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Monograph Series No. 2

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**Ethical and Legal  
Issues in  
Guardianship Options  
for Intellectually  
Disadvantaged People**

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# Foreword

This is the second volume in the Human Rights Commission's Monograph Series. The Series is designed to include publications under the auspices of the Commission which have the status of a major research project and which, in the view of the Commission, are likely to form a continuing source of reference. It is intended that the Commission monographs will cover a wide range of topics reflecting the Commission's interests and will contribute to better understanding and acceptance of human rights in Australia.

This monograph takes the form of an options paper. It puts forward a critical assessment of the merits of various models which might be selected as the basis for a guardianship law catering for the needs of intellectually disadvantaged people in the Australian Capital Territory (A.C.T.) and Australian jurisdictions generally. The assessment is grounded in a consideration of relevant human rights standards as stated in the Declaration on the Rights of Mentally Retarded Persons as well as in an evaluation of the advantages and disadvantages which might in practice flow from particular choices.

The study is given practical focus by a brief survey of existing law relating to guardianship in the A.C.T. and the other Australian jurisdictions. The survey also includes key features of reform models which have been developed or are in the course of being framed, and places these reforms in the context of the guardianship options developed from human rights criteria. The monograph discusses guardianship law within a human rights context and therefore does not provide a detailed account of associated social, welfare or medical issues.

The Commission will itself draw on the monograph in making recommendations as to the form of guardianship legislation in the A.C.T. which would most effectively meet the needs of those involved without imposing unwarranted restraints upon their civil rights. It is hoped that the monograph will serve the interests of guardianship law reform in other Australian jurisdictions.

It should be noted that the views expressed in this, or in any, volume of the Monograph Series are not necessarily those of the Human Rights Commission or its members and should not be identified with it or them.



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# Contents

Foreword		
Preface		ix
<hr/>		
<i>Chapter One</i>	<i>Introduction</i>	
	The human rights context	1
	Goals and philosophies	3
	Maximising the freedom of the individual	3
	Protecting the welfare of the individual	5
	Changing attitudes	6
<hr/>		
<i>Chapter Two</i>	<i>The existing law in the Territories</i>	
	Introduction	8
	The Australian Capital Territory	8
	The Northern Territory	9
	The Australian Capital Territory	9
	Introduction	9
	The framework of the present law in the A.C.T.	10
	The United Nations Declaration	13
	The Northern Territory	15
	Introduction	15
	The framework of the Northern Territory law	15
	The United Nations Declaration	18
<hr/>		
<i>Chapter Three</i>	<i>The existing and proposed law in the Australian States</i>	
	Introduction	19
	Existing law in New South Wales	19
	Structure	19
	Content of the N.S.W. law	20
	Evaluation of the N.S.W. position	22
	Existing law in South Australia	23
	Structure	23
	Content of the South Australian law	23
	Evaluation of the S.A. position	25
	Existing law in Victoria	25
	Structure	25
	Content of the Victorian law	25
	Evaluation of the Victorian position	26
	Existing law in Queensland	26
	Structure	26
	Content of the Queensland law	27
	Evaluation of the Queensland position	28
	Existing law in Western Australia	28
	Structure	28
	Content of the Western Australian law	28
	Evaluation of the W.A. position	29

Existing law in Tasmania	29
Structure	29
Content of the Tasmanian law	30
Evaluation of the Tasmanian position	31
Summary	31
Proposed reforms	32
New South Wales: the 1982 unproclaimed reforms	32
New South Wales: the 1983 reforms	34
South Australia	36
Victoria	36
Queensland	38
Commentary	40
<hr/>	
<i>Chapter Four Services and facilities for intellectually disadvantaged people</i>	
The power of attorney	42
Community welfare services	43
Advocacy	43
Institutionalisation	45
Guardianship	48
The broad approach	49
The American Bar Association Model Statute	51
<hr/>	
<i>Chapter Five Options in caring for and protecting intellectually disadvantaged people</i>	
Introduction	55
The legalistic or 'substituted judgment' model	56
The welfare model	61
The 'parent—child' or developmental model	68
Limited guardianship	70
<hr/>	
<i>Chapter Six Features of guardianship legislation</i>	
The population to be served	78
Criteria for admission to guardianship	78
Legislative examples of criteria for admission	79
Procedural matters: general	85
Evaluation in guardianship proceedings	85
Representation	88
Notice	90
Standard of proof and evidentiary standards	90
Broad standing provisions	91
Other procedural issues	92
Who should be guardian?	92
Review of guardianship orders	96
Appeals	99
<hr/>	
<i>Chapter Seven Medical, income and property matters</i>	
Medical treatment	100
Sterilisations	102
Abortions	104
Donation of non-regenerative tissues	105
Legislative examples	105
Conclusion	106

---

Estate administration	107
Legal capacity of intellectually disadvantaged persons	108
Contracts	108
Liability for torts	110
Testamentary capacity	111
Conclusion	112

---

*Chapter Eight Conclusions*

The models	113
A legalistic model	113
A welfare model	114
A developmental model	114
Choosing the best model	114

---

Table of statutes	118
Table of cases	120
Bibliography	121





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## Preface

This monograph began life as a research report commissioned in 1982 and submitted to the Human Rights Commission in 1983. Following a period of public consultation it was decided that the manuscript be extended to provide a survey of all Australian jurisdictions and be published as a monograph. The pace of legislative change necessitated that the manuscript be revised three times during the course of publication to accommodate law reform initiatives in various States. In a Federal system of law that is the 'price' of progress. The law is stated as it was known to the authors in June 1985. The draft A.C.T. Guardianship and Management of Property Ordinance (August 1985) was released after this date. Its strength is that it conforms to the legalistic model advocated in this monograph. Its limitations are that it does not fully incorporate the policy guidelines and civil rights precepts discussed in this work, and that access may be inhibited by an overly heavy reliance on judicial machinery.

This monograph owes its existence to the work and support of many people. We acknowledge in particular the support of the Human Rights Commission, whose initiative it was to commission the project; the research support of Mr Ben Potter, Mrs Barbara Hocking and Mr Frank Di Giantomasso; the word processing of Ms Chele Ford; and the editorial and production skills of the staff of the Commission, in particular of Mrs Elizabeth Van Der Hor, and the Australian Government Publishing Service. Responsibility for the contents of the monograph, of course, remains ours alone.

Terry Carney  
Peter Singer

*16 June 1985*



## THE HUMAN RIGHTS CONTEXT

The Human Rights Commission Act 1981 (Cwlth) of Australia incorporates as Schedule 3 the principles laid down in the 1971 United Nations *Declaration on the rights of mentally retarded persons*.<sup>1</sup> As part of its charter, the Australian Human Rights Commission is required to have regard, in areas of Commonwealth responsibility, to the rights of intellectually disadvantaged persons as recognised in the International Declaration.

Although the Declaration does not have any legal force under international law in that it is not binding upon or enforceable by signatory states under the principles of international law<sup>3</sup>, it does express important aspirations. One of the tasks of the Commission is to monitor and report on the way in which Commonwealth departments and agencies, and activities generally in the Australian Capital Territory, conform with these aspirations. As presently structured<sup>4</sup>, the purpose of the Commission is to promote discussion and understanding of human rights in the community generally and to recommend to the Australian Government and Parliament changes in law or practice which would be required to order to bring that law and practice into line with human rights as defined by, among other instruments, the Declaration.<sup>5</sup> The United Nations Declaration on the Rights of the Mentally Retarded is included in the definition of 'human rights' in the Human Rights Commission Act and the Declaration includes a call by the General Assembly of the United Nations for national and international action to ensure that the document is used as a common basis and frame of reference for the protection of those rights.<sup>6</sup>

In the limited sense provided by the present Act, these principles are part of the law of Australia. State legislation concerning intellectually disadvantaged persons should recognise the moral suasion of that Commonwealth measure and give adequate recognition to the general and special rights set out in its seven Articles. Commonwealth legislation, including legislation for the Australian Capital Territory, should pay particular regard to the standards set in that Declaration. At the present time, the Declaration serves as one standard by which our existing laws can be measured and to which proposals for reform of the law might conform. Implementation of the measures

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<sup>1</sup>Human Rights Commission Act 1981 (Cwlth), Schedule 3.

<sup>2</sup>*United Nations Declaration on the general and special rights of mentally retarded persons* (1971) U.N. General Assembly 26th Session, Resolution 2856, (XXVI): cited in D. J. Djonovich (ed.), (1970) 13 *United Nations Resolutions: Series I*, Oceana, 1976, 449-50.

<sup>3</sup>T. Carney, 'Civil and social guardianship for intellectually handicapped people' (1982) 8 *Monash University Law Review*, 199-201.

<sup>4</sup>During debate on this legislation in the Senate, speakers from each of the major parties drew attention to the very weak normative and enforcement effects of the present Act: see Australia, Senate, *Parliamentary Debates*, 12 March 1981, 592 (Senator Evans speaking on behalf of the Labor Party), 612 (Senator Chipp speaking on behalf of the Australian Democrats), 603 and 614 (Senators Hamer and Missen from the Government parties). For its part, the then Labor Opposition expressed a strong commitment to significantly strengthen the legislation: *ibid.*

<sup>5</sup>Mr Viner, the then Minister of Employment and Youth Affairs, moving the second reading of the Human Rights Commission Bill 1981 (Cwlth): Australia, House of Representatives, *Parliamentary Debates*, 24 March 1981, 85.

<sup>6</sup>Human Rights Commission Act 1981 (Cwlth), s. 3 and Schedule 3.

foreshadowed by the present Australian Government whilst in opposition — where it expressed its strong support for the enactment of a Bill of Rights with some 'overriding' force<sup>7</sup> — or the enactment of a State Human Rights Bill such as that foreshadowed by the present Victorian Government<sup>8</sup> would strengthen significantly the normative force of the provisions of the Declaration.

It follows that the Declaration may be used as a 'check-list' for evaluating legislation. Model legislation might be required to incorporate in its provisions all of the rights contained in the UN Declaration. For ease of reference during the balance of the discussion in this monograph, the text of the paragraphs of the Declaration is set out in full below:

1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.<sup>9</sup>

Paragraph 5 confers a right to a qualified guardian when this is required to protect the personal well-being and interest of someone who is intellectually disadvantaged and any guardian so constituted must protect the personal well-being and interest of his ward to the full extent of the parameters specified in the Declaration.

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<sup>7</sup>The commitment of the then Attorney-General, Senator G. Evans, to the enactment of the Human Rights Bill was expressed on many occasions. See for example *National Times* 26 February 1983; (1983', 29 *Reform*, 47-8. The current Attorney has referred the issue to a parliamentary committee and proposes to table a 'weaker' draft Bill during 1985.

<sup>8</sup>The Governor's Speech at the opening of Parliament following the election of the present Victorian Labor Government expressed a commitment by the Government to enact 'a Bill of Rights in which the fundamental human rights of all citizens is spelt out clearly, simply and comprehensively': Victoria, Legislative Council, *Parliamentary Debates*, 27 April 1982, 4. Substantial work was completed on the drafting of such a bill but it was not brought into the Parliament. In its second term of office the commitment has changed to that of a reference to a parliamentary committee.

<sup>9</sup>Human Rights Commission Act 1981 (Cwlth), Schedule 3.

## GOALS AND PHILOSOPHIES

There are two broad competing goals in caring for and assisting intellectually disadvantaged people. On the one hand, society would like to maximise their freedom as individuals. On the other hand, society feels that it must adequately protect their welfare. The character of any program for assisting and caring for intellectually disadvantaged people depends upon the relative importance attached to each of these goals by the authors of the program. In this chapter the philosophies underlying these goals are discussed.

### Maximising the freedom of the individual

Some proponents of maximum freedom argue that any unnecessary denial of the collection of rights which have become known as human rights is a hindrance to the development of the individual. Others argue simply that any such denial is wrong in itself, irrespective of the consequences. The notion of man's prima facie entitlement to these rights is, however, a relatively modern one.

The more extreme version of the goal of maximising individual freedom supports the extension of total freedom of action. The argument runs that the mere fact that a person is intellectually disadvantaged, and as a consequence may make decisions not in his/her own best interests, is no justification for placing limits upon that person's freedom beyond those limits which are imposed on the freedom of the typical 'non-retarded' individual. The *Declaration on the rights of mentally retarded persons*, however, places an important qualification on the application to intellectually disadvantaged persons of the rights of 'non-retarded' persons. For it does not state flatly that intellectually disadvantaged persons have the *same* rights as others; rather it says that they have those rights 'to the maximum degree of feasibility'.

A 'qualified' version of the goal of maximising freedom can be derived from a human rights base. Article 55(c) of the *United Nations Charter* 1948, for example, reads (in part):

The United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The problem of intellectually disadvantaged persons was addressed more specifically by the General Assembly of the United Nations in 1971. The preamble to the *Declaration on the rights of mentally retarded persons* opens as follows:

Reaffirming faith in human rights and fundamental freedoms and in the principles of peace, of the dignity and worth of the human person and of social justice proclaimed in the Charter . . .

