an individual without the need for a guardianship appointment.

It should not be necessary to take away a person' rights in order for advocacy to be provided.

In some other jurisdictions, the Public Guardian or equivalent investigates applications that have been made to the Tribunal and provides a report and recommendation to the Tribunal. In NSW, the Tribunal itself has staff to investigate application. The NSW practice should not be changed. The Public Guardian would face a major conflict of interest if it had the investigation role. The report from the investigation could often influence whether or not the Tribunal appointed the Public Guardian.

Procedural fairness and privacy
An application to the Guardianship Tribunal can be an important protection of an individual and/or an unwarranted intrusion on the person's autonomy and privacy. Decisions of the ADT have said that an applicant is usually entitled to see documents such as confidential financial documents that are placed before the Tribunal (*TC v Public Guardian* [2006] NSWADTAP 15).

Similar issues arise in a range of contexts where it is arguably not in the interests of the person with disability for another party to have full knowledge of evidence. For example, there can be inflammatory evidence, disclosure of which will damage relationships that are important to the person's welfare but which the Tribunal does not see as altering its view of the situation. Disclosure may adversely affect the welfare of the person without assisting the Tribunal to make the right decision in the case.

The law does recognise that the paramountcy of the interests of the person with disability can qualify procedural fairness if unqualified application of procedural fairness would "frustrate the purpose" of the jurisdiction. (*J v Lieschke* (1987) 69 ALR 647 at 653). This is arguably a very strict test.

It would be preferable if there was an explicit statement in the Act that the rules of procedural fairness apply but that those rules are qualified to the extent that the Tribunal sees as necessary in the interests of the person with a disability.

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