Dear Sir/Madam

Thank you for the opportunity to comment on the review of the Guardianship and Management of Property Act 1991 (ACT).

The attached submission has been prepared by the Elder and Succession Law Committee of the Law Society of the ACT for your consideration.

Please do not hesitate to contact me should you require any further information in relation to the attached.

Yours sincerely,

Dianne O’Hara
Chief Executive Officer
The Elder Law & Succession Committee (the Committee) has been actively considering the need for law reform for some time. The Guardianship and Management of Property Act 1991 (the Act) is now under review and the Committee makes the following submission.

The Committee understands that Government is focussed on big-picture reform rather than reform of the detail of the legislation.

While the Committee broadly supports the intended changes, it also believes that any reform must be calculated so as not to undermine the lawful decisions and decision-making of duly-appointed attorneys, guardians and financial managers. The Committee also believes that the finer detail of the legislation should be considered either now or in the near future.

The Committee is also concerned to ensure that the Act and the Powers of Attorney Act 2006 operate in harmony.

1. **Policy Issues**

The United Nations Convention on the Rights of Persons with Disabilities (the Convention) emphasises the autonomy of the individual.

Article 3 of the Convention reads:

**Article 3 – General Principles**

The principles of the present Convention shall be:

a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

b) Non-discrimination;

c) Full and effective participation and inclusion in society;

d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

e) Equality of opportunity;

f) Accessibility;

g) Equality between men and women;

h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.
Article 19 relevantly provides:

**Article 19 – Living independently and being included in the community**

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

The general principles focus on supported decision-making, rather than substitute decision-making. There is a perception that the current state of the law in the ACT focusses on the latter.

The Committee generally supports an emphasis on supported decision-making, but we need the opportunity to consider and comment on the model the Government proposes to adopt as it develops.

2. **Legal Practice Concerns**

Any amendments to the legislation to implement principles of supported decision-making needs to be taken carefully.

The general principles and Article 19 are good guiding principles but the Committee is concerned that if they are applied uncritically they could create uncertainty by undermining the decision-making of duly-appointed attorneys, guardians, and financial managers. Such uncertainty is not in the best interests of persons with impaired decision-making capacity.

The Committee recommends that the Government takes steps to ensure the legal community is thoroughly educated about the changes.
An Enduring Power of Attorney is a powerful document. Taking instructions for, giving advice in relation to, and drafting an Enduring Power of Attorney is a complicated process and all of these steps are most often performed by the same person. Failing to adequately perform each step can result in the attorney appointing the wrong person, or failing to express appropriate wishes. The Committee is concerned that the preparation and execution of Enduring Powers of Attorney has been treated as a mere formality, rather than a critical legal document. For example, Respecting Patient Choices and other community services will often recommend and prepare Enduring Powers of Attorney for patients, sometimes without fully understanding the legal technicalities. Proper assessment of a person to enter into an Enduring Power of Attorney is particularly complicated: see Powers of Attorney Act 2006, section 17.

The Committee recommends that Government should consider making amendments which will elevate Enduring Powers of Attorney to their proper status. One step to ensure this would be to provide that one witness an Enduring Power of Attorney must be a solicitor or an authorised, adequately trained public servant.

The Committee has observed that the level of understanding of the extent of and the limits of the powers of attorneys, guardians, and managers of by the community is limited. The Committee is aware of instances where instructions are taken from unauthorised agents and is concerned that this could be more widespread. The Committee therefore recommends that the Government takes steps to improve the information available to and the education of attorneys, guardians, managers, and the persons to whom these people give instructions including the ambit of decision-making power of the attorneys and the scope of guardianship tribunal orders.

3. Specific Amendments
The Committee sees some weaknesses in the Act that should be rectified.

Broadly, the Act should give more powers to the ACT Civil and Administrative Tribunal (ACAT) and needs to prevent ademption of gifts in wills where managers sell property of a protected person.

ACAT's Powers
The ACAT can only revoke an Enduring Power of Attorney – but cannot suspend – the operation of an Enduring Power of Attorney.

There are times where an Attorney’s powers needs to be suspended to ensure a complete investigation of their decision-making can take place or to defuse latent tension between attorneys or attorneys and the principal’s family.
The ACAT does not have any coercive powers. In coming to a decision to suspend, revoke, or ensure compliance with the terms of appointments of attorneys, guardians, or managers. It is unfortunately common that an attorney, guardian, or manager acts in a manner that is in direct contraction with the terms of an enduring power of attorney or a guardianship or financial management order.

The Committee notes that New South Wales has given their equivalent of the ACAT powers to remove a person with impaired decision-making capacity from property if it is necessary to do so: *Guardianship Act 1987* (NSW), section 11. The NCAT can also make orders allowing the police to search a property for a person with impaired decision-making capacity: *Guardianship Act 1987* (NSW), section 12.