The crucial question though is, what are these rights and fundamental freedoms? It has been stated that the basic rights are the right to life, liberty and self-development.<sup>10</sup> Presumably the fundamental freedoms of which the United Nations Charter speaks are included in the different forms of liberty.

The use in the Declaration of the words 'to the maximum degree of feasibility' introduces a qualification on the rights to which intellectually disadvantaged people are entitled, thus recognising that some people may suffer from a degree of mental retardation which renders them incapable of enjoying one or more of these rights. For example, intellectually disadvantaged people may be incapable of enjoying liberty to the same extent as others. Unrestricted liberty may cause them to suffer in various ways that 'non-retarded' people would be able to avoid. Intellectually disadvantaged persons may also have difficulty in making use of the right to self-development. However, if they are capable of self-development, albeit with the assistance of others, then they have a right to

<sup>10</sup>H. J. McCloskey, 'Handicapped Persons and the rights they possess', in R. S. Laura (ed.), *Problems of handicap*, Macmillan, 1980, p. 86.

receive that assistance to the maximum degree of feasibility and a right to the development of self which is expected to flow from that assistance.<sup>11</sup>

Thus intellectually disadvantaged people may have special rights which are derived from the basic rights to life, liberty and self-development, which latter rights they enjoy in common with 'non-retarded' people.<sup>12</sup>

The above argument for qualified human rights accords with John Stuart Mill's argument for a qualified right to liberty. According to McCloskey<sup>13</sup>, Mill saw liberty as a means to or condition of the attainment of certain goods, such as pleasure, happiness, rationality and rational belief, knowledge and truth, right living, self-development, moral responsibility and achievements. His argument was that we have a right to liberty when and insofar as it is necessary for the attainment of such goods. If the granting of liberty to particular people would not lead to the realisation of these goods, Mill denied that they had a right to liberty. Thus the young, the uncivilised and, in certain circumstances, mature, civilised adults, could have their right to liberty curtailed.<sup>14</sup>

Others have not seen Mill as such a consequentialist. According to Bogen and Farrell<sup>15</sup>, Mill also argued that liberty is valuable in itself and that there is something intrinsically desirable about individual liberty and something intrinsically undesirable about coercion. To put the argument another way: all other things being equal, free action is simply more desirable than the same action brought about through coercion and manipulation. Here, again, the qualification is introduced. With intellectually disadvantaged persons all other things are not necessarily equal, because too much liberty might lead to adverse consequences.<sup>16</sup>

In the context of mental retardation and other handicaps, the problem of determining whether to accord liberty, and if so, how much, poses practical difficulties. While there are dangers in according liberty where the considerations referred to by Mill in his argument do not apply, or where some of the limitations he referred to do apply, there are also dangers and 'real evils' in restricting liberty unduly, for this may deprive individuals of their rights and of access to the goods of which Mill spoke.<sup>17</sup>

The argument in favour of giving precedence to the goal of maximising the freedom of the individual is that the risk of impairing a person's dignity and restricting his/her development by paternalistic overprotection outweighs the risk that such a person may come to harm if given too much liberty. Writing about the dignity of human risk, Perske says:

Overprotection endangers the client's human dignity and tends to keep him from experiencing the risk-taking of ordinary life which is so necessary for normal human growth and development.<sup>18</sup>

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<sup>11</sup> *ibid.*, p. 102.

<sup>12</sup> *ibid.*, p. 86. "

*ibid.*, p. 100. "

*ibid.*

<sup>13</sup> James Bogen & Daniel M. Farrell, 'Freedom and happiness in Mill's defence of liberty' (1978) *The Philosophical Quarterly*, 3258.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*, 101.

<sup>16</sup> R. Perske, 'The dignity of risk', in W. Wolfensberger, *The principle of normalization in human services*, cited in Paul McLaughlin, *Guardianship of the person*, National Institute on Mental Retardation, Downsview, Ontario, 1979, p. 19.

## Protecting the welfare of the individual

The argument for protection is that intellectually disadvantaged citizens have a right to protection from exploitation, abuse and degrading treatment. This is mirrored in paragraph 6 of the *Declaration on the rights of mentally retarded persons*.

Some protection is necessary to ensure the physical safety and welfare of many intellectually disadvantaged persons. But there is more to it than that. An appropriate level of protection should actually facilitate intellectually disadvantaged people's enjoyment of those rights and liberties which they are capable of enjoying. The right to protection is thus one of the derivative rights.

One of the problems with protection is finding the appropriate level of it for each individual. There has been a tendency to regard intellectually disadvantaged people as 'eternal children', to be cared for, protected, kept occupied and removed from the mainstream of society on the premise that they are happier with others like themselves. This assumes that intellectually disadvantaged people are incapable of making any decisions about their life or property. However, the degree of mental retardation from which people suffer varies greatly, and many intellectually disadvantaged people live in the community and cope very well, without having the need for assistance in day-to-day decisions.<sup>19</sup>

The great majority of intellectually disadvantaged persons are only mildly retarded. They can be absorbed into the total adult population after leaving school and are not readily identifiable. They generally work in competitive jobs and, provided they have no physical or emotional problems in addition to their retardation, are able to lead independent lives. A few fall into the moderately retarded group. They are more limited, being more likely to require special pre-school and school programs. As adults, they are usually able to live and work within the community, but need some kind of sheltered environment or supervision in order to be able to function optimally.

Only about one in thirty intellectually disadvantaged persons is severely or profoundly retarded. Individuals functioning at these levels are much more dependent, need more intensive programming and frequently have physical problems in addition to the retardation in mental development.<sup>20</sup>

However, classifying intellectually disadvantaged people in this way usually provides little or no information of value in developing programs for the individual. The development of programs requires factual information about the person's strengths and weaknesses and the kinds of supports that are most beneficial to that person.

In other words, functional capacity is not wholly dependent upon the level of mental retardation from which the individual suffers. This makes nonsense of any automatic assumption of total incapacity. However, the persistence of such an assumption itself contributes to the need for protection. McLaughlin had this to say about public attitudes:

Mentally retarded adults . . . must cope with life in the face of an uncaring political system, a rigid, self-indulgent bureaucracy, a neglectful and exploitative economic system, a discriminatory legal system, a human service system that is more intent on labelling, segregating, institutionalising, locking up and processing than on providing a truly human service and a family system that is under extreme pressure itself. No wonder their lives are so filled with danger.<sup>2,1</sup>

<sup>19</sup> Susan Hayes & Robert Hayes, *Mental retardation — law policy and administration*, Law Book Co., Australia, 1982, p. 236.

<sup>20</sup> *ibid.*, pp. 3-4.

<sup>21</sup> Paul McLaughlin, *Guardianship of the person*, National Institute on Mental Retardation, Downsview, Ontario, 1979, p. 4.

In McLaughlin's view, intellectually disadvantaged persons primarily need protection from the elements of society that influence the public to think and act in this way.<sup>22</sup>

Intellectually disadvantaged adults are not children and do not deserve to be treated as such. Their welfare would be better safeguarded if the 'eternal child' notion were replaced by a flexible approach which would adapt to the changing capabilities of intellectually disadvantaged persons (and cater to their needs) at all levels of functional impairment.

## CHANGING ATTITUDES

There was once a time when intellectually disadvantaged people were allowed to remain in and to live as members of their local communities. Indeed, Shakespeare made the court 'fool' an important character in several of his plays. By the nineteenth century, however, our society dealt with people who appeared to suffer from some form of mental problem by incarcerating them in institutions. This did represent some small advance on the immediately preceding era so graphically depicted by William Hogarth in his representation of 'Bedlam'. At that time, criminals had been confined and housed with various groups of people who were in some way mentally afflicted. At least in Victorian times people guilty of criminal offences were gaoled separately.

An institutional structure that perhaps perpetuates this 'out of sight, out of mind' philosophy operated in Australia in the nineteenth century. The inmates of the institutions were called 'lunatics' or 'the insane' and the method of social control adopted towards these unfortunate people was simply to put them away in institutions where the size and isolation of those institutions very much removed them from public gaze. Many of the conditions of life associated with institutional care paralleled those associated with imprisonment.

As times changed, the terminology adopted to describe this set of people was updated. Phrases such as 'mentally ill' or 'incapable persons' have been adopted over recent times. The use of these terms reflected the gradual development over the last few decades of a paternally based welfare or medical model that replaced the previous more authoritarian institutional method of social response. This development came about through the great increase in medical knowledge of mental illness, and it has been accompanied by a change in community attitudes towards mentally ill and intellectually disadvantaged persons. Some of the difficulties which still result from the institutional legacy of the previous century are the continued use of institution-based systems for caring for these people and a tendency to continue to lump disparate groups of people together. Although the structure of the more recently enacted 'welfare/medical' legislation does enable the different groups of people to be provided for separately to some extent, there is a strong case for more complete separation. This work will explore the various choices which must be made if that separation is to be achieved.

The *Declaration on the rights of mentally retarded persons* makes it clear that the primary focus of today's legislation should be on the rights, welfare and interests of the individuals concerned. On this view, the role of the state is no longer to be that of a father figure to all those who are in some degree intellectually disadvantaged; rather the state should provide appropriate legislative arrangements for services and facilities which will enable individuals to pursue their interests. It has been argued that to this end the state should provide appropriate generic legislation for a system of guardianship that can be individually tailored to suit the needs of each intellectually disadvantaged person. But there are also other reform suggestions which have been advanced in jurisdictions both here and overseas.

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<sup>22</sup> *ibid.*, p. 7.



Selection of the appropriate position in this philosophic debate between the merits of paternalism and individual autonomy will determine which of the various competing options for reform of the law on intellectually disadvantaged persons might be worthy of support. This monograph will discuss the modern options for intellectually disadvantaged persons which might replace the historical legacy of the institutional model or its successor the 'welfare/medical' approach. The main focus will, however, be on the ethical (or other more pragmatic) bench-marks against which these options should be measured.

The next two chapters will set out the law as it applies in the various Australian jurisdictions and will outline reform proposals already in train. Chapter Four details a broad and essentially non-interventionist approach to the needs posed by the intellectually disadvantaged. This is followed by a chapter which teases out three distinctive guardianship philosophies and models (Chapter Five). Particular features of one of the most common models — the partial guardianship approach — are taken up in Chapter Six of the work. Issues of medical care, property rights and so on are dealt with in Chapter Seven. Chapter Eight sets out our conclusions.

## Chapter Two

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# The existing law in the Territories

### INTRODUCTION

This chapter will sketch out the framework of the law relating to intellectually disadvantaged people in the Australian Capital Territory and the Northern Territory, and detail its main provisions.

### The Australian Capital Territory

The law in the A.C.T. was a mixture of the old, the borrowed and the new. Both the old and the borrowed portions of the law were derived from New South Wales. When the Territory was established the expedient was adopted of incorporating by reference the 'applicable' provisions of the then prevailing New South Wales law.<sup>1</sup> Subsequently, the lawmakers for the Territory (essentially the executive branch of the Commonwealth Government, which has power to make and promulgate laws — or more strictly Ordinances — for the Territory) often availed themselves of the option of entering into agreements with the State of New South Wales, agreements which had the effect of adopting identified portions of the laws enacted by New South Wales after the date of establishment of the Territory.<sup>2</sup>

Both the 'pre-existing' and the 'borrowed by agreement' segments of A.C.T. law remained in force until they were displaced by fresh Ordinances designed specifically to meet the needs of the Territory. Significant portions of the law in the Capital Territory are now contained in the Ordinances which have been framed for this specific purpose. The A.C.T. Child Welfare Ordinance, and its proposed replacement<sup>3</sup>, is a case in point. Both this Ordinance and the Mental Health Ordinance 1983 (A.C.T.) will be discussed in more detail below.

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<sup>1</sup>The decision of the A.C.T. Supreme Court in *Re M.* demonstrated that the 'settlement' strand of the law retained its vitality, for it was held in this case that a provision of the Lunacy Act 1898 (N.S.W.) continued as the source of the law relating to the appointment of a person (known as a committee) to manage the estate of a person who through 'mental infirmity, arising from disease or age, [is] incapable of managing his affairs': (1982) 43 ACTR 20.

<sup>2</sup>Provisions of the child welfare and mental health laws in New South Wales, for example, were applicable within the Territory by virtue of the terms of legislation endorsing Agreements between the two jurisdictions. This method was relied on where it proved to be necessary for the Territory to make arrangements for citizens of the Territory to be accommodated within institutions and facilities operated by the State of New South Wales.

<sup>3</sup>The draft Ordinance proposed by the Australian Law Reform Commission in its 1981 report (see footnote 9 below) has been endorsed by the A.C.T. House of Assembly and its introduction by the Australian Government is imminent at the date of writing.

