Review of the Guardianship Act 1987

Legal Aid NSW Submission to NSW Law Reform Commission

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Legal Aid NEW SOUTH WALES

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About Legal Aid NSW

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 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.

Legal Aid NSW provides Civil Law services to some of the most disadvantaged and vulnerable members of our society. Currently we have over 150 civil lawyers who provide advice across all areas of civil law.

The specialist Mental Health Advocacy Service of Legal Aid NSW provides representation to clients in the Guardianship Division of NCAT on a direct representation basis and when NCAT orders that the client be separately represented. The service assisted 328 clients in 2014-2015, through in-house or private practitioners.

Legal Aid NSW welcomes the opportunity to respond to the Review of the *Guardianship Act 1987* (NSW). These submissions are those of specialist practitioners employed by the Mental Health Advocacy Service of legal Aid NSW.

Should you require further information or would like to discuss any of our recommendations, the contact officers are:

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Review of the Guardianship Act 1987

Legal Aid NSW has confined the comments in this submission to those terms of reference of the Review that relate to the practice of the Mental Health Advocacy Service of Legal Aid NSW.

The relationship between the Guardianship Act 1987 (GA) and the Mental Health Act 2007 (MHA).

Voluntary Patients

While it appears that the relationship between the two statutes with regard to voluntary patients is clear, Legal Aid NSW submits this is not the case.

In summary:

- Section 7 of the MHA permits a person to be admitted to a mental health facility at the request of their guardian.
- Section 8(2) of the MHA states that a voluntary patient may discharge themselves at any time.
- Section 8(3) states that an authorised medical officer must give notice of the discharge of a voluntary patient who is a person under guardianship to the person's guardian.

These sections would suggest that while a guardian may request the person's admission to a mental health facility, the patient is entitled to self-discharge. In the experience of Legal Aid NSW, this position is not necessarily accepted by the NSW Public Guardian. Pursuant to sections 21(1)(a) and 21A of the GA, a guardian may be appointed with the powers to determine where someone may reside and may be given coercive powers to enforce that decision.

The apparent conflict between these positions was explored in the case of *Sarah White v The Local Area Health Authority and Anor* [2015] NSWSC 417. The applicant was ordered to be discharged by the court, supporting primacy of the provisions of the MHA. However, in our submission, the judgement did not settle the issue. The case was determined largely on its facts, including that an order for discharge had been made by the Mental Health Review Tribunal (MHRT) and that the applicant's original admission as a voluntary patient was not at the request of the guardian.

Legal Aid NSW submits that this issue should be clarified. Legal Aid NSW supports the view that, for the purposes of admission as a voluntary patient to a mental health facility, it is the wishes of the person and not the guardian which are to be taken into account. We submit that the MHA properly sets out the specific rules for detention for mental health treatment and that this statute covers the field.

It is neither necessary nor appropriate to create a second class of involuntary 'voluntary' patients. While a guardian may have enforcement powers and decide to require someone to remain in other accommodation, we submit that mental health facilities, including psychiatric hospitals, and prisons have their own empowering legislation with a detailed review structure.

Recommendation

Legal Aid NSW recommends that the relationship between the *Guardianship Act 1987* and the *Mental Health Act 2007* be clarified in relation to admission of voluntary patients to mental health facilities. Legal Aid NSW recommends that the provisions of the Mental Health Act should have priority in this context.

Community Treatment Orders (CTOs)

CTOs raise a similar issue to that of involuntary 'voluntary' admission to a mental health facility. Division 4 Part 3 of the MHA provides a scheme for the involuntary administration of psychiatric treatment in the community through CTOs.

These CTOs require the patient to be present, at the reasonable times and places specified in the order, in order to receive the medication, therapy, counselling, management, rehabilitation and other services provided in accordance with the treatment plan (section 56 (1)(b) MHA). The MHA sets out a detailed scheme of the conditions precedent for making such an order and the manner in which it may be enforced.

Legal Aid NSW appeared in one matter in which an application was made to the Guardianship Division of NCAT (NCAT) for an order to enforce psychiatric treatment in the community, relying upon the guardian's consent to medical treatment power and the power in section 21A of the GA to enforce that treatment.

Legal Aid NSW understands (anecdotally) that this is actually occurring in some other instances. In our matter, NCAT accepted that an order could not be made to provide an alternative CTO regime (QCM [2015] NSWCATGD 38). Legal Aid NSW submits that the law should be clarified and provide that where there is a comprehensive scheme for involuntary psychiatric treatment set out in the MHA, it is inappropriate to allow the more general provisions of the GA to establish a less rigorous alternative arrangement.

Recommendation

Legal Aid NSW recommends that the relationship between the *Guardianship Act 1987* and the *Mental Health Act 2007* be clarified in relation to involuntary administration of psychiatric treatment in the community under Community Treatment Orders and that it be clear that the MHA provides the only statutory regime for enforcement of such orders.

The NSW Trustee and Guardian Act 2009 (TAGA)

For the purpose of this Submission, the relevant provisions of TAGA may be summarised as follows:

- Sections 43 to 52 of TAGA provide that the MHRT may, at a mental health inquiry, consider whether a patient is capable of managing his or her affairs.
- If the MHRT is satisfied that the person is not capable of managing his or her affairs the MHRT may order that the estate of the person be subject to management under TAGA (section 44).
- Section 45 of TAGA provides that the MHRT may order the estate of a forensic patient be subject to management under TAGA.
- Section 46 of TAGA provides that the MHRT may, on application, consider a person's capability to manage their affairs (in circumstances other than at a mental health inquiry). Applications may be by anyone that the MHRT considers to have sufficient interest. The MHRT may, if it considers that the person is not capable of managing his or her affairs, order that the estate of the person be subject to management under TAGA.
- The MHRT may make interim orders (section 47) and review interim orders (section 48).
- Section 49 of TAGA provides for appeals to the Supreme Court. The court may confirm or revoke the order.
- Section 50 of TAGA provides for appeals to NCAT on a point of law or, with leave of NCAT, on any other grounds.
- Section 52 of TAGA provides that the estate of a person that is ordered, under this Part, to be subject to management is then committed to the management of the NSW Trustee and Guardian, subject to any special order of the Supreme Court.
- Section 88 of TAGA provides that the MHRT may revoke an order on application by the person if the person is no longer a patient and it is satisfied that the protected person is capable of managing his or her affairs or that the revocation is in the best interests of the person.

