

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

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**Inquiry into Substitute Decision-Making
for People Lacking Capacity**

Submission on behalf of

Legal Aid NSW

to the

Legislative Council Social Issues Committee

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Mental Health Advocacy Service ("MHAS") of Legal Aid NSW provides a specialised service representing disabled people appearing before the Guardianship Tribunal and Mental Health Review Tribunal ("MHRT") in the Sydney metropolitan area. Assistance and representation in such cases is also provided by solicitors in our regional offices. This brief submission draws on the experience of the solicitors and advocates who provide these services.

Introduction

The Attorney General has asked the Social issues Committee to consider

- whether the NSW legislation requires amendment to make better provision for the management of estates of people incapable of managing their affairs, and
- the guardianship of people who have disabilities

It also asks the Committee to consider three possible amendments to the *NSW Trustee and Guardian Act 2009 (NSW)* ("the Act").

Our submission addresses these specific proposals from the perspective of our experience in representing clients subject to guardianship or management orders. Two scenarios based on the kind of cases we provide assistance in illustrate the way these proposals might work.

Submission

Attorney General's Proposals

1. To amend the Act to allow the relevant Court or Tribunal to exclude parts of an estate from financial management (similar to section 25E of the *Guardianship Act 1987*).

Legal Aid NSW supports this proposal. The following scenario illustrates a possible application of the proposed amendment.

Client X has a history of mental illness but has not had any recent admissions due to appropriate and effective community treatment. Client X has recently received a lump sum payout for a victim's compensation matter. Unfortunately, the client's mental state deteriorates and changes in behaviour include the giving away large sums of money to relative strangers. Client X is admitted to hospital involuntarily.

The treating team are concerned about the client's vulnerability to exploitation and the possibility of unscrupulous parties accessing his lump sum payout. They argue that the giving away of large sums of money to strangers is evidence of a lack of capability to manage affairs. An application for a financial management order is made to the MHRT and an order is made.

This proposed amendment would enable the court or tribunal to make a determination which would ensure the protection of the lump sum but exclude the client's Disability Support Pension, allowing the client to retain some control of his or her day to day financial affairs. This is a lesser restrictive arrangement than a financial management order which controls all of the client's estate. It is better aligned with the "lesser

restrictive" Principles of section 39(b), (c) and (f) whilst at the same time appropriately considering the protective function of the principle referred to in section 39(g) of the Act.

2. To amend the Act to allow the Supreme Court or the Mental Health Review Tribunal to vary or revoke an order (even where the person remains incapable of managing their affairs) on the application of a person who, in the opinion of the Supreme Court or the MHRT, has a genuine concern for the welfare of the protected person.

Legal Aid NSW supports the proposal. In particular, allowing the MHRT to vary or revoke a financial management order, even though the person subject to the order remains incapable of managing his or her finances, by considering broader grounds, such as an order being in the "best interests" of the person would be desirable. This has been possible in proceedings before the Guardianship Tribunal under section 25P(2)(b) of the *Guardianship Act 1987* (NSW).

The following scenario illustrates a possible application of the proposed amendment.

Client Y is an Aboriginal man with a history of chronic schizophrenia. He lives in a small regional centre with his mother and grandmother. Members of the local community are aware of client Y's mental health issues. Due to the chronic nature of Client Y's illness he has always had difficulty managing his finances and an informal arrangement has been developed where the local bank disburses a small amount of his pension daily. On any occasions when he requires more money for purchases such as clothing, his mother or grandmother attend the bank with him and provide informal authorisation for the release of further funds.

Client Y experiences deterioration in his mental health whilst visiting Sydney and is admitted to a large metropolitan hospital. The treating staff assess him as being incapable of managing his finances and a financial management order is applied for and made by the MHRT. There is no consultation with client Y's family. The acute episode is treated and client Y returns home.

Client Y is not able to return to the informal financial arrangement that had worked for him and his family, as his usual level of functioning is such that he is never able to demonstrate the capacity to manage his affairs. He and his family are now required to negotiate with the Office of the Protective Commissioner for the release of additional funds when required.

This proposed amendment would enable Client Y's mother or grandmother, as people with a genuine concern for the welfare of the protected person, to make an application

for revocation of the order. The previous informal plan could be detailed and provided to the Tribunal along with supporting documentation from the relevant parties such as the local bank tellers. A return to this plan could be assessed in relation to the principles in section 39 of the Act or in relation to the principle of the client's "best interest".

Without this amendment, a client with a chronic mental illness with symptoms which impair capacity may never be in position for any alternative form of management of their estate once an order is made.

3. To amend the Act to allow the MHRT to appoint a private manager.

Legal Aid NSW supports this proposed amendment. The example used in Issue 2 could equally be applied with Client Y's mother or grandmother being considered for the role of private manager either at the point of the making of the order or subsequently in an application to the MHRT for variation.

The appointment of a private manager in this circumstance would recognise both the protective principle in section 39(g) of the Act as well as the importance of preserving the family relationships and cultural and linguistic environments of people subject to orders under section 39(e).

CONCLUSION

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Bronwyn McCutcheon, Executive Officer, on 02 9219 5973, or via email at: bronwyn.mccutcheon@legalaid.nsw.gov.au.