## The Northern Territory

The law prevailing in the Northern Territory is also an amalgam of the pre-establishment laws from South Australia<sup>4</sup> and those made under the 'domestic' arrangements for law-making in the Territory following its transfer from South Australia to the Commonwealth in 1910. These domestic powers have altered as the Territory has gradually moved from being but a dependency administered by a Commonwealth Administrator exercising powers akin to those exercised over a colony<sup>5</sup> towards its post-1978 status as a jurisdiction with its own elected Assembly, exercising plenary legislative powers subject only to obtaining the assent of the Administrator or Governor-General.<sup>6</sup>

In the case of the Northern Territory, however, the legislature has been quite active, with the result that the bulk of the law is to be located in Ordinances and Acts passed by the Territory as 'domestic' provisions.<sup>7</sup>

## THE AUSTRALIAN CAPITAL TERRITORY

### Introduction

By virtue of the operation of the Seat of Government Acceptance Act 1909 (Cw1th) virtually all laws in force immediately before the date of surrender by New South Wales to the Commonwealth of that area of New South Wales that was to become the Australian Capital Territory are — 'so far as applicable' — continued in force until other provision should be made.<sup>8</sup> As a result, the law concerning intellectually disadvantaged persons in the A.C.T. was always, to some extent, that of New South Wales as well as of the A.C.T. itself. The Australian Law Reform Commission has pointed out that the 'so far as applicable' test left some uncertainty as to whether anachronistic laws long forgotten in New South Wales still had effect in the A.C.T. by way of the general adoption of pre-1911 Acts.<sup>9</sup>

Until the Mental Health Ordinance 1983 (A.C.T.) swept away the bulk of these provisions, two New South Wales laws were operative in the A.C.T., despite their obsolescence and virtual disuse and despite their repeal in New South Wales.<sup>10</sup>

<sup>4</sup>Northern Territory Acceptance Act 1910 (Cw1th), s. 71; 'All laws in force in the Northern Territory at the time of acceptance shall continue in force but may be altered or repealed.'

<sup>5</sup>In 1947 legislation was, however, enacted to create a Legislative Council with certain consultative powers: Northern Territory (Administration) Act 1947 (Cw1th).

<sup>6</sup>Subject to obtaining assent, the Territory has power to make laws for the 'peace order and good government of the Territory': Northern Territory (Self Government) Act 1978 (Cw1th), s. 6.

<sup>7</sup>e.g. Aged and Infirm Persons' Property Act 1979 (N.T.); Public Trustee Act 1979 (NT.); Mental Health Act 1979 (N.T.); Powers of Attorney Act 1980 (N.T.).

<sup>8</sup>Seat of Government Acceptance Act 1909-1955 (Cw1th), s. 6; Seat of Government (Administration) Act 1910 (Cw1th); Seat of Government (Administration) Ordinance 1930 (A.C.T.); Interpretation Ordinance 1967 (A.C.T.).

<sup>9</sup>The date of the establishment of the A.C.T. was 1 June 1911; Law Reform Commission, Report No. 18, *Child Welfare*, AGPS, Canberra, - 1981.

<sup>10</sup>Law Reform Commission of the A.C.T., *Report of the Review of New South Wales Act in force in A.C.T.*, AGPS, Canberra, 1974. *Re M.* (1982) 43 ACTR 20. The nineteenth century, or what might be termed the 'English system', was imported by this legislation. This approach provided on the one hand for the management of the property and affairs of the mentally infirm and, on the other, for the care and custody of the person of the mentally infirm (known respectively as committees of the estate and committees of the person). These two procedures operated independently of each other. liiAustralia, as a general rule, the task of managing the property and affairs of these people was undertaken either by officers of the Supreme Courts or by the Public Trustees of the various States. The care and custody of the persons themselves was separately entrusted to institutions by way of guardianship or wardship orders.

Following the passage of this Ordinance the Inebriates Acts (N.S.W.) of 1900 and 1909 have been totally repealed" and much of the Lunacy Act 1898 (N.S.W.) has also been replaced.<sup>12</sup> But those sections of the 1898 legislation dealing with the powers of the Master of the Supreme Court to protect the property or the person of mentally ill or intellectually disadvantaged people, or to appoint private citizens (committees) to undertake this task, remain in force.<sup>13</sup>

The scheme of this, now quite antiquated, legislation makes provision for managing the personal affairs or property of people for whom custodial care and treatment may not be required. Persons who, although neither wards nor under guardianship nor institutionalised, are judged to be incapable of managing their affairs might be dealt with in this way where it is held to be in the interests of the persons concerned.<sup>14</sup> This was the situation which arose in *M's case*, where Lockhart J. was obliged to apply the 1898 provisions and appoint managers of M's property.<sup>15</sup> To date the call for reform of this branch of the law has gone unheeded.<sup>16</sup>

### **The framework of the present law in the A.C.T.**

The applicable law relating to intellectually disadvantaged people in the A.C.T. now derives from two main sources. First there are the domestic Ordinances such as the Mental Health Ordinance and the Powers of Attorney Ordinance 1956 (A.C.T.). The second source is the retention on the books of certain borrowed laws, such as those regulating management of property.

#### **Mental health**

The first of the domestic Ordinances deals with the circumstances in which adults, or children, may be compulsorily admitted (by court order apart from up to 72 hours 'emergency admission'), for care or treatment. In addition to a disturbance or defect of *inter alia* 'comprehension, reasoning, learning, or judgment' which conditions must be of a *severely disabling degree*, it is necessary that there should be an immediate and substantial risk of actual bodily harm to that (or another) person; and that there be an 'unwillingness to accept treatment'. All three must be satisfied before the emergency power is attracted.<sup>18</sup>

Where a court order is to be made, the second ground is broadened to include either present or likely future behaviour, which behaviour has, or is likely, to result in actual bodily harm to self or others.<sup>19</sup> Alternatively the order may be made if the person is in a condition of 'social breakdown'.<sup>20</sup> Unwillingness to undergo treatment (or an inability to responsibly judge the need for it) is also retained as a necessary precondition to making such orders.

<sup>12</sup>Mental Health Ordinance 1983 (A.C.T.), s. 3 (1).

<sup>13</sup>Vans VII and VIII, dealing respectively with the general powers of the Master in Lunacy and the capacity to appoint committees, have been expressly exempted from the repeal provision. The draft A.C.T. Guardianship and Management of Property Ordinance (August 1985) is designed to replace these provisions.

<sup>14</sup>Lunacy Act 1898 (N.S.W.), s. 103.

<sup>15</sup>Re *M.* (1982) 43 ACTR 20.

<sup>16</sup>25. But see footnote 13 above for more recent developments.

<sup>17</sup>Mental Health Ordinance 1983 (A.C.T.), s. 4(1) definitions. Voluntary admissions will, of course, be the norm. The bulk of the provisions came into force in February 1985: *Commonwealth Gazette* (26 Feb. 1985), s. 54, 1

<sup>18</sup>s. 21(1).

<sup>19</sup>s. 34(1)(b); in the case of orders for up to 28 days, this power may be exercised by a Magistrates Court, but beyond this duration it is a power vested in the Supreme Court.

<sup>20</sup>s. 34(1) (b) (iii).

For intellectually disadvantaged people, the social breakdown limb is likely to be the crucial one. This is defined as:

The condition in which the person's capacity to —

(a) obtain and use the goods and services essential to the support of life; and

(b) make decisions and take the actions essential to an autonomous life;

is so impaired as to cause the person to suffer severe distress or physical, material or emotional deprivation to an extent that is likely to cause lasting and serious harm to the person.<sup>21</sup>

Properly construed, this limb may not unduly broaden the grounds on which an intellectually disadvantaged person may be considered for treatment. The requirement to establish likely 'lasting and serious harm'; the focus on life support and autonomy; and the presence of the third limb, with its emphasis on 'refusal of *adequate* treatment',<sup>22</sup> may, given that the gate-keeping function is in judicial hands, serve as an adequate check against inappropriate institutionalisation of intellectually disadvantaged people. Nevertheless the lumping together of mental illness with intellectual handicap, under the euphemism of 'mental dysfunction', is regrettable.

### **Powers of attorney**

One of the methods proposed as a means of establishing limited guardianship of the estates of intellectually disadvantaged persons is the use of a power of attorney. At common law of course, an intellectually disadvantaged person cannot grant a power of attorney and, moreover, if an adult grants a power of attorney and later becomes intellectually disadvantaged, the grant is revoked.

The A.C.T. has a Powers of Attorney Ordinance that provides for the creation of an irrevocable power of attorney for a fixed period that cannot exceed two years. When dealings for valuable consideration are involved, such power of attorney is not revoked by death, lunacy, unsoundness of mind or bankruptcy of the donor that may occur within the fixed period.<sup>23</sup> There is at the moment, therefore, provision for adults to grant irrevocable powers of attorney that would continue to operate in the event of intellectual disadvantage developing, but it is time-limited and is effective only when such power of attorney is expressed to be irrevocable.<sup>24</sup>

The second strand of applicable A.C.T. law relies on the provisions incorporated from New South Wales legislation in force as at the date of establishment of the Territory, or adopted since.

### **Supreme Court protective jurisdiction**

Under the legislation previously alluded to, persons incapable through mental infirmity by reason of disease or age, of managing their affairs, can be placed under the protective jurisdiction of the Supreme Court and the Master of the Court in that jurisdiction, and the Court can appoint a manager of their property.<sup>25</sup> Such a person then becomes an 'incapable person'. One of the major deficiencies of this definition is that very few members of the population of intellectually disadvantaged people fall within the category of persons who are 'incapable' by reason of disease.<sup>26</sup> As in the more populous States, the machinery associated with this Supreme Court jurisdiction is such that it is a

<sup>21</sup>s. 4(1) definitions.

<sup>22</sup>S. 34(1) (c).

<sup>23</sup>Powers of Attorney Ordinance 1956 (A.C.T.), s. 7.

<sup>24</sup>55, 6, 7. This is so whether the document be for valuable consideration or otherwise: s. 7(2). See Chapter Four below for a description of the benefits of powers of attorney.

<sup>25</sup>Supplemental Agreement, Clause 7 and Mental Health Act 1958 (N.S.W.), ss. 4, 39 and Parts X and XI. Lunacy Act 1898 (N.S.W.), s. 103.

<sup>26</sup>Retardation which cannot be attributed to a 'disease' is not covered: *G v. F* H98311 NSWLR 54, 56 (Powell J.).

cumbersome and unattractive procedure, ill-adapted to meet the needs of the intellectually disadvantaged<sup>27</sup> Yet at the time of writing this remains the main avenue for catering to the needs of adult intellectually disadvantaged persons in the A.C.T.

### Committees

In the case of mentally ill and incapable persons a Judge of the Supreme Court can appoint committees of their estate and of their person. Such a person then becomes a 'protected person'. The manager of an incapable person has the same powers, and is subject to the same obligations and control, as a committee of the estate of a protected person.<sup>28</sup> The distinction between the persons and their estates is maintained. There is also provision for a jury to hear and determine the questions of whether, either through mental illness or through 'mental infirmity, arising from disease or age', a person is incapable of managing his/her affairs •29

### Guardianship

A guardian can be appointed for a mentally ill person, following a report made by a Master at the direction of the Court<sup>30</sup> and there is provision for the consent of a guardian of a protected person to be given by the committee of the estate of that protected person on the order of the Court<sup>31</sup>; this may be set in train on the application of any person interested in the exercise of the power.

Clearly, there have been and still are gaps in the law concerning those intellectually disadvantaged adults whose disability was not present during their minority. Moreover, these gaps also apply to some extent to intellectually disadvantaged children after they turn eighteen. An assessment of these deficiencies is made at the end of the next chapter.

The one remaining area which calls for some brief comment relates to the law governing intellectually disadvantaged children. Given that action to implement the recommendations of the Australian Law Reform Commission is imminent, what follows will not be of great moment.

### Children

The necessity to pay some regard to the position of children in the Territory arises only because New South Wales has made separate provision to cater for the ongoing needs of certain intellectually disadvantaged children who have come into State care. Legislation between the Territory and the State of New South Wales embodying certain inter-governmental agreements, may have the effect of placing these laws at the disposal of the Territory. The chronology has emerged this way.

First, there was enacted the Child Welfare Agreement Ordinance 1941 (A.C.T.) endorsing an Agreement with New South Wales.<sup>32</sup> In that Agreement, 'State Act' means the Child Welfare Act 1939 of the State and includes any Act [subsequently] passed in amendment of or in substitution for such Act and includes the regulations for the time being in force under any such Act.<sup>33</sup> Secondly, the Child Welfare Ordinance

<sup>27</sup>T. Carney, 'Civil and social guardianship for intellectually handicapped people' (1982) 8 *Monash Univers O' Lazo Review*, 213.14.

<sup>28</sup>Mental Health Act 1958 (N.S.W.), ss. 38, 39.

<sup>29</sup>S. 43.

<sup>30</sup>s. 80.

<sup>31</sup>s. 91.

<sup>32</sup>Ratified too in New South Wales by the Child Welfare (Commonwealth Agreement Ratification Act) 1941 (N.S.W.).

