

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

Organisation: NSW Guardianship Tribunal
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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

FAXED
21/8/01

Dear Mr West,

Substitute decision making for people lacking capacity

I am writing in relation to the inquiry into substitute decision-making for people lacking capacity. The New South Wales Guardianship Tribunal makes a range of legal orders to facilitate substitute decision-making for people with cognitive disabilities. The Tribunal appoints guardians and financial managers, reviews enduring guardianship appointments and enduring powers of attorneys and makes orders for substitute medical consent when a person lacks capacity to give informed consent for themselves. The Tribunal is established under and operates in accordance with the provisions of the Guardianship Act 1987.

I understand from the terms of reference that the Standing Committee on Social Issues' inquiry in relation to the making of financial management orders for an incapable person will focus on the powers and functions of the Mental Health Review Tribunal. It is not clear to me from the terms of reference the exact focus of the Committee's inquiry in relation to the guardianship of people who have disabilities.

In these circumstances it may be appropriate if I offer to assist the Committee by providing information about the Guardianship Tribunal's jurisdiction and other matters relating to the guardianship legislation if required. I am happy to assist in any way which suits the Committee, perhaps by oral submissions or a written response to submissions received during the inquiry.

I wish to bring one matter to the attention of the Committee at this stage. I am concerned about the recent amendment of section 77 of the Guardianship Act 1987. The New South Wales Trustee and Guardian Act 2009 amended section 77 presumably to facilitate the new structure of the NSW Trustee and Guardian. However the new section 77(4) appears to be unrelated to the structural changes and allows the Public Guardian to delegate his powers in relation to substitute decision making to persons outside the Office of the Public Guardian.

Considerable discussion has occurred in the context of the UN Convention on the Rights of People with Disabilities in relation to substitute decision making and specifically whether the model of substitute decision making, as opposed to assisted decision making, should be endorsed by the Convention. There are strong arguments for the need for substitute decision making with appropriate safeguards and as a last resort.

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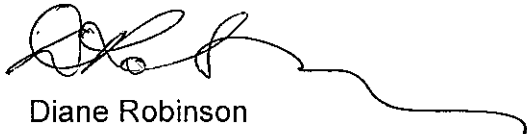
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However, the ability of the public substitute decision maker to delegate decision making powers to others may be regarded as being outside the spirit and intention of the UN Convention when it is permitted without clear and comprehensive legislative safeguards. Such safeguards should prescribe how any scheme for delegated substitute decision making can guarantee the welfare and best interests of people with disabilities. I believe this is a matter which requires immediate legislative attention.

Please feel free to contact me if I can be of any assistance to the Committee. I look forward to hearing from you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'DR', followed by a long, horizontal, wavy line that extends to the right.

Diane Robinson
President
19 August 2009