The Committee believes the ACAT needs similar powers as the NCAT. Broadly, the ACAT needs powers to protect persons with impaired decision-making capacity and ensuring attorneys, guardians, and managers comply with the terms of their appointment and with the law more broadly. Specifically, the Committee believes that the ACAT should be empowered to make orders:

- to search for and protect the physical integrity of persons with impaired decision-making capacity;
- to protect the property of the person with impaired decision-making capacity;
- to audit the financial records of the attorney or manager; and
- to review the medical decisions of a person with impaired decision-making capacity.

If a person has impaired decision-making capacity then they cannot make a new Enduring Power of Attorney, but the Enduring Power of Attorney may well have contained specific, important directions and functions that simply will not be available under guardianship or financial management.

Any substitute appointment as guardian or manager must be reviewed at least once every three years, increasing the workload of the ACAT. An attorney's actions do not need to be reviewed with such regularity.

Allowing the ACAT to suspend the operation of an Enduring Power of Attorney will help to protect the interests of a principal and will help to reduce pressure on the ACAT.

**Giving of Benefits**

Currently, an attorney, guardian or financial manager can only make certain decisions for the person for whom they are authorised to make decisions, but they are prohibited from making certain other decisions if the relevant instrument does not include a direction to that effect.
This is particularly troubling in blended families where one spouse owns the home and includes a life estate in their Will, but does not include the right to live in the property rent free in their Enduring Power of Attorney or, worse, they do not have an Enduring Power of Attorney at all. While section 41 of the Powers of Attorney Act 2006 provides some relief where there is an attorney it does not go far enough and it certainly does not protect guardians or financial managers.

There are many selfless decisions that a person may well have made if they had capacity. The conferring of a benefit is just one example. It is a problem that the ACAT cannot supervise and support the making of such decisions.

The ACAT should be empowered to authorise attorneys, guardians, or managers to make decisions that they cannot make under the instrument of appointment. Of course, this should not extend to matters addressed in section 36 of the Powers of Attorney Act 2006, but it is reasonable to include the power to authorise the giving of benefits to other persons and could extend to other decisions.

**Ademption**

Where a will includes a gift of particular property (for example, shares or real estate) and that property does not form part of the person’s estate when they pass away, the gift fails and the intended beneficiary gets nothing.

There is a narrow common law exception to ademption in relation to the actions of unauthorised agents, but no such exemption exists at common law for authorised agents under Enduring Powers of Attorney or guardianship and financial management orders.

New South Wales have put in place a regime which protects such gifts failing where property is disposed of by a duly-appointed attorney. The power is found in sections 22 and 23 of the Powers of Attorney Act 2003. The law only applies to Enduring Powers of Attorney executed since a particular date.

The ACT should implement a similar scheme, but it should apply to Enduring Powers of Attorney where the principal is still living even if it was executed in the past.

**Recommendations**

Our specific recommendations are as follows:

(1) The Act should be amended to favour supported decision-making over substituted decision-making. However, any amendments must take care not to give too much autonomy to persons who consistently require others to make decisions for them.
(2) The Act (and the Powers of Attorney Act) should be amended to provide a mechanism that would avoid the ademption of gifts in a will where property has been sold by an attorney or financial manager. To assist this power, the attorney should also have the right to view a copy of any provisions of the person's will that are or may be relevant to the attorney's decision-making.

(3) The Act should be amended to give the ACAT the following powers:
   a) suspend in whole or in part the operation of an Enduring Power of Attorney on such terms and for as long as the ACAT considers appropriate;
   b) to authorise attorneys, guardians, and financial managers to make decisions that a person with impaired decision-making capacity could have done if they had capacity or if they had authorised an attorney to do so (for example, the giving of gifts, permitting family to stay in properties owned by them free of rent). Any such power must only be available where there is evidence that the person would have made the decision if they had the requisite capacity. Such evidence may be found in relevant clauses of the will of the person (if any).
   c) make orders to:
      i. empower the ACT police to search for and protect the physical integrity of persons with impaired decision-making capacity;
      ii. protect the property of the person with impaired decision-making capacity;
      iii. audit the financial records of the attorney or manager; and
      iv. review the medical decisions of a person with impaired decision-making capacity.

(4) the Government should provide better educate attorneys, guardians, managers, and the persons who accept instructions from those persons.

(5) the Government should consider amending the Powers of Attorney Act 2006 to ensure that Enduring Powers of Attorney are prepared and witnessed by a person who is qualified to assess the legal capacity of the person giving instructions.

Elder Law & Succession Committee

5 June 2015