<sup>33</sup>Child Welfare Agreement Ordinance 1941 (A.C.T.) (as reprinted), First Schedule, 1.

1957 (A.C.T.)<sup>34</sup> was passed and finally, in 1962,<sup>35</sup> a Supplemental Agreement between New South Wales and the A.C.T. was adopted.

The main purpose of this legislation was to enable children to be committed by A.C.T. courts to institutions in New South Wales for their reception, detention and maintenance 'and for such children and other children from the said Territories'<sup>36</sup> to be dealt with under and subject to the Child Welfare Act 1939 of the State and any [amending] Act.<sup>37</sup> 'Children admitted to government control under the Child Welfare Ordinance 1957 of the Territory may be removed to and accepted into depots or homes in the State and be dealt with as if they were wards admitted to State control under the Child Welfare Act 1939 of the State'.<sup>38</sup>

It seems clear that for the limited purpose of covering A.C.T. children 'placed out' in N.S.W. facilities, A.C.T. law has always included the New South Wales Child Welfare Act 1939 as amended. That Act has now been repealed<sup>39</sup> and in its place, the Community Welfare Act 1982 (N.S.W.) has been enacted (but not yet proclaimed). There are saving and transitional provisions<sup>40</sup> concerning the position of wards; proceedings and orders as to intellectually disadvantaged persons under the Child Welfare Act 1939 (N.S.W.); and as to licences and permits for residential centres for intellectually disadvantaged persons under the Youth and Community Services Act 1973 (N.S.W.).<sup>41</sup> If, as seems probable, the Community Welfare Act 1982 of New South Wales is an Act 'in substitution for' the Child Welfare Act 1939 (N.S.W.), then it too is now to be included in the law of the A.C.T., at least to the extent of the operation of the Agreements made by the A.C.T. and New South Wales Governments.<sup>42</sup>

## The United Nations Declaration

When judged against the entitlement set out in paragraphs 1 and 4 the intellectually disadvantaged person in the A.C.T. cannot be said to have, as far as possible, the same rights as other citizens. If care in an institution becomes necessary for a child it would be provided in New South Wales, far away from family members and in a large isolated organisation bearing little if any resemblance to the circumstances and surroundings of normal family life.

Can it be said that paragraphs 2 and 3 are observed at present in the A.C.T.?

So far as a right to economic security and a decent standard of living are to be expected, different standards seem to apply to these persons. There is presently no right to work and no right to any physical therapy and education, training, rehabilitation and guidance that might be required to assist in personal development. Legislation provides only that the Minister *may* grant an allowance to help support 'a destitute child'; and criteria of destitution are enumerated.<sup>43</sup> "This allowance shall not be granted or continued after the child has reached school-leaving age unless the child is an invalid or is otherwise

<sup>34</sup>As amended to 1979.

<sup>35</sup>Child Welfare Agreement Ordinance 1962 (A.C.T.).

<sup>36</sup>Equivalent Acts and Ordinances apply also to the Territory of Norfolk Island.

<sup>37</sup>Child Welfare Agreement Ordinance 1941 (A.C.T.), First Schedule.

<sup>38</sup>Second Schedule.

<sup>39</sup>Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1982 (N.S.W.), s. 4 and Schedule I. <sup>40</sup>s. 5 and Schedule 2.

<sup>41</sup>Also repealed by the Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1982 (N.S.W.), s. 4 and Schedule 1. See Chapter Three below.

<sup>42</sup>Clause 10 of the First Schedule of the Principal Agreement provides for termination at any time by either party on six calendar months' previous written notice of termination.

<sup>43</sup>Child Welfare Ordinance 1957 (A.C.T.), s. 28.

incapacitated." Intellectually disadvantaged adults are included in this provision but once again only if their condition was present before they reached the school-leaving age and only if they were 'destitute'.

The Child Welfare Ordinance does seek to protect children by means of creating offences if there is, for example, a failure to provide adequate and proper food, nursing, clothing, medical aid or lodging; or any assault, ill treatment or exposure of a child.<sup>45</sup> There is provision for medical examination and treatment" and, should a ward be or become entitled in possession to any land, management and control of that land is handled by the Curator of the Estates of Deceased Persons, any income being applied to the maintenance and benefit of the ward.<sup>47</sup>

It might be thought that paragraphs 5 and 6 are complied with, but access to a guardian is neither as of right nor is the guardian qualified. And the Mental Health Ordinance 1983 of the A.C.T. indicates all too clearly that there is as yet no right to protection from exploitation, abuse and degrading treatment at the hands of the state itself.

The definition of 'mental dysfunction' in the Mental Health Ordinance 1983 of the Australian Capital Territory must be criticised as being far wider than that in the New South Wales Mental Health Act which previously applied. 'Mental dysfunction' is defined as 'a disturbance or defect to a severely disabling degree, of perception, comprehension, reasoning, learning, judgment, memory, motivation or emotion'. It therefore potentially includes within its parameters both mentally ill and intellectually disadvantaged persons, and could be the legislative means whereby compulsory treatment for any particular intellectually disadvantaged person (as well as for the mentally ill) was provided.

There is no apparent justification for such a legislative measure to be applied to the intellectually disadvantaged. Arguably, the provisions of the A.C.T.'s Mental Health Ordinance 1983 are in direct contravention of the United Nations *Declaration on the rights of mentally retarded persons*. After all, both the N.S.W. and Victorian model guardianship law would rely (as is the case in South Australia) for *all* appropriate treatment for any particular intellectually disadvantaged person to be provided through the appointment of a guardian and the powers of that guardian to consent to medical treatment for his/her ward. These provisions would make redundant the nineteenth century idea that compulsory treatment options must be available for the intellectually disadvantaged. In the case of intellectually disadvantaged persons, the consent of a qualified guardian is all that is required. Compulsory treatment for intellectually disadvantaged people who are not so severely incapacitated by their disability that they require the appointment of a guardian, cannot be contemplated either. It would entail a notable disregard of the individual human rights of these people and be in clear breach of paragraphs 1, 5 and 6 of the United Nations Declaration."

Little if any of the legislation described bears any relation to the seven paragraphs of the United Nations Declaration. The applicable law dates back to 1898 and was directed towards the committal of certain 'social nuisances' to confinement in institutions. The subsequent enactments are largely variations on this theme. The purpose of the

<sup>45</sup>5.29.

<sup>46</sup>ss. 94-104.

<sup>47</sup>s. 120 (Minister *may* consent).

<sup>48</sup>5. 119. In its Report on Child Welfare, the ALRC has put forward a draft Child Welfare Ordinance 1981. The Trustee Ordinance 1957 (A.C.T.) enacts, with certain modifications, the Trustee Act 1925-1942 of New South Wales. In this Act the powers of the Curator of Estates of Deceased Persons and of the Master in Lunacy in relation to resumed land are dealt with: this is replaced by the protective jurisdiction of the Supreme Court of New South Wales. As Lockhart J. points out, there is no longer any such office as the Master in Lunacy: see *Re M.* (1982) 43 ACTR 20 at 24.

"See Human Rights Commission, Report No. 2, *Proposed A.O.T. Mental Health Ordinance 1981*, AGPS, Canberra, 1982.



legislative structure is the denial of rights by changing the status of the individuals who are subject to its operation. It most definitely is not directed towards recognising and maximising the rights of intellectually disadvantaged persons in any of the ways set out in the United Nations Declaration.

## THE NORTHERN TERRITORY

### Introduction

As mentioned at the beginning of the chapter, the Northern Territory also had a situation where the laws of South Australia in force as at the date of transfer of the Territory, remained in force until amended or displaced by domestic provisions enacted specifically for the Territory. Up until the sixties, South Australian laws, such as the Lunatics Amendment Act of 1865, remained applicable to the Territory. However, over recent years, the Territory has effectively covered the field by enacting laws in all the areas of central concern to intellectually disadvantaged persons.

### The framework of the Northern Territory law

The interests of intellectually disadvantaged people in the Territory are governed by three main pieces of legislation, namely, the Aged and Infirm Persons' Property Act 1979 (N.T.), Mental Health Act 1979 (N.T.) and the Powers of Attorney Act 1980 (N.T.). This legislation, together with the inherent powers conferred upon the Territory Supreme Court<sup>49</sup>, provides a fairly systematic and comprehensive statutory framework.

#### Mental health

The mental health legislation in the Northern Territory comprises both classical and quite atypical provisions. The classical features are that there is a trisection of the population into compulsory, voluntary but incapable, and voluntary/informal patients.<sup>50</sup> Judicial process is insisted on as a pre-condition to the exercise of compulsory powers of admission<sup>51</sup>, while medical assessment and confirmation is laid down for the voluntary but incapable group<sup>52</sup>, with the balance of the population left to their own devices.<sup>53</sup> These processes are coupled with the criteria of 'illness' and need for care, treatment or control; an inability to manage one's affairs, and a likelihood of harming oneself or others<sup>54</sup>, to serve as the pre-conditions to the Court making a compulsory admission. There are also the traditional arrangements for up to three days emergency custody where a warrant for custody and a judicial order has been obtained<sup>55</sup>, or for twenty-four hours care where judicial warrant has not been obtained<sup>56</sup>, and for regulating therapeutic and other procedures to which the person does not consent.<sup>57</sup>

The quite unusual feature of the Territory legislation is its failure to include any positive definition of what constitutes mental illness. Rather, the scheme of the Act involves specifying that certain matters of religious, political or moral belief, and drug-

<sup>49</sup>Supreme Court Act 1962 (N.T.), s. 16.

<sup>50</sup>Mental Health Act 1979 (N.T.), ss. 4(4), 5, 6 and Part III.

<sup>51</sup>Part III generally.

<sup>52</sup>s. 6.

<sup>53</sup>S. 13(1).

<sup>54</sup>S. 7(1).

<sup>55</sup>S. 9(2).

<sup>56</sup>S. 25.

taking *per se*, do not, of themselves, constitute mental illness.<sup>58</sup> The rest is left at large. In practice this will no doubt mean that the views of appropriately qualified medical practitioners will carry the day, as also tends to be the case in those jurisdictions which have enacted broad (and often tautological) definitions.<sup>59</sup>

Where intellectually disadvantaged people stand as a matter of law is more dubious. However, although it cannot be taken to be entirely beyond argument, the frequent reference in the legislation to the concept of 'illness'<sup>60</sup> seems to be designed to rule out the prospect of invoking the legislation to deal with intellectually disadvantaged persons. Since illness imports a notion of 'disease', support for this construction can be drawn from the analogous decisions of the courts in construing the more expansive language to be found in legislation elsewhere.<sup>61</sup>

### Power of attorney

As with the A.C.T., the Northern Territory has also enacted legislation to overcome the common law barrier to effectuating an 'enduring' power of attorney. Arguably, this legislation ranks with the best of that to be found in the Federation.<sup>62</sup> For the instrument to remain effectual after the donor suffers an incapacity, it must satisfy four basic conditions. First it must evince an intention that it subsist beyond any incapacity.<sup>63</sup> It need not be under seal<sup>64</sup>, but, unlike Victoria, no special form is recommended for use on the part of the donor. Secondly, it must incorporate (by endorsement or annexation) a statement by the donee, in a prescribed form, spelling out his/her acceptance of the implications and responsibilities of being a donee of an enduring power.<sup>65</sup> Finally, the instrument must be executed in the presence of an independent witness, and it must be registered<sup>66</sup>

The Territory legislation also confers a supervisory jurisdiction on the Supreme Court in relation to such instruments. First, it requires the leave of the Court before a donee is enabled to retire from duty.<sup>62</sup> Secondly, people interested in the property and the Public Trustee are both granted standing either to seek a variation of the terms of the instrument or the appointment of the Public Trustee or any fit person as a substitute for the nominated donee; or to require the filing or auditing of accounts.<sup>68</sup> The making of a protection order in relation to property under the terms of the Aged and Infirm Persons' Property Act does, however, displace an enduring power to the extent of any inconsistency.<sup>69</sup> The only exception to this is where proprietary interests of the donee, or obligations owed to the donee, are at stake.<sup>70</sup>

<sup>58</sup>S. 4(2), (3).

o. V. Briscoe, 'The meaning of "mentally ill person" in the Mental Health Act 1958-1965 of New South Wales' (1968) 42 *Australian Law Journal*, 207.

'e.g. Mental Health Act 1979 (N.T.), ss. 5, 7(1), 9(1), 10(4), 13(1), 24(1), 26(1), 35(1).

"G v. F [1983] 1 NSWLR 54, 55 (intellectual handicap is not mental illness, though it may fall within an infirmity arising from disease); W v. W [1983] 1 NSWLR 61; M v. R [1983] 1 NSWLR 144, 147 (a stroke victim).

"Powers of Attorney Act 1980 (N.T.).

"s. 13(a). <sup>64</sup>s. 6(3). <sup>65</sup>s.

13(b). <sup>66</sup>ss. 14, 13(c)

respectively.

