

# COAT/AIJA CONFERENCE - THE TRIBUNAL OF TOMORROW

The impact of Australia's decision to ratify the UN Convention on the Rights of Persons with Disabilities on the legislation governing, and the practice of, guardianship and mental health tribunals in Australia.

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# Use of the UNCRPD

- There are no NSW Guardianship Tribunal decisions, nor Administrative Decisions Tribunal or NSW Supreme Court appeal decisions that refer to the UNCRPD.
- Many of the Article 12 safeguards are already reflected in the principles in section 4 of the NSW Guardianship Act.
- The principles in section 4 are observed by Registry staff in the pre-hearing process and by Tribunal panels when making decisions.

# Principles in the Guardianship Act

## 4 General principles

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

# Use of the UNCRPD - Victoria

- Victoria has predominantly used the UNCRPD in tribunal decision making - the effect of the Human Rights Charter.

*Nicholson & Ors v Knaggs & Ors* [2009] VSC 64 per Justice Vickery:

The UNCRPD “... reflects a movement from treating persons with disabilities as objects of social protection towards treating them as subjects with rights, who are capable of claiming and exercising those rights and making decisions based on free and informed consent as active members of society” [13].

See also: *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646 and *PJB (Guardianship)* [2010] VCAT 643.

# NSW pre-hearing procedures

- Application triage – prioritising matters according to risk.
- Listing of matters – hearing venues (regional, disability access venues), hearing durations, 3 member panels, availability of interpreters, teleconference and videoconference facilities, hearing aid equipment, appointment of separate representative.

# NSW pre-hearing procedures

- Procedural fairness and document exchange – The Tribunal Officer explains the application and the processes to the subject person, obtains the subject person's views, prepares a hearing report collating of the documents and views of the participants, release of all documents submitted for the hearing and the hearing report to parties.
- Business process review 2010/2011 – refocusing all procedures on the rights of the person with the disability.

# Tribunal decision-making

- Orders are a last resort – limited and reviewed.
- Orders should be least restrictive – tailoring the functions.
- Presumption of capacity at common law and the legislative tests to make an order promote the principles:
  - Guardianship - required to find disability, capacity and need (no presumption that disability equates to incapacity).
  - Financial management – required to find incapacity, best interests and need.

# Standing Committee on Social issues

- Substitute decision-making for people lacking capacity (Report 43, March 2010) recommendations:
  - Focus on capacity rather than incapacity.
  - Principles of the UNCRPD should be explicitly imported into NSW legislation.
  - NSW legislation should be consistent in reflecting UNCRPD principles in provisions relating to substitute decision making.
  - A requirement of automatic review of FM orders.
  - Safeguards and monitoring – orders should be as short as is appropriate, substitute decision makers should be held to high standards and monitored.



# Victorian Law Reform Commission

## Review of Guardianship

- Major recommendations:
  - Victoria should have a new Guardianship Act, integrating all acts that currently relate to substitute decision making for persons with disabilities as well as principles that reflect modern guardianship values – including that a person with a disability has the same rights as those set out in the Convention.
  - Supported and co-decision making arrangements to be created in the legislation.

# Victorian Law Reform Commission

## Review of Guardianship

- Triaging, notice requirements and procedural fairness principles to be incorporated into the legislation.
- All initial applications should be conducted in the presence of the subject person or by reasonable arrangements.
- A subject person has a right to legal representation, any other person may be represented with leave of the Tribunal.
- VCAT should seek to enter into arrangements with Victoria legal aid or other providers of a pro bono service to enable a representative to be appointed by the Tribunal when required.

# Victorian Law Reform Commission

## Review of Guardianship

- Initial applications should be heard by 3 members with different expertise.
- All guardianship and financial administration orders are to be reviewed by VCAT at regular intervals, which should ordinarily be not less than annually for guardianship and not less than every three years for FM (either full review hearing, by telephone or on the papers).
- Internal appeals within VCAT.

# Issues for reform in NSW – impact of the UNCRPD on the jurisdiction

- Financial management orders – should be limited and reviewed regularly.
- Mandatory legal representation/separate representation.
- Remove plenary guardianship orders from the Act.
- An express presumption of capacity.
- An express principle of proportionality.
- Supported/assisted decision making.

# Working within the paradigm shift

- Incorporation of UNCRPD articles into NSW Legislation.
- Legislative supported/assisted decision making.
- European Commissioner's reports into the Right to Legal Capacity and the Right to Live Independently for persons with disabilities (March and April 2012).
- Projects at the Public Guardian, NSW Trustee and Guardian to trial supported decision making.
- Guardianship Tribunal's trial of "conciliation stream" pre-hearing processes.