



CCS
disability action
Including all people

TE HUNGA HAUĀ MAURI MŌ NGĀ TĀNGATA KATOA

Submission on the Courts Matters Bill

16 February 2018

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Recommendations

1. The Bill should require a process to be set out for managing conflict between welfare guardians under the same order.
2. The Bill should require welfare guardians under the same order to regularly consult with each other.
3. The Bill should introduce ways for courts to dismiss, without replacing, or add welfare guardians through the Section 86 review process
4. The Bill should state that assessing the continued capability of the welfare guardian or manager is an item that can be reviewed in Section 86 and 87 reviews.

Introduction

Thank you for the opportunity to submit on the Court Matter Bill. This Bill makes a number of amendments to the Protection of Personal and Property Rights Act 1988. In particular, sections 136, 141 and 142 in the amendment Bill lower the threshold for courts to appoint more than 1 welfare guardian and to extend personal order to 5 years. The amendment Bill does this by removing the term exceptional circumstances from the criteria for these two actions. By lowering the threshold, both actions are likely to happen more often.

We believe further changes are needed to the Bill to make the lowering of these thresholds safe and practical.

About us

CCS Disability Action is a community organisation that has since 1935, supported disabled people and advocated for their inclusion in the community. As of May 31 2017, we were providing support to around 4,000 children, young people and adults through our 17 branches, which operate from Northland to Invercargill. Our support focuses on breaking down barriers to participation. We receive a mixture of government and private funding.

Further changes needed to make orders with more than one welfare guardian safer and easier to administer

Making the appointing of more than one welfare guardian easier is potentially a positive move. It will help ensure succession and back-up in the event of a welfare guardian being unable to perform their duties. It may also keep more people involved in a person's life. The Bill in its current form, however, fails to fully think through the consequences of appointing more than one welfare guardian. There are a number of further changes needed to ensure people's safety and to prevent them from facing excess bureaucracy.

Firstly, there should be a process for managing conflict between welfare guardians. The Bill should either set-out a process for managing any conflict

or require a court to give directions to the welfare guardians on how to manage any conflict. A further alternative would be for the Act to require courts to establish primacy amongst the welfare guardians with one welfare guardian being the primary guardian. We acknowledge welfare guardians can always request a review to address conflicts. It would be preferable, however, if there were ways a welfare guardian could try first to resolve conflicts without going through a court process.

Secondly, when there is more than one welfare guardian, there is a need to prevent situations where it is unclear who is taking primary responsibility at that moment for the person's welfare. If several welfare guardians are involved, miscommunication between them could result in accidental negligence. The Act should require welfare guardians to regularly consult with each other, similar to the existing consultation requirements in sub-sections 18 (4c) and 18 (5) of the Protection of Personal and Property Rights Act 1988.

Thirdly, currently, the only way to dismiss a welfare guardian is for the related order to be discharged by a court or for the welfare guardian to be replaced by a new welfare guardian through a Section 86 review. If having more than one welfare guardian becomes more common, it would be preferable for the Bill to explicitly introduce ways for a court to dismiss, without replacing, or add welfare guardians through the Section 86 review process.

A strict reading of Section 86 would prevent a court from dismissing an existing welfare guardian through the review process without a new welfare guardian replacing them, even if there were other welfare guardians under the same order. The existing wording of the Act is that any replacement is a "new" welfare guardian, which would imply that existing welfare guardians cannot be the replacement for the particular welfare guardian being dismissed.

Recommendations

1. The Bill should require a process to be set out for managing conflict between welfare guardians under the same order.

2. The Bill should require welfare guardians under the same order to regularly consult with each other.
3. The Bill should introduce ways for courts to dismiss, without replacing, or add welfare guardians through the Section 86 review process.

Reviewing the capabilities of welfare guardians and managers

We are concerned about the lowering of the threshold for 5 year extensions given the current gaps in the oversight of welfare guardians and managers. In particular, there is a lack of explicit authorisation for courts to assess the welfare guardian or manager's continued ability to carry out their duties. Section 12 (5a) of the Protection of Personal and Property Rights Act 1988 requires courts to be satisfied that the welfare guardian is capable of carrying out their duties in a satisfactory manner when appointing them. Section 31 (5a) sets a similar requirement for courts when appointing managers of property.

Further Section 89 allows the individual decisions of welfare guardians or managers to be reviewed. Yet Sections 86 and 87 do not explicitly mention assessing the continued capability of the welfare guardian or manager as an item for review. This seems to be an oversight and many courts would review the capability of the welfare guardian or manager without explicit authorisation. It would prevent confusion and encourage courts to consider the welfare guardians or managers' capabilities during reviews, if reviewing the capability of welfare guardians or managers was made an explicit ground for review under Section 86 and 87.

Through our work, we have found that courts make mistakes and we have seen cases where guardians and managers clearly lacks the skills to manage the person's welfare and/or property in a safe and adequate way. The result is neglect and abuse. It is important that there is a clear legal pathway to address and prevent these situations.

Recommendation

4. The Bill should mention assessing the continued capability of the welfare guardian or manager as an item that can be reviewed in Section 86 and 87 reviews.

Supported decision-making

Finally, although outside of the scope of the Court Matters Bill, we want to raise the need to move the Protection of Personal and Property Rights Act 1988 towards a supported decision-making model.

There has been a steady move in the disability community from substitute decision-making to supported decision-making where the person makes the decision with the right support. Supported decision-making also uses the test of whether a decision reflects the person's will and preference rather than the test of just being in person's interests (Office for Disability Issues, 2017).

There is growing awareness in the disability community that some people previously thought to be unable to make an informed decision can with the right support. Article 12 of the Convention on the Rights of Persons with Disabilities requires the government to provide support to ensure people with disabilities can exercise their legal capacity. Of note, both British Columbia (Representation Agreement Act) and Ireland (Assisted Decision-Making (Capacity) Act 2015) have moved towards supported decision-making.

The current Protection of Personal and Property Rights Act 1988 uses a substitute decision-making model. There is a need to shift the Act to a supported decision-making model, through either progressive changes or a major overhaul.

Conclusion

Once again, thank you for the chance to submit on the Court Matters Bill. While we note this Bill has limited scope, the Protection of Personal and

Property Rights Act 1988 needs significant changes, including a move to a supported decision-making model. We look forward to the Committee continuing to reform this important Act.

Bibliography

Convention on the Rights of Persons with Disabilities. (n.d.).

Office for Disability Issues. (2017, February 08). *Promoting choice and control*. Retrieved from Office for Disability Issues:

<https://www.odi.govt.nz/whats-happening/promoting-choice-and-control/>