<sup>67</sup>s. 15(1).

<sup>68</sup>s. 15(2), (4).

<sup>69</sup>s. 18.

<sup>70</sup>ss. 18, 19.

## Supreme Court protective jurisdiction

The Territory Supreme Court draws its jurisdiction with respect to intellectually disadvantaged people from two sources. Least significant for our purposes are the powers with which it was clothed on its establishment by way of the head of power broadly equating it with the South Australian Supreme Court<sup>71</sup>, and those powers conferred by the continued operation of South Australian laws in force as at the date of the transfer of the Territory to the Commonwealth<sup>72</sup>. Rather, for all practical purposes, the law in the Territory on this point is stated in the Aged and Infirm Persons' Property Act 1979 (N.T.).

As with the South Australian Act on which it is modelled, this piece of legislation confines its attention to the management of property as distinct from the person. Both invest their respective Supreme Courts with extensive and flexible heads of jurisdiction, and each casts the net widely. In the Territory legislation, protective orders may be made where 'by reason of age, disease, illness, or mental or physical infirmity' a person is placed in a position which renders protection 'necessary in the interests of that person or of those dependent on [that person]'.<sup>73</sup> Plainly this encompasses some intellectually disadvantaged people. The person concerned, certain relatives, or the Public Trustee can apply to the Supreme Court as of right<sup>74</sup>; any person can do so by leave; and the Court can move of its own motion, to make, vary or revoke orders.<sup>75</sup>

The orders themselves can relate to part or all of the estate<sup>m</sup>, and may involve appointing the Public Trustee or others as 'managers'.<sup>77</sup> The jurisdiction may be exercised by the Master or in chambers<sup>78</sup>, but notice must be given to affected parties<sup>79</sup> and the Court may examine the person or commission a report from the welfare authorities.<sup>80</sup> The Court must pay regard to such matters as the ability of the person to manage (wholly or partly) his/her affairs, and his/her susceptibility to undue influence.<sup>81</sup> The protection order may be made on such terms and conditions as the Court sees fit.<sup>82</sup>

<sup>71</sup>The Northern Territory Supreme Court Act 1961 (Cwth), s. 15(1), provides that the Supreme Court 'has . . . the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had [before 1911]' and s. 15(3) provides that this amplifies any jurisdiction under any Imperial Act. This may, by the indirect route of picking up those historic, inherent powers of the courts of Chancery with which powers the South Australian Supreme Court was itself clothed on its own establishment, enable the Territory to appoint guardians or committees of the person: on historical antecedents see further, T. Carney, 'Civil and social guardianship for intellectually handicapped people' (1982) 8 *Monash University Law Review*, 199, 205-7. Support for the view that inherent powers subsist is to be found in *Re Magavalis* [1983] Qd R 59, 63; *Re R* [1983] 1 NSWLR 556, 564 and *M v. R* [1983] 1 NSWLR 144, 148. However, it seems such powers have not been invoked: personal communication, Mr J. Flynn, N.T. Public Trustee, 18 April 1984.

<sup>72</sup>e.g. provisions such as the Lunacy Amendment Act 1865 (S.A.).

<sup>73</sup>Aged and Infirm Persons' Property Act 1979 (N.T.), s. 12(1). <sup>74</sup>s. 7(1).

<sup>75</sup>s. 7(2), (3).

<sup>76</sup>ss. 4 (definition of 'estate'), 11, 12(2) (b) (i).

<sup>77</sup>s. 13; statements and accounts are required of managers, which obligations are potentially more stringent for private citizens appointed as managers: ss. 24, 25.

<sup>78</sup>s. 6.  
<sup>79</sup>s. 8.

<sup>80</sup>ss. 9, 10.

<sup>81</sup>s. 12(2).

<sup>82</sup>s. 16(1).

## **The United Nations Declaration**

The Northern Territory legislation passes muster to a greater degree than can be said of the A.C.T. law (and for that matter the laws in some other States). As a matter of strict law, intellectually disadvantaged people in the Northern Territory seem well clear of the reach of the mental health laws. Yet at the level of practice, there is a significant risk that the medical profession will be misled into reaching the opposite view, by the absence in the law of a clear definition spelling this out. In the interests of clarity the legislation desirably should, at least, include a provision stating that admission under that Act may not be grounded solely on intellectual disadvantage.

The enduring power of attorney and Supreme Court 'protective order' powers, generally conform to the dictates of the Declaration so far as due process rights are concerned. And the potential for welfare reports to be obtained; for partial orders to be made; the generous standing for people to apply for initial orders or modifications; and the general flexibility of the protection order powers — are all quite creditable. But there is nothing on the statute book in the Northern Territory (or for that matter in the A.C.T.) which guarantees intellectually disadvantaged people access to a qualified guardian, or to the least restrictive intervention when assistance is called for. Nor is there much by way of protection against exploitation and abuse. Judged against these key standards, both Territories have a very great deal of ground to make up.

## Chapter Three

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# The existing and proposed law in the Australian States

### INTRODUCTION

This chapter will consider in some detail the legal position of intellectually disadvantaged persons in each of the Australian States. The formal legislative structures and the legal procedures that are followed or have been followed in these States throughout most of the first half of the twentieth century will be described.

To date the legislatures of the Australian States have employed a number of basic methods of providing guardianship for intellectually disadvantaged persons. In short, they include the following:

- (i) guardianship of the person or estate of the ward through an order of the State Supreme Court, pursuant to the provisions of the relevant Supreme Court Act;
- (ii) guardianship pursuant to the provisions of State mental health legislation;
- (iii) appointment of the State Public Trustee as guardian of the person's estate;
- (iv) the use of the power of attorney device, for management of the intellectually disadvantaged person's affairs by some third person;
- (v) the establishment of Guardianship Boards, to consider the needs of intellectually disadvantaged persons, as well as mentally ill persons; and
- (vi) management of the person and/or the estate of an intellectually disadvantaged person who has been admitted to a State mental health institution.

Accordingly, the discussion that follows will examine the various legal mechanisms by which guardianship of either the person or the property (or both) of an intellectually disadvantaged person, may be achieved in each of the Australian States. To this end, it should be borne in mind that often an additional consideration arises, in that the position between adult and infant wards may differ in some respects. Finally, the last part of this chapter will briefly outline the various reforms which have either been proposed, or are about to come into effect in some of these States.<sup>1</sup>

### EXISTING LAW IN NEW SOUTH WALES

#### Structure

The legislation operating at the time of writing in New South Wales has been alluded to in the previous chapter. It is expected to remain in force until late 1985 when some portions of new enactments are to become operative.<sup>2</sup> The first step towards these reforms was taken in 1977, when New South Wales set up Intellectually Handicapped Persons Review Tribunals and an Intellectually Handicapped Persons Review Panel.<sup>3</sup> Further changes, to be dealt with in the second part of this chapter, were enacted in 1982 and 1983. Neither was in force at the time of writing and the 1982 changes will now be

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<sup>1</sup>The process of change being something of a patchwork, some of the reforms are already in, or are about to come into, operation; in particular, for example, the new Powers of Attorney provisions and anti-discrimination legislation in New South Wales and Victoria.

<sup>2</sup>See 'Proposed reforms' below.

<sup>3</sup>Child Welfare Act 1939 (N.S.W.), Part IX, ss. 43-48M (as amended in 1967 and 1977).

superseded. Partial guardianship provisions are anticipated for late 1985 or early 1986. For the time being, therefore, the law is as set out below. In the immediate future only the 1983 Protected Estates Act, and portion of the new Mental Health Act, appear destined for prompt proclamation.

## Content of the N.S.W. law

'Intellectual handicap' is defined in the Child Welfare Act 1939 (N.S.W.) as 'a condition characterized by an inadequate social adjustment, a retarded rate of maturation and a significant limitation of learning capacity due to arrested or limited development of intellectual functioning'.<sup>4</sup>

### Guardianship of the person

People can be brought within the Act in one of three ways. First, the Minister may order that a ward of State (admitted to care under the child neglect or delinquency laws) be dealt with as an intellectually disadvantaged person when satisfied both that the ward requires care, protection or supervision in his/her own interests or in the interests of others, and that the interests of the ward would be promoted.<sup>5</sup> Secondly, the guardian of a child (someone under 16 years) or young person (someone aged between 16 and 18 years) is able to request the Minister to make such an order.<sup>6</sup> Thirdly, a court (defined as a Children's Court constituted by a Special Magistrate') may make an order.<sup>8</sup>

No provision is made for an adult who is intellectually disadvantaged to be brought within the operation of the Act for the first time as an adult. Section 48A of the Act, however, provides a method for continuous extensions, on a two yearly basis, of existing orders that have not been discharged. In this way, someone who has been made an intellectually disadvantaged person before turning 18 can remain within the ambit of these special legislative provisions after reaching adulthood.<sup>9</sup>

The unsatisfactory nature of this device is to be seen in its result, namely, that an adult who is intellectually disadvantaged and subject to a renewed order is in the care of the Department of Youth and Community Services. Other intellectually disadvantaged adults can be provided for only if, within the terms of the Mental Health Act 1958 (N.S.W.), they can be classified either as 'mentally ill and incapable of managing their affairs'<sup>10</sup> or 'through mental infirmity, arising from disease or age, [are] incapable of managing their affairs'.<sup>11</sup>

<sup>4</sup>s. 43(1).

<sup>5</sup>s. 46(1). Notice has to be given to the previous guardian of the ward and any representations made within 21 days by that person have to be considered: s. 46(2).

<sup>6</sup>s. 46(3).

<sup>7</sup>s. 42(1).

<sup>8</sup>s. 47; on the application of an officer authorised in that behalf by the Minister (s. 47(1)) and only after considering the reports required by ss. 89(2) and 47(2).

<sup>9</sup>s. 48A(1).

<sup>10</sup>Mental Health Act 1958 (N.S.W.), s. 38; 'a protected person'. Intellectually disadvantaged people cannot fall within this definition: *G v. F* [1983] 1 NSWLR 54,56; *W v. W* [1983] 1 NSWLR 61,62-3.

<sup>11</sup>s. 39; 'an incapable person'. Intellectually disadvantaged people can satisfy this provision only where there is a 'causal relationship': *G v. F* [1983] 1 NSWLR 54,55; even so a manager will be appointed only where it is in the interests of the person to do so: *W v. W* [1983] 1 NSWLR 61,62-3; *P v. P* [1982] 2 NSWLR 508; *O'Dell v. Barwick* [1983] 1 Qd R 114,121-2.

## Estates

As mentioned in the previous chapter, New South Wales law provides four avenues by which the property (or personal affairs in some instances) of a person may be placed under guardianship.

In the first place, s. 52 of the Mental Health Act provides that the property of any patient who is compulsorily admitted to a psychiatric facility, is automatically placed under the control of the Master of the Supreme Court. The second route is mapped out by s. 22 of the Act. This provision allows voluntary patients to elect to place themselves in the same position. In both cases it is the operation of the mental health admission procedures which serves as the gateway.

The remaining two avenues are the province of the Supreme Court itself. A manager may be appointed of the estate of a person found to be an 'incapable person' under s. 39 of the Act. This extends to any person who has lost the capacity to manage his/her affairs by reason of a 'mental infirmity arising from disease or age'. Finally, there is provision in s. 38 for the Court to declare persons to be 'protected person[s]' if they are mentally ill and incapable of managing [their] affairs'. In this instance, a committee of the estate may be appointed. The Court is also empowered to appoint a committee of the person (called a guardian in this monograph) in either event.

Where the Master of the Court is empowered to act, this in substance means that the estate will be handled by the Protective Commissioner (and the associated Protective Office) established under the Mental Health Act (Part XI) and the Supreme Court Rules, to serve as the administrative arm of the Court in such matters. Wide powers of management of the property are conferred by s. 61 of the Act.

When a committee or manager is selected in the exercise by the Supreme Court of its s. 38 or s. 39 powers, a private individual will generally be chosen for this purpose (though estate management is presumptively seen to be the preserve of the Public Trustee). Again, a wide variety of powers is available to be delegated by the Court to that individual. In the case of a 'protected person' there is an alternative course. If appropriate, the Court may place the property in the hands of the Public Trustee in reliance on s. 12 of the Public Trustee Act 1913 (N.S.W.). Once again, there are quite wide ranging powers which accrue to the Public Trustee in such circumstances.

Where the Supreme Court has appointed a committee of the estate or of the person it has the power to declare that a person has recovered mental health and is capable of managing his/her affairs once more. There is also provision for the court to order that these questions be determined by a jury if the person making the application so desires.<sup>12</sup>

## Children

The Minister responsible for Child Welfare can request that the Master in the Protective Jurisdiction of the Supreme Court exercise the powers of management of the estate of an intellectually disadvantaged person.<sup>13</sup> But there is no appeal to the Supreme Court or a jury from a decision by the Minister responsible for Child Welfare that a child or young person should be dealt with as an intellectually disadvantaged person under Part IX of the Child Welfare Act 1939 (N.S.W.). The safeguards provided in this Act against unjustified orders and extensions are by way of appeal to an Intellectually Handicapped Persons Review Tribunal", and although the members of this body are selected from suitably qualified people who are members of the Intellectually Handicapped Persons Review Panel", there is no appeal either on matters of fact or on questions of law from a Review Tribunal decision.

