

Protection of Money Awarded as Damages

Terms of Reference

In 1976 the Commission was asked to report, in an informal manner, on whether it might be desirable to enact legislation to protect plaintiffs who recover substantial damages in a court judgment but who lack the capacity to handle their own affairs (although not an incapable person mentally).¹

Background of Reference

In June 1976, the Attorney-General informed the Commission that the former Chief Justice of Western Australia, Sir Lawrence Jackson, had raised the question of whether legislation was required to protect plaintiffs who recover substantial damages but were unable to manage their own affairs. The Attorney-General asked the Commission for its views on how the problem could be approached and drew attention to the *Aged and Infirm Persons' Property Act 1940* (SA) which enables a court to make an order restraining such persons from dissipating money awarded as damages to the detriment of themselves and their families.²

At the time of the reference, the existing law in Western Australia dealing the management of a person's affairs was contained in several provisions within the *Mental Health Act 1962* (WA)³ and the *Public Trustee Act 1941* (WA).⁴ The operation of these provisions depended on a finding or certification that a person is "incapable" of managing his or her affairs. Under the South Australian legislation, the court is able to act on its own motion, and can make a protection order where a person is unable "wholly or partially" to manage their affairs, or is subject to undue influence or otherwise in a position that renders it in their interests that their property be protected.⁵

Nature and Extent of Consultation

As the report was conducted on an informal basis, no consultation with the wider community was undertaken. The Commission submitted its report in a letter to the Attorney-General dated 3 August 1976.

Recommendations

The Commission examined the South Australian legislation and recommended that similar legislation be enacted in Western Australia. The Commission also reviewed several methods by which such reform could be achieved but did not recommend any particular method.

Legislative or Other Action Undertaken

There has been no legislative action undertaken to give effect to the Commission's recommendation.

Currency of Recommendations

The Commission's recommendation remains current. Other jurisdictions, such as New South Wales and the Northern Territory, have since enacted legislation similar to that recommended by the Commission.⁶

¹ Although this reference appears chronologically following Project No 63, because it was an informal report it was not allocated a specific project number. For the purposes of this publication, the reference has been designated "Project X".

² *Aged and Infirm Persons' Property Act 1940* (SA), s 8a.

³ *Mental Health Act 1962* (WA) s 64.

⁴ *Public Trustee Act 1941* (WA) s 35.

⁵ See Law Reform Commission of Western Australia, *Annual Report 1976–1977*, 32.

⁶ *Protected Estates Act 1983* (NSW); *Aged and Infirm Persons' Property Act 1992* (NT). This legislation does not deal specifically with the protection of money received as damages, but rather provides for the protection of property of "incapable persons".

Action Required

Legislation is required to give effect to the Commission's recommendation. Since the Commission did not specifically recommend a particular method of reform, a working paper on this issue may be appropriate.

Priority — Medium

There is an argument that as the population ages, there may be a corresponding increase in the number of persons unable to manage their own affairs.⁷ By following the Commission's recommendation, Western Australia could develop its own scheme for dealing with the property of incapable persons to meet that community need.

⁷ See Brian Porter, 'Protected Persons and Their Property: New Law and Practice' (1987) 25 *Law Society Journal* 54–57, which discusses the merits of the *Protected Estates Act 1983* (NSW) – a system for dealing with property problems related to incapable persons.