Submission
No 12

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

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SUBMISSION TO THE SOCIAL ISSUES COMMITTEE OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES

Substitute decision-making for people lacking capacity (Inquiry)

INTRODUCTION

The Committee has been charged with reporting upon –

> The provisions for substitute decision-making for people lacking capacity in New South Wales, and in particular:
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> > (a) whether any NSW legislation requires amendment to make better provision for:
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> > > (i) the management of estates of people incapable of managing their affairs; and
> > > (ii) the guardianship of people who have disabilities

Among the relevant statutory provisions, some are to be found in the Guardianship Act 1987 and in the Powers of Attorney Act (POAA) .

POWERS OF ATTORNEY

When making a prescribed form of power of attorney, the donor or principal is obliged to state -

> My attorney may exercise the authority conferred on my attorney by Part 2 of the Powers of Attorney Act 2003 to do on my behalf anything I may lawfully authorise an attorney to do.

The POAA provides the authority on which the attorney's powers are based in section 9(1)-

> (1) Subject to this Act, a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.

Both the format for the Power of Attorney (POA) and the statute itself leave to the donor or principal the powers duties and obligations which are expressed in the POA and to which the attorney must adhere in acting under the Power. Both also leave to the Law the determination of what is capable of being lawfully authorized.

At one level, it is not hard to understand what may be lawfully authorized. Matters which are unlawful clearly stand outside the authority to be conferred. For example, -

> "as the governing director of the company I authorize my attorney to take out of the company's funds, sufficient money to maintain my home and other property until my return..."

However, if the POA were to state –

> "if I become incapable of making decisions, I authorize my attorney to give all necessary instructions to my medical practitioner, make all accommodation and lifestyle decisions for me including what medical treatment I may need and what treatment, in his sole discretion should be refused".

Such an authorization may well be open to challenge in the Guardianship Tribunal as being an instrument not made under that Act and therefore not capable of being implemented as an Appointment of Enduring Guardian. Moreover if an appointment of Enduring Guardian had been made, perhaps some years later by the same Donor or Principal but in favour of another person, there would be the possibility of conflict between the two persons appointed.

In my experience this apparent dichotomy of the format into which decision making about medical decisions may be articulated, is confusing to lawyers themselves.

This submission suggests that the matter be clarified. It could no doubt be clarified in a number of ways, perhaps the simplest of which is to add a section to the POAA in Part 2, to the effect that a prescribed power of attorney does not authorize the delegation of authority for which an Appointment of Enduring Guardian is intended by the Guardianship Act 1987.

GUARDIANSHIP ACT 1987

There is, it is submitted, a need for greater certainty for delegates appointed under the Guardianship Act, to refuse medical treatment. This is an extension of the right of any person to refuse medical treatment and at common law is a corollary of the law of trespass to the person.

In this field of law, what has detained courts in many countries has been the search for available facts which support the contention that a person wishes to refuse the treatment offered, in the circumstances which have arisen. This kind of forensic search occurs in cases where it is claimed that a person has expressed her/his will in advance and thus has already indicated her/his view on the issue of refusal of consent to medical treatment at a time when s/he cannot speak for her/himself. Until very recently there have been no superior court decisions in Australia, although there have been a number elsewhere, in the USA, UK, Canada and New Zealand[1]. The examples given below are but three of the cases, although the case of *Hunter and New England Area Health Service v A* is the recent case decided by the Supreme Court of New South Wales which now allows some greater certainty in this State upon the subject.

Refusal of treatment as one of the powers of an appointed guardian is hinted at but not explicitly included in the Statute. Section 6E provides, in part:-

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[1] Airedale National Health Service Trust v Bland [1993] AC 789; Re T (Adult: Refusal of Treatment) (1993) Fam 95; Hunter and New England Area Health Service v A [2009] NSWSC 761.

... an instrument appointing a person as an enduring guardian authorises the appointee, while the appointment has effect, to exercise the following functions:

(a) deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live,
(b) deciding the health care that the appointor is to receive,

(c) deciding the other kinds of personal services that the appointor is to receive,

(d) giving consent under Part 5 to the carrying out of medical or dental treatment on the appointor,

(e) any other function relating to the appointor's person that is specified in the instrument.

(2) The instrument of appointment may limit or exclude the authority it confers in relation to any one or more of the functions specified in subsection (1).

True it is that the power to give consent when included in a statute is also to imply that consent may not be given. However that may not be so apparent to a person not trained in the law. To that extent the power to refuse, a very important part of the reason for many people giving an Enduring Guardianship Appointment, should not be shrouded in any mystery. Neither should it give rise to any doubt on the part of the delegate upon whom the power, not just to withhold consent, but to initiate refusal of treatment, may be placed. Such matters are not for the faint hearted when tested against the best medical advice about the inevitable outcome of refusal of treatment.

This submission suggests that Section 6E of the Guardianship Act 1987 be amended to allow for an explicit right for the appointee to exercise the function of refusing medical treatment if that refusal can be found, in terms which have arisen, in the instrument of appointment itself.

ADVANCE MEDICAL DIRECTIVES

Although the right to refuse treatment is available at common law as suggested earlier in this submission, a case has recently been decided by Justice McDougall of the Supreme Court of New South Wales reported as Hunter and New England Area Health Service v A [2009] NSWSC 761 reported on 14 August 2009. This case has now ended the period of the absence in New South Wales of a case which addressed the facts and law of refusal of medical treatment and the right to withdrawal of treatment, in circumstances where the patient was incapable o f making a decision.

In New South Wales the common law governs matters such as the right to refuse medical treatment, including in advance, unless directions are given explicitly in an instrument made under section 6E of the Guardianship Act. Put another way, there is no codified attempt in this State to cover the field of the legal treatment of advance medical directives and refusal of medical treatment.

Legislation exists in the States of Victoria, Queensland and South Australia[2], each of which could add something useful to the possible reform of law in this area in New South Wales. A detailed review of the Legislation has not been made but reference may be made to Elder Law in Australia[3] as one text which addresses this field of statute law, although not in detail.

DATE: 20th August, 2009

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[2] Medical Treatment Act 1988 (Vic);Powers of Attorney Act 1998 (Qld); Consent to Medical treatment and Palliative Care Act 1995 (S.A.).

[3] Lewis, R., Lexis Nexis, Sydney, 2004, pp 278-295.