<sup>12</sup>ss. 38\_40.

<sup>13</sup>Child Welfare Act 1939 (N. S.W.), s. 48E.

<sup>14</sup>ss. 48A(2), 48B.

<sup>15</sup>s. 43A.

The New South Wales Government has enacted two further reforming pieces of legislation. The Anti-Discrimination (Amendment) Act 1982 (N. S.W.) (assented to in December 1982) and the Conveyancing (Powers of Attorney) Amendment Act 1983 (N.S.W.) together with the cognate Mental Health (Powers of Attorney) Amendment Act 1983 (N.S.W.) and the Trustee (Powers of Attorney) Amendment Act 1983 (N.S.W.) make some significant advances.

### **Discrimination**

Under the first of these measures, discrimination on the ground of a person's intellectual impairment has become unlawful in certain circumstances. These include work, partnerships, trade union membership, continuation of a professional trade or occupational authorisation or qualification, employment, education, the provision of goods and services, accommodation and club membership.

It is interesting that in the Anti-Discrimination (Amendment) Act 'intellectual impairment' is defined as follows:

. . . any defect or disturbance in the normal structure and functioning of the person's brain, whether arising from a condition subsisting at birth or from illness or injury; [and] 'intellectually handicapped person' means a person who, as a result of disabilities arising from intellectual impairment, is substantially limited in one or more major life activities.<sup>16</sup>

This is simpler and at the same time more extensive than the definitions in other N.S.W. legislation.

### **Power of attorney**

The amendments to the powers of attorney legislation provide that where expressed to be irrevocable and given for valuable consideration, the power is not revoked by and remains effective notwithstanding the mental incapacity of the principal.<sup>17</sup> This is the nucleus of a method of providing limited guardianship for adults who take this precautionary step, if later in life they happen to become mentally incapacitated.

## **Evaluation of the N.S.W. position**

Assessment of the N.S.W. law against the benchmark of the rights contained in the paragraphs of the United Nations Declaration demonstrates its limitations. First, it is clear that several aspects of the rights contained in paragraph 7 are not complied with; specifically, the right of appeal to higher authorities and the presence of proper legal safeguards against every form of abuse. Secondly, although the legislation provides for the establishment or licensing of hostels, homes, institutions and so on for wards of State, there is no *right* to the provision of care that is the nearest possible equivalent to normal life, as specified in paragraph 4. Thirdly, paragraph 5 of the UN Declaration contains a right to a qualified guardian for each intellectually disadvantaged person. The Minister responsible for child welfare cannot be regarded as a qualified guardian in all the circumstances set out above, and the Mental Health Act 1958, has no provisions specifically directed towards guardianship of intellectually disadvantaged adults at all.<sup>18</sup>

<sup>16</sup>Anti-Discrimination (Amendment) Act 1982 (N.S.W.), Schedule 1(2) (b).

<sup>17</sup>Conveyancing (Powers of Attorney) Amendment Act 1983, s. 160. The signatory must not be labouring under a disability at the time of executing the document: *Re Barnes* [1983] VR 605, 609.

<sup>18</sup>See later this chapter for the new position.



## EXISTING LAW IN SOUTH AUSTRALIA

### Structure

The Mental Health Acts of the various States are the usual legislative framework within which some provision for the care of intellectually disadvantaged children and adults is to be found. Until 1977, the position in South Australia had been virtually the same as that in New South Wales (as described in the previous section). In that year, the Mental Health Act 1976-1977 (S.A.) was passed. This reform measure made provision for the care, treatment and protection of persons who are intellectually disadvantaged, as well as mentally ill persons. This Act marked the start of a change in approach towards intellectually disadvantaged persons. Although they were still dealt with in a Mental Health Act, their rights were given some recognition by means of the establishment of a Guardianship Board — one of the first so constituted in Australia — and a Mental Health Review Tribunal.<sup>19</sup>

### Content of the South Australian law

The South Australian Act adopts the term 'Mental handicap' which is defined as 'imperfect or retarded development, impairment or deterioration of mental faculties from whatever cause'<sup>20</sup> as the basis for determining the scope of the legislation.

#### Guardianship of the person

The Guardianship Board constituted by the 1976-1977 Act can order a person to be received into the guardianship of the Board provided certain conditions are satisfied. Eligibility is confined to people who are suffering from mental handicap and who by reason of that handicap are incapable of managing their own affairs, or who require oversight, care or control in the interests of their own health and safety or for the protection of others.<sup>21</sup> The provisions of the 1976-1977 Act also apply to persons in need of guardianship because of mental illness.<sup>22</sup>

In the 'unreformed' States of Victoria, N.S.W., Queensland and so forth, the powers of a guardian and of a committee of the person are to be found in the common law. Neither the New South Wales nor the present Victorian legislation details these powers in any way. By contrast, the powers of the Guardianship Board in South Australia are set out in wide general terms in the 1976-1977 Act. They include, in addition to any common law and equitable powers, powers concerning the care and custody, the treatment or care, and the upbringing, education and training of the protected person.<sup>23</sup>

#### Estates

The previous Act, the Mental Health Act 1935-1974 (S.A.), provided for the administration of the estates of intellectually disadvantaged or mentally ill persons, which provisions operated in conjunction with those contained in the Aged and Infirm Persons Property Act 1940-1975 (S.A.). The provisions of the latter Act still remain in operation, maintaining a dual arrangement, with the jurisdiction of the Board in some competition with those earlier provisions. The present Mental Health Act provides that the Board may appoint an administrator of the estate of persons who, in the opinion of

<sup>19</sup>Mental Health Act 1976-1977 (S.A.), ss. 20, 29.

<sup>20</sup>s. 5.

<sup>21</sup>ss. 20, 26.

<sup>22</sup>ss. 5, 20, 26.

<sup>23</sup>s. 27. Section 27(1) (d) empowers a guardian to consent to medical treatment of his ward.

the Board, are incapable of managing their affairs. Such an order may be made whether or not those persons are actually received into the guardianship of the Board. The Public Trustee is to be appointed as the administrator in the absence of any special reasons why some other person should be appointed. Conditions can however be attached to the appointment.<sup>24</sup>

A division between the guardian of the person and the administrator of the estate of a protected person has been retained.<sup>25</sup> South Australia has modernised the language, and given the powers to the Guardianship Board whilst retaining that distinction; but the power of the Board to impose conditions can perhaps be regarded as an early form of limited guardianship.

### Appeal

South Australia has an unlimited right of appeal to the Supreme Court by any person aggrieved by any decision or order of the Mental Health Review Tribunal.<sup>26</sup> There is a right of appeal to the Tribunal against orders of the Guardianship Board<sup>27</sup> and the Tribunal must make periodic reviews of custodial orders of intellectually disadvantaged persons.<sup>28</sup>

Furthermore, both the Guardianship Board and the Mental Health Review Tribunal are to be chaired by either a Judge, a Special Magistrate, or a legal practitioner of not less than 7 years' standing.<sup>29</sup> There is also provision for mandatory representation on appeals. Counsel is to be paid by the South Australian Health Commission, and may be dispensed with only where the appellant does not desire to be represented and, in the opinion of the Tribunal or Court, has sufficient command of mental faculties to make a rational judgment in the matter.<sup>30</sup>

### Power of attorney

In mid 1984 provision was made for an enduring power of attorney to be created. The Powers of Attorney and Agency Act 1984 (S.A.) broadly follows the Northern Territory model. Thus s. 6 simply requires that the instrument be a deed which evinces a clear intent to create an ongoing power; that the donee expressly consent in writing to act in that capacity; and that the transaction be witnessed by at least one person who is authorised to swear affidavits. As in the Northern Territory, s. 9 goes on to provide that a donee of an enduring power may not renounce that responsibility without the leave of the Supreme Court, which court also exercises a general supervisory role in relation to the discharge of these responsibilities.

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<sup>24</sup>The Model Statute of the American Bar Association (referred to later in this monograph) also maintains the distinction between guardian (of the person) and administrator (of the estate) but calls the latter a conservator. As in South Australia, the ABA model is to be found within a single legislative framework, but it is not, unlike that of South Australia, a Mental Health Act and the appointment of an administrator is among the alternative methods available to the Court that is to make a decision on an application brought before it concerning an alleged disabled person. The ABA model has such applications heard and determined by a Court in accordance with the requirement of paragraph 7 of the UN *Declaration on the rights of mentally retarded persons*.

<sup>25</sup>Mental Health Act 1976-1977 (S.A.), S. 38.

<sup>28</sup>

<sup>28</sup>ss. 20, 21, 29, 30.

<sup>30</sup>. 39.

## Evaluation of the S.A. position

South Australian law does have some positive features. There is no specific provision in the South Australian legislation that institutional care must be as close as possible to normal life (UN Declaration paragraph 4), but there is a power for the Board to place a protected person in the care and custody of a relative or some other person who will, in the opinion of the Board, take proper care of him or her.<sup>31</sup> Partial guardianship is provided in embryonic form and guardians are more likely to be 'qualified' within the terms of paragraph 5. Review provisions also equate with the requirement of paragraph 7. Otherwise, however, South Australia falls short of the standards of the Declaration.

## EXISTING LAW IN VICTORIA

### Structure

Pending enactment of the Guardianship and Administration Board Bill 1985 (Vic.) and allied Bills, Victoria's legislation remains that of a bygone era. The Public Trustee Act 1958 (Vic.), together with the Mental Health Act 1959 (Vic.), provide that the Supreme Court is to be the vehicle for determining the status of intellectually disadvantaged persons in Victoria. Unlike the other States, the responsibility for the operation of the Victorian system is placed in the hands of the Public Trustee.

### Content of the Victorian law

#### Guardianship of the person

There are, at present, two methods for the appointment of a guardian of the person of an intellectually disadvantaged adult in Victoria. An application may be made to the Supreme Court under either s. 32 or s. 39(a) of the Public Trustee Act 1958 (Vic.).

Section 39(a) enables the Supreme Court to make an order for the appointment of a committee of the person (i.e. a guardian) of anyone who is a 'patient' within the meaning of the Mental Health Act. The term 'patient' refers, among other things, to any person who has been 'admitted for training' on the certificate of a medical practitioner pursuant to the Mental Health Act, s. 44.

Section 39(a) was widened by the Public Trustee (Amendment) Act 1981 (Vic.). As a result, the Supreme Court may now make an order appointing a guardian of the person for anyone who is an 'infirm person' within the meaning of the Public Trustee Act. To become an infirm person, one must first be examined by two medical practitioners. The medical practitioners must sign certificates certifying that in their opinion, the person is incapable of managing his/her affairs. To be effective, the certificates must be sent to the Public Trustee within 21 clear days of the examination. If the Public Trustee is satisfied that the person is incapable of managing his/her affairs, by reason of senility, disease, illness or physical or mental infirmity, the Public Trustee may sign a certificate that he is satisfied that the person is an 'infirm' person.<sup>32</sup>

Section 32(1) of the Act provides a second avenue, in that it empowers the Supreme Court to conduct an enquiry in order to determine whether a particular person is 'intellectually defective and incapable of managing his affairs'.<sup>33</sup> An application may be

<sup>31</sup>South Australia, Committee on the Rights of Persons with Handicaps (C. H. Bright, Chairman), *The law and persons with handicaps*, vol. 2, *Intellectual handicaps*, Adelaide, 1981. Hereinafter referred to as Bright Committee Report.

<sup>32</sup>Public Trustee Act 1958 (Vic.), s. 28 and Public Trustee (Amendment) Act 1981 (Vic.). See too the definition of an 'infirm person' in s. 3.

<sup>33</sup>Public Trustee Act 1958 (Vic.), s. 32.

made by the Public Trustee or by any other person. The person who is alleged to be 'intellectually defective' is entitled to notice of the application. The enquiry itself is held before a judge or Master of the Supreme Court. If the judge or Master finds that the subject of the enquiry is 'intellectually defective and incapable of managing his own affairs', he must certify him as so incapable. The person then becomes a 'lunatic so found'.<sup>34</sup> The Supreme Court may then appoint the Public Trustee or any other person whom it thinks fit to be the 'committee' of the person (guardian) of the lunatic so found.<sup>35</sup>

### **Estates**

The Supreme Court or Master can however specially find and certify that a person is incapable of managing his/her affairs, but does not require oversight, care or control with respect to his/her person. This method results in management only of the estate of the person concerned. The estate is also automatically brought under control by compulsory admission and a person may elect to have it so managed if a voluntary patient.<sup>36</sup>

### **Power of attorney**

One of the other significant reforms made in Australia is the Victorian legislation that enables a power of attorney to continue to operate despite, and thus not to be revoked by, the subsequent incapacity of the donor of the power of attorney, when this eventuality has been expressly anticipated and provided for by the donor.<sup>37</sup> This is one of the options being made use of overseas as a least restrictive method of guardianship available to intellectually disadvantaged people — as long as they have thought of it beforehand.

