

Submission No.....75
Date Received.....

Guardianship Tribunal

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The Secretary
House of Representatives Standing Committee
On Legal and Constitutional Affairs
P.O. Box 6021
Parliament House
CANBERRA ACT 2600

RECEIVED
7 DEC 2006
BY: LACA

Dear Secretary,

Re: Inquiry into Older People and the Law

The NSW Guardianship Tribunal seeks to promote the rights and interests of people with disabilities in NSW by facilitating substitute decision making on their behalf. Approximately half of the 5,428 new applications the Tribunal received in the 2005/06 financial year related to people with aged related disabilities, such as dementia and strokes.

The NSW Guardianship Tribunal is a member of the Australian Guardianship and Administration Committee. The Tribunal is aware of and supports the submission that has been made on behalf of AGAC.

I note the standing committee's terms of reference deal primarily with the adequacy of current legislative regimes in addressing issues of fraud and financial abuse. 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. 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. In 2005/06 the Tribunal received 2,318 applications for a financial management order and 58 applications to review an enduring power of attorney. It should be noted however, that most of these applications would not relate to a situation of financial abuse or exploitation.

The NSW Guardianship Tribunal is well aware of the kinds of fraud and financial abuse that is detailed in the AGAC submission. Those examples are representative of issues exposed in the hearing of applications.

New Powers of Attorney Act

Some years ago the NSW Guardianship Tribunal and other State departments, recognised the problems associated with the abuse of enduring powers of attorney. After the release of a discussion paper a new Powers of Attorney Act 2003 was proclaimed on 16 February 2004. That Act seeks to provide remedies for the "pathology" that is sometimes associated with Enduring Powers of Attorney. In particular, a new form of appointment

was adopted which provided more information to appointors and their attorneys about their respective rights and legal obligations.

The Guardianship Tribunal was granted jurisdiction to review the making and operation and effect of an enduring power of attorney, whereas previously, matters could only be reviewed by the Supreme Court. This was very costly, and consequently few applications were made unless considerable assets were involved.

Under the new Powers of Attorney Act 2003, both the Guardianship Tribunal and the Supreme Court were authorised to be able to declare that the principal who made an enduring power of attorney was no longer competent to manage their affairs¹. This prevents the principal, who lacks capacity, from continuing to be able to demand their money from a financial institution or from entering into binding financial contracts.

The Role of the Guardianship Tribunal

The Guardianship Tribunal provides a free and accessible forum for the hearing of applications for guardianship and financial management orders and reviews of enduring powers of attorney and reviews of the appointment of enduring guardians, among other things. Anyone with a genuine interest in the welfare of a person with a disability can make an application to the Tribunal to determine if there is a need to make orders to protect the interests of that person. The increasing number of applications made each year indicate that the Tribunal provides an effective mechanism to address the needs of older Australians for the appointment of substitute decision makers who can protect and enforce the legal rights and interests of people for whom a guardian and/or financial manager is appointed.

In NSW, people who are the subject of an application to the Tribunal can be legally represented with the leave of the Tribunal. Or the Tribunal can appoint a separate representative if the person is unable to provide instructions. The subject of an application to the Tribunal is entitled to representation by a Legal Aid solicitor. This is currently not means or merit tested. However, the majority of people who are the subject of an application to the Tribunal appear unrepresented. In NSW there is one Community Legal Centre that is dedicated to assisting older people, the Aged Care Rights Service, and they deal mostly with advice and assistance relating to accommodation and associated issues.

Barriers to Accessing Legal Services

Older Australians face the same barriers to legal services as the rest of the community. Primarily, this relates to limited personal and public resources and a lack of knowledge as to where to access information and legal advice. Older Australians can also be hampered in their access to legal services because of a physical or cognitive disability and the reluctance of legal service providers to travel to see the person in their own home or hospital, etc.

In NSW there has been an attempt to address the knowledge base of lawyers practising in the field of elder law. In October 2001 the University of NSW hosted a forum on

¹ (NSW) Powers of Attorney Act 2003, s.36 (4)

dementia awareness for lawyers. More recently, the NSW Law Society has produced guidelines for lawyers to help them assess the capacity of a person who approaches them to witness an enduring power of attorney². There are regular continuing legal education sessions advising practitioners of the new Powers of Attorney Act and the role of the Guardianship Tribunal in reviewing enduring powers of attorney. Such education programs help to develop the skills and awareness of solicitors who may be approached to draft documents for older persons who may not be competent to instruct a solicitor.

In NSW there is no body that has a general mandate to investigate matters and advocate for systemic change. The establishment of a body that was authorised and adequately resourced to undertake systemic advocacy could benefit many older Australians in NSW by effectively eliminating some of the barriers and practices that currently disadvantage older persons.

Thank you for the opportunity to make this submission to the inquiry. I would be happy to discuss it further in person, should you require.

Yours faithfully,

Marion Brown
Deputy President
1 December, 2006

² Guidelines for Solicitors Preparing an Enduring Power of Attorney, Law Society of NSW, December 2003