

Motions & Mentions

Bar Council Discusses Proposed Guardianship Legislation

The N.S.W. Council for Intellectual Disability sought the Bar Council's support for proposed N.S.W. Legislation dealing with the Guardianship of Intellectually Disabled adults. The legislation envisages the establishment of a small tribunal comprising people with formal and informal training to make decisions about the appropriateness of guardianship orders for intellectually disabled adults and to make those orders. Similar legislation generated some controversy in Victoria regarding the question whether it is appropriate to commit such powers to such a tribunal in preference to the Supreme Court.

The Bar Council considered that question. It was not in a position to reach a concluded view because the legislation was not available, however it reached the following preliminary views.

1. There appears to be at present a gap in the law regarding decision-making for intellectually disabled adults who are unable to make their own decisions. In many instances, this is filled on a **de facto** basis, sometimes unsatisfactorily.
2. The proposal is that the gap be filled by the appointment of guardians, plenary or restricted, under the new legislation. In some instances, such as major medical procedures, decisions would be shared by the guardian and the tribunal itself. This proposal obviously raises the questions whether it is more appropriate for such fundamental rights to be dealt with by such a tribunal or by the Supreme Court.
3. The Bar Council is of the view that the Supreme Court is the appropriate repository for the powers to be given to the new tribunal.
 - (a) Under the Protected Estates Act, 1983, it is the Supreme Court which, when satisfied that a person is incapable of managing his or her affairs, is given the power to order that the estate of that person be subject to management under the Act. Stipendiary Magistrates and the Mental Health Review Tribunal are given certain powers in relation to persons who come within the ambit of the Mental Health Act, 1983. But if the legislature sees fit to give to the Supreme Court power over an incapable person's money and property then **a fortiori** it should be the Court which has power to appoint a guardian who has much more power relating to an incapable person's person and social habits. The Council is of the view that it is inappropriate to have powers over an individual and over his or her property resting in two separate institutions and, further more, that the only appropriate institution in those circumstances should be the Supreme Court.
 - (b) The power which a guardian has over a disabled person would include controlling where the person is to live or work, what education the person is to have and whether the person should

have an operation. Whether an individual is so incapable that control over those areas relating to him should be placed in the hands of another is, in the Council's view, a question which is fundamental to that individual's rights and should only be determined by the Supreme Court.

- (c) The cost of establishing and running the proposed Tribunal is not warranted when the Supreme Court can already provide the needed facility. □

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