## **Evaluation of the Victorian position**

Clearly, the Victorian law falls well short of the standards specified in the Declaration. It fails to provide adequate protection from exploitation or ready access to a least restrictive or partial guardianship. Nor does it subscribe to the due process and informed decision-making requirements of paragraph 7.

## **EXISTING LAW IN QUEENSLAND**

### **Structure**

Queensland legislation governing the question of guardianship for intellectually disadvantaged persons will undergo major reform in the near future. The Intellectually Handicapped Citizens Act 1985 (Qld) is expected to be proclaimed at the end of 1985. Prior to this, guardianship in Queensland was provided for by a number of enactments. The first, the Supreme Court Act 1867 (Qld) (which survives the reforms), contains provisions vesting jurisdiction in the Supreme Court to appoint a guardian or a

<sup>34</sup>s. 34.

<sup>35</sup>ss. 35, 37 respectively.

<sup>36</sup>T. Carney, 'Civil and social guardianship for intellectually handicapped people' (1982) 8 *Monash University Law Review*, 211.

<sup>37</sup>Instruments (Enduring Powers of Attorney) Act 1981 (Vic.). The material section of the Act states: '114. Notwithstanding any rule of law to the contrary an enduring power of attorney shall not be revoked by the subsequent incapacity of the donor of the power.' The words of Schedule 13 are: '3. I declare that this power of attorney shall continue to operate and have full force and effect notwithstanding that I may subsequently become incapable.' However, the person must be of full capacity when the document is signed: *Re Barnes* [1983] VR 605, 609 (Beach J).

committee of either the estate or person of an intellectually disadvantaged individual. Secondly, certain provisions of the — unfortunately named — Backward Persons Act 1938 (Qld), were also of relevance to the care of intellectually disadvantaged persons. This Act is repealed by the 1985 Act. Thirdly, Part VI of the Public Trustee Act 1978 (Qld) deals with the management of estates of 'Incapacitated Persons'. This Act is to remain in place.

## Content of the Queensland law

### Guardianship of the person

Queensland legislation provides three methods by which guardianship of the person of an intellectually disadvantaged person can be founded. The first of these is by an order of the Supreme Court pursuant to s. 22 of the Supreme Court Act 1867 (Qld). This essentially empowers the Court to appoint a guardian or committee of the person of intellectually disadvantaged individuals where such an order was available under the Royal prerogative as it stood in the late nineteenth century.<sup>38</sup>

Secondly, an intellectually disadvantaged person was able to be admitted to a 'Backward Persons' Institution', under the Backward Persons Act 1938 (Qld). The third possibility was to be found in s. 20 of the Act. This took the form obtaining a licence for the 'care, treatment or control of a single patient'.<sup>39</sup> Although the Backward Persons Act, in defining 'backward person' does distinguish between mentally ill and intellectually disadvantaged persons, later sections of the Act, including those referred to above, led to the impression that at times this distinction had been blurred.

### Estates

Queensland legislation also provided several means by which the management of an intellectually disadvantaged person's estate could be achieved. The 1985 Act amplifies these by allowing for management to be assumed (or declined) by the Public Trustee on reference from the newly created Intellectually Handicapped Citizens Council.

As in the case of guardianship of the person, a guardian or committee of the estate may be appointed by the Supreme Court. The second avenue is found in the provisions of the Public Trustee Act 1978 (Qld), which empower the Supreme Court, upon an application made by the Public Trustee, to make a 'Protection order'.<sup>40</sup> A 'Protection order' provides for the Public Trustee to assume possession and control of the whole or any part of the estate of a person to whom the order relates. Such a person is referred to as a 'Protected Person'. An individual may be declared to be a protected person pursuant to the criteria specified in s. 65(1) of the Act, which include the situation:

- (i) Where, for any of a number of reasons, the person is unable to manage his affairs, or is at risk of exploitation by undue influence; or
- (ii) Where the court considers that it is in that person's interest, or in the interests of those dependent upon him, that his property be protected.<sup>41</sup>

The third method is also provided by the Public Trustee Act. Section 70 of the Act enables the Public Trustee to file a 'Certificate of Disability' with the Supreme Court.

<sup>38</sup>The scope of the inherent powers of the Supreme Court is analysed in *Re Magavalis* [1983] Qd R 59,63 and *S v. S* [1983] 3 NSWLR 199, 202. Apart from the jurisdiction over 'natural born fools' the only other head is that covering 'persons deprived of understanding and reason by act of God'.

<sup>39</sup>Backward Persons Act 1938 (Qld), s. 20.

<sup>40</sup>Public Trustee Act 1978-1981 (Qld), s. 64.

<sup>41</sup>s. 65; *Re Stone* [1982] Qd R 83; *O'Dell v. Barwick* [1983] Qd R 114. The power to make a partial order, covering only a portion of the person's estate derives from section 68 (which draws on South Australian model legislation): *Fowler v. Gray* [1982] Qd R 334.

The effect of the certificate is the same as the issuance of a 'Protection Order' under s. 65 of the Act. It differs from a protection order, however, in that:

- (i) It may only be granted in respect of persons whose estates do not exceed \$5,000.00 in value;
- (ii) The Public Trustee is the decision-maker who makes the order<sup>42</sup>; and
- (iii) The protected person himself may request the Public Trustee to file the Certificate.<sup>43</sup>

Finally, the Public Trustee Act provides a fourth method by which a guardian may be appointed. Section 58 of the Act allows for the Public Trustee to be appointed as the guardian of an infant, including presumably, an intellectually disadvantaged child.

## Evaluation of the Queensland position

Once again the law was but a pale shadow of what is required by the Declaration. The entitlements to a qualified guardian, to protection from exploitation, due process and appeal rights, and the ability to live in the mainstream of family and community life were seriously restricted by Queensland law.

## EXISTING LAW IN WESTERN AUSTRALIA

### Structure

In Western Australia, the main forms of legislation governing the question of guardianship, are the Supreme Court Act 1935 (W.A.), and the Mental Health Act 1962 (W.A.). As in most of the other States, the Supreme Court Act confers jurisdiction on the Court to appoint guardians and committees of the person and the estate.<sup>44</sup> The Mental Health Act also contains major provisions with respect to the admission of patients to approved institutions, and the management of their estates. In 1981, the Western Australian Parliament passed the Mental Health Act 1981 (W.A.), which was intended to effect major reforms to the earlier Act of 1962. However, that Act was not proclaimed. The present Government levelled trenchant criticisms at the Act whilst in opposition in 1981 and commissioned a review and fresh legislation on coming to office.<sup>45</sup> Thus, the 1962 Act remains the law in Western Australia, for the time being. Legislative reforms along Victorian lines are, however, due to be introduced in Spring 1985.

## Content of the Western Australian law

### Mental disorder

In addition to the appointment of a guardian or committee of the person of an intellectually disadvantaged individual pursuant to the provisions of the Supreme Court Act, a person suffering from a 'mental disorder' may be admitted for care and treatment to an approved hospital. This can be done either at the request of the individual so

<sup>42</sup>Public Trustee Act 1978-1981 (Qld), s. 70(1).

s. 71.

<sup>43</sup>Supreme Court Act 1935 (W.A.), ss. 16(1) (e) (ii), 23.

<sup>44</sup>See Western Australia, Parliament, *Debates* August 1981, 2567 (Mr Hodge), 2581 (Mr Hodge), and 2582 (Mr Bryce). The criticisms were levelled mainly at the definitions of 'intellectual handicap' and 'mental illness' under the proposed legislation.

admitted, or upon referral by a medical practitioner or other authorised person." The Mental Health Act 1962 defines 'mental disorder' as

any illness or intellectual defect that substantially impairs mental health<sup>47</sup>.

The definition therefore groups together both mentally ill and intellectually disadvantaged persons for the purposes of admission to an approved hospital for treatment. The Act does provide, however, that only intellectually disadvantaged persons may be admitted to a 'Training centre' for treatment, mentally ill persons being excluded in this regard.

### Estate management

Management of the estate of an intellectually disadvantaged person in Western Australian is possible by either of two means. The first is by court order." The second is provided by the operation of Part VI of the Mental Health Act 1962 (W.A.) which deals with management of the estates of 'incapable persons'. Under s. 64(1) of the Act, persons may be declared to be 'Incapable Persons', where the Supreme Court is satisfied that, by reason of intellectual handicap, they are capable of managing their affairs. Once such a finding is made, the Court is empowered, under s. 64(1), to appoint managers of the 'incapable person's' estate. Section 65(1) of the Act provides that estate managers so appointed are to be supervised by the Principal Registrar of the Court. In appointing a manager, the Court, under s. 68 of the Act, may invest him with such powers specified under that section, as it thinks appropriate in the circumstances of the case.<sup>49</sup>

Two final matters concerning the legislation are worthy of mention. The first is that a declaration that an individual is an 'incapable person', is reversible, and is thus not necessarily permanent.<sup>50</sup> Secondly, a person who has been admitted as a patient to an approved institution under the Act, does not automatically become an 'incapable person'.<sup>51</sup> To some extent, therefore, these provisions would seem to provide least restrictive measures for the protection of the person's estate. They allow, where possible, estate management by the 'incapable person'.

## Evaluation of the W.A. position

Overall though, the legislation is quite deficient when judged against the standards of the Declaration. The subsuming of intellectual disadvantage within mental health is regrettable. Graduated guardianship is not provided for and neither the decision-making process or the guidelines provide any comfort that the terms of the Declaration will be met. As in the other States, paragraphs 1 (normalisation), 4 (least restrictive alternative), 5 (qualified guardian), 6 (protection from abuse) and 7 (due process and review) are overlooked by the present law.

## EXISTING LAW IN TASMANIA

### Structure

Unlike the position in other States, Tasmania's guardianship laws are largely concentrated in one statute, the Mental Health Act 1963 (Tas.). The Act, which is under departmental review, provides for both guardianship of the person and estate

<sup>47</sup>Mental Health Act 1962 (W.A.), ss. 27-28,31-34.

<sup>48</sup>s. 5(1).

<sup>49</sup>Supreme Court Act 1935 (W.A.), ss. 16,23.

<sup>50</sup>Mental Health Act 1962 (W.A.), ss. 67-68.

<sup>51</sup>s. 66(1).

<sup>52</sup>s. 62(1).

administration, for persons suffering from 'mental disorder'. The Act also provides for some questions relating to guardianship to be dealt with by a Guardianship Board, which has a similar role to that played by the analogous body in South Australia. The Supreme Court, whose lunacy jurisdiction was found earlier in the Supreme Court Civil Procedure Act 1932 (Tas.), now also has jurisdiction over guardianship questions by virtue of Part VI of the Mental Health Act 1963 (Tas.).<sup>52</sup>

Guardianship of the person and the estate are also dealt with, in the case of infants, by one other piece of legislation. The Guardianship and Custody of Infants Act 1934 (Tas.) allows for the appointment of a guardian (or guardians) by the father of the infant<sup>53</sup>, by the mother<sup>54</sup>, or in some instances, by the Supreme Court.<sup>55</sup> Insofar as intellectually disadvantaged children are concerned, this may represent another means by which a guardian may be appointed.

## Content of the Tasmanian law

### Guardianship of the person

Part III of the Mental Health Act 1963 (Tas.) provides for two types of applications to be made in respect of persons suffering from 'mental disorder'. They are:

- (i) Admission to a hospital; and
- (ii) Applications for guardianship.

The term 'mental disorder' is defined in s. 4 of the Act, together with the (unfortunately chosen) terms 'subnormality' and 'severe subnormality'. 'Mental disorder' is defined as including both mental illness and intellectual handicap. The two 'subnormality' terms, however, refer specifically to varying degrees of intellectual handicap.

Under the Act an application may be made to have a person suffering from 'mental disorder' either admitted to a hospital<sup>56</sup>, or made subject to a guardianship order.<sup>57</sup> In either case, the Act refers to such a person as a 'patient'<sup>58</sup>, a term which in respect of at least some applications on behalf of intellectually disadvantaged persons would seem inappropriate. Applications for guardianship are made to the Guardianship Board, which is empowered to appoint any person named in the application (including the Board itself), as the guardian of the person.<sup>59</sup> The effect of such an appointment is to vest in the guardian such powers as would be exercisable by that person over the 'patient', as if they were that person's father, and the 'patient' had not yet attained the age of fourteen.<sup>60</sup> In the case of either an admission application or a guardianship application, however, the application must be supported by the recommendations of two medical practitioners.<sup>61</sup>

As in the case of the South Australian legislation, the Tasmanian Act provides also for the establishment of a Mental Health Review Tribunal<sup>62</sup>, to which the 'patient' may

<sup>52</sup>Mental Health Act 1963 (Tas.), s. 63.