The MHRT is therefore empowered to make and revoke financial management orders but can only place the estates of people under order in the management of the NSW Trustee and Guardian.

These provisions enable a person to appeal against the decision to either the Supreme Court or NCAT and seek to have the order revoked, or in the case of the Supreme Court, have the order amended to provide for the person's estate to be managed by someone other than the NSW Trustee and Guardian.

This position should be contrasted with Part 3A of the *Guardianship Act 1987* which gives the Guardianship Division of NCAT much wider powers to appoint financial managers other than the NSW Trustee and Guardian, including to review and revoke financial management orders and to review the appointment of financial managers.

NCAT may appoint a family member or close friend as a financial manager in the first instance and it may also change the appointed financial manager, if appropriate.

Legal Aid NSW submits that problems arise because a person with a mental illness who cannot manage his or her affairs can have very different results when their incapacity is considered by two different tribunals.

An order made under TAGA is more restrictive than an order made under the GA.

TAGA provides for quick action to be taken to safeguard a person's financial affairs when they are at their most vulnerable. The MHRT can act swiftly to place a person's estate under the management of the NSW Trustee and Guardian whereas an application to the Guardianship Division may take some months to be heard, save for emergency applications.

This means that a person who is not capable of managing their affairs but has a family member or friend who could, or who at a later stage has a family member or friend offer to manage their affairs, must appeal to the Supreme Court to have their order reviewed and changed.

The Mental Health Advocacy Service of Legal Aid NSW takes many calls from people under financial management who wish to have their order revoked. In a great many cases these people lack the capacity to manage their own affairs.

In a smaller number of cases, however, Legal Aid NSW has been contacted by people whose affairs were ordered by the MHRT to be placed under management and who have a trustworthy person in their life who could manage their affairs. When it is explained to the person that they need to apply to the Supreme Court to have their order reviewed they often become discouraged and we do not receive any further contact.

Legal Aid NSW does not support changing the current powers of the MHRT to order that the estates of involuntary patients be placed under management. Instead, Legal Aid NSW recommends empowering the NCAT to review financial management orders made by the MHRT in cases where a substitute manager has been identified.

Legal Aid NSW submits that the benefits would include:

- *Equity* - Putting people with mental illness whose affairs have been put under management by both tribunals on a more equal footing.
- *Simplicity* – the Guardianship Division of NCAT already reviews its own financial management orders.
- *Cost effectiveness* – the numbers of additional reviews envisaged by the proposed change will not be excessive and will not require any additional resources.

Recommendation

Amend the *Guardianship Act 2007*, the *NSW Trustee & Guardian Act* and the *Mental Health Act* in order to facilitate the review of financial management orders by the Guardianship Division of NCAT, even where the orders have been made by the Mental Health Review Tribunal.

Relationship with Legal Aid NSW and Separate Representation

Pursuant to section 45(4)(c) of the *Civil and Administrative Tribunal Act 2013* (NCAT Act), NCAT may order that a party be separately represented. Where such an order is made, NCAT notifies Legal Aid NSW. In most cases we provide a grant of legal aid to that person and appoint a legal representative. Legal Aid NSW policy is that such matters are not means tested.

Section 12(b) of the *Legal Aid Commission Act 1979* requires Legal Aid NSW to have regard to the need for legal aid to be readily available and easily accessible to disadvantaged persons throughout New South Wales.

The Guardianship Division of NCAT has the power to order that persons be separately represented where it considers that the interests of a subject person would be protected by such an appointment. Legal Aid NSW has applied the same policy to NCAT appointments as it does to applications for legal aid for representation received from a person. Subject to limited exceptions we grant aid and provided a separate representative without the application of a means test.

However, in an increasing number of matters the client is not economically or socially disadvantaged and accordingly is not within the class of persons that Legal Aid NSW was established to assist.

The referral of these clients to Legal Aid NSW for representation enables NCAT to secure the services of an experienced and independent practitioner. It is the referral aspect of this service (rather than the provision of free legal services) which is required by NCAT in a small but significant number of matters.

The Guardianship Division of NCAT does not usually make costs orders. The usual situation is covered by section 60 of the NCAT Act which provides for each party to pay their own costs unless there are special circumstances.

Legal Aid NSW submits that section 60 of the NCAT Act should be amended to include a provision that, where an order has been made that a party be separately represented, at the conclusion of the matter NCAT should consider whether in its view the party is able to pay for that representation without hardship. If NCAT forms that view, NCAT should have the discretion to order that the costs of the representation provided by Legal Aid NSW be paid from the person's estate. This would ensure that Legal Aid NSW may continue to provide a separate representative in the maximum number of matters.

Recommendation

In cases where the Guardianship Division of NCAT has made an order for separate representation and has referred the client to Legal Aid NSW for a grant of legal aid, section 60 of the NCAT Act should be amended to allow NCAT to make costs orders for the Legal Aid NSW representation to be paid from the client's estate (where this would not cause undue hardship).