<sup>53</sup>Guardianship and Custody of Infants Act 1934 (Tas.), s. 4.

<sup>54</sup>s. 6.

<sup>55</sup>s. 5(2).

<sup>56</sup>Mental Health Act 1963 (Tas.), s. 22(1).

<sup>57</sup>s. 18(1), 20(1).

<sup>58</sup>s. 3(1). <sup>59</sup>s.

22(2). <sup>60</sup>s.

23(1). <sup>61</sup>s.

14(1).

<sup>62</sup>. 9.



apply to have the guardianship order revoked.<sup>63</sup> Furthermore, the 'patient' or nearest relative may further appeal to the Supreme Court, if they are dissatisfied with the decision of the Tribunal.<sup>64</sup> The Tribunal is also authorised to state a special case for determination by the Supreme Court, on any question of law raised.<sup>65</sup>

### Estate management

Management of the estate of a person suffering from 'mental disorder', is provided for by Part VI of the Mental Health Act. Although the heading to Part VI of the Act is entitled 'Management of Property and Affairs of Patients', and thus implies that guardianship of the person as well as the estate is able to be granted under its provisions, the language and tenor of the sections would suggest that the Part is primarily concerned with estate management. Similarly, the tenor of Part III of the Act (discussed above), also suggests that guardianship of the person is primarily intended under that portion of the Act.

The process of appointing an estate manager, under Part VI of the Mental Health Act is somewhat complex. It begins with the issuance of a 'Certificate of Disability' by the Public Trustee, in respect of a person whom the Public Trustee is satisfied suffers from a 'mental disorder', and who by reason thereof is incapable of managing property and affairs.<sup>66</sup> Once the Certificate is filed in the Supreme Court, the Public Trustee is deemed to have been appointed the committee of that person's estate.<sup>67</sup> Under s. 86 of the Act, however, the Supreme Court is also empowered to appoint another person as the committee of the estate of the 'patient', should this be desired. The court is authorised to define the authority of the person so appointed as committee of the estate<sup>68</sup>, and may further require the grant of a security from that person.<sup>69</sup> Both the Certificate of Disability, and the committee of the estate, may be revoked and discharged (respectively) at a later date, if this is considered necessary.<sup>70</sup>

## Evaluation of the Tasmanian position

On the positive side, the Tasmanian legislation does manifest greater concern to extend due process and review rights along the lines of paragraph 7. Guardianship is, as with South Australia, also rather more likely to be 'qualified' as specified in paragraph 5. But the intermingling with mentally ill persons, the conferral of plenary (rather than partial) guardianship by virtue of orders of the Board, and the absence of least restrictive alternative guidelines, or other encouragements of normalisation, still leave Tasmania with much ground to make up.

## SUMMARY

As the preceding discussion illustrates, the legislatures of the Australian States have employed a variety of measures for providing guardianship for intellectually disadvantaged individuals. Often, several pieces of complex legislation need to be consulted within any one State, before the general framework of the guardianship provisions emerges. In general, court-appointed guardianship of the person and/or the estate of an intellectually disadvantaged individual, and provisions for the care and

<sup>63</sup>s. 76(2).

<sup>64</sup> s. 4

<sup>65</sup>s. 81.

<sup>66</sup>s. 88.

<sup>67</sup>s. 93.

<sup>68</sup>s. 85.

<sup>69</sup>s. 86(2). <sup>70</sup>ss.

89, 86(4).

management of patients admitted to mental health institutions, continue to be adopted by a number of jurisdictions. However, some jurisdictions have adopted more novel means, such as the use of Guardianship Boards in South Australia and Tasmania, and the enduring power of attorney introduced in South Australia, Victoria and New South Wales.

Analysis of the legislation also reveals that often the aspirations expressed in the UN Declaration of 1971 have not been safeguarded. For example, the concepts of normalisation for institutionalised individuals, appeal against decisions, protection against abuse and/or exploitation, and the right to a qualified guardian, have often not been embodied. Further criticisms may also be levelled. The legislation is often outmoded, and uses archaic expressions (e.g. 'Backward Person', 'Lunatic so found'); and in many instances, intellectually disadvantaged and mentally ill persons are grouped together.

Several State legislatures, in recognition of these defects, have recently announced prospective measures for reform of the legislation affecting intellectually disadvantaged persons. A consideration of these proposals for reform (as they relate to guardianship) will be made in the following section.

## **PROPOSED REFORMS**

### **New South Wales: the 1982 unproclaimed reforms**

In New South Wales a Community Welfare Act was passed into law in 1982. Following its enactment the days of the old order were thought to be numbered. The new Act was to usher in new legislative provisions and structures for providing welfare services to the community. Proclamation was ostensibly delayed to allow the preparation of regulations<sup>71</sup>; but cost implications were the real bugbear. An amended Act is anticipated to be in force late in 1985 or early 1986. Presently the law in New South Wales, and therefore to some limited extent the Australian Capital Territory, remains as set out in this and the previous chapter. As such it is very similar to the law still to be found throughout most of the rest of Australia.

It is to be noted that the new legislation was couched to some extent in the welfare model vein. Consequently the comments on that model that are made at the end of this section are applicable. However, the provisions in Part XI of that Act will now not be proclaimed. Instead, guardianship provisions (akin to Victoria) will take their place some time late in 1985.

#### **Tribunals**

The Community Welfare Act 1982 (N.S.W.), proposed to constitute an Intellectually Handicapped Persons Review Panel from which Intellectually Handicapped Persons Review Tribunals were to be drawn.<sup>72</sup> Their previous function and role was extended and all intellectually disadvantaged persons were dealt with in Part XI of the new Act. Adults were no longer excluded.

#### **Definition**

The definition of 'intellectual handicap' was in the same words as in the Child Welfare Act 1939 (N.S.W.), as amended, with one change. The three criteria of inadequate social adjustment, a retarded rate of maturation or a significant limitation of learning

<sup>71</sup>The projected date was to be July 1983. The Opposition expressed regret at the delay: N.S.W., Legislative Assembly, *Parliamentary Debates*, 29 November 1983, 3826 (Mrs Foot, Deputy Leader).

<sup>72</sup>Community Welfare Act 1982 (N.S.W.), Schedule 8 and ss. 258, 261.

<sup>73</sup>See text to footnote 3 above.

capacity, were complementary in the earlier Act, because they were then joined by the word 'and'. In the new Act these three criteria are disjunctive because they are joined by the word 'or'. There is little or no danger, however, that a single criterion, for example that of 'inadequate social adjustment', can be misused as a vehicle for the imposition of value judgments, because the definition provides that the condition characterised by that particular criterion has to be 'due to arrested or limited development of intellectual functioning'.<sup>74</sup> Unlike the definition in Division 2, this definition still does not include the senile aged and, if strictly interpreted, would not include people suffering from intellectual disadvantage as a result of accident or other sudden deterioration of intellectual functioning in adult life.

If the aim of the reform is to enact generic legislation, that is to say, passage of a single Act that would make suitable guardianship available for all people for whom it would be of advantage, then the definition in the South Australian Mental Health Act 1976-1977, appears superior to that in New South Wales.<sup>75</sup> Some of the provisions though are generic in their focus. Thus the New South Wales Act applies equally to physically and sensorily disabled and mentally ill persons in relation to the provision of services<sup>76</sup> and the object of this part of the Act is the living of as normal a life in the community as their disabilities permit.<sup>77</sup>

### Guardianship

Guardianship, however, is available only for intellectually disadvantaged persons. The procedure is the same as that already in existence. It makes no provision for limited guardianship<sup>78</sup>, and there are no options available that could make the least restrictive alternatives possible.

### Representative

One advance in the new legislation is the inclusion of a provision that each disabled person is to have a 'representative'. This is to be a person (other than a public servant) or a non-government organisation, and an Intellectually Handicapped Persons' Tribunal is to nominate a representative for any intellectually disadvantaged person who is unable to nominate someone.<sup>79</sup>

This is the first such provision in Australia, but in view of the fact that it is limited by the words 'for the purposes of this Division', it is in effect likely to be less extensive than the South Australian requirement that an intellectually disadvantaged person be represented by counsel on all appeals. In New South Wales, the representative is unlikely to be legally qualified counsel, particularly as there is no provision either for appeals or for the payment of legal fees. Again this must be contrasted with the South Australian position.

No appeal, either on matters of fact or on questions of law, is provided for from the decision of an Intellectually Handicapped Persons' Tribunal to the Supreme Court of New South Wales. Although there is a right of appeal on questions of law to the Supreme Court from decisions of the Community Welfare Appeals Tribunal<sup>80</sup>, there appears to be no appeal from an Intellectually Handicapped Persons' Tribunal decision to the

<sup>74</sup>Community Welfare Act 1982 (N.S.W.), s. 258.

<sup>75</sup>See text to footnote 18 this chapter.

<sup>76</sup>Community Welfare Act 1982 (N.S.W.), s. 260. Division 2 deals with the provision of centres for intellectually disadvantaged persons and of residential centres for disadvantaged persons *other* than intellectually disadvantaged persons.

<sup>77</sup>s. 259.

<sup>78</sup>ss. 263-273.

<sup>79</sup>S. 262.

<sup>80</sup>s. 289.

Community Welfare Appeals Tribunal. As a result of a finding by an Intellectually Handicapped Persons' Tribunal that an individual is intellectually 'handicapped' within the definition of the Act, an individual may be declared, by order in writing of the Minister, an intellectually 'handicapped' person under guardianship.<sup>81</sup> Without an express statutory right of appeal to higher authorities and with no proper legal safeguards, the New South Wales law falls short of compliance with these two requirements of paragraph 7 of the UN Declaration.

The further requirements of paragraph 7 that the procedure be based on evaluation by experts, and be subject to periodic review are complied with to the extent that an order expires after a period of two years unless it is renewed.<sup>82</sup> It is doubtful, however, if a two-year review cycle is within the spirit of the UN Declaration.

### New South Wales: the 1983 reforms

At the end of the 1983 Parliamentary session the New South Wales Government enacted a package of mental health reforms; essentially none of these is yet in force.<sup>83</sup> These had a lengthy gestation" and will (with a likely commencement in Spring 1985) effect significant reforms so far as mentally ill persons are concerned. But the improvements wrought for the intellectually disadvantaged are of a partial nature. The major gain is that such people are essentially placed beyond the reach of the compulsory admission procedures of the new Mental Health Act 1983 (N.S.W.). Section 5 defines the grounds for admission in terms broadly requiring that the person be a risk to his or herself or others; but it then goes on to state that a person is not mentally ill only by reason of the fact that 'the person has a developmental disability of mind'<sup>85</sup> Although the legislation is weakened by the omission of a definition of developmental disability<sup>86</sup> and by the absence of a complementary piece of legislation specifying the rights of intellectually disadvantaged persons to services and protection from exploitation<sup>87</sup>, it nevertheless constitutes a major advance. As mentioned by government Members during debate, the bringing into force of this provision will end the practice of regarding intellectual 'handicap' as a form of mental illness.<sup>88</sup>

The second area in which some advance will be made is that of the protection of property interests. The Protected Estates Act 1983 (N.S.W.) does two things. First it removes the provisions relating to property from the Mental Health Act and breaks the nexus between compulsory admission and protection of a patient's property. In future protection will no longer automatically ensue on admission, and orders will no longer be based on a showing of 'mental infirmity due to disease or age' (which definition excluded

<sup>81</sup>s. 263.

<sup>82</sup>s. 266.

'Mental Health Act 1983 (N.S.W.); Protected Estates Act 1983 (N.S.W.); Crimes (Mental Disorder) Amendment Act 1983 (N.S.W.); Miscellaneous Acts (Mental Health) Repeal and Amendment Act 1983 (N.S.W.).

<sup>84</sup>The legislation stemmed from recommendations (based on four years work) in the 1976 report by a committee of review of mental health laws and a 1977 report on psychosurgery. The final proposals reflected the benefit of the extensive consultation which ensued following the introduction, and tabling, of an earlier version of this legislation in 1982: N.S.W., Legislative Assembly, *Parliamentary Debates*, 22 November 1983, 3087-89 (Mr Brereton, Minister of Health).

<sup>85</sup>Mental Health Act 1983 (N.S.W.), s. 5(2) (1).

<sup>86</sup>N.S.W., Legislative Assembly, *Parliamentary Debates*, 29 November 1983, 3845 (Mrs Foot, Deputy Leader of the Opposition).

<sup>87</sup>In Victoria the Government has accepted the advice of independent committees of review to the effect that a comprehensive package, dealing (separately) with the needs of the two groups, should go hand in hand with guardianship legislation: Victoria, *Report of the Committee on a Legislative Framework for Services to Intellectually Disabled Persons*, Government Printer, Victoria, February 1984.

<sup>88</sup>N.S.W., Legislative Assembly, *Parliamentary Debates*, 29 November 1983, 3866 (Mr Knight).

consequences of strokes and certain handicaps). Instead it will be based simply on a person's inability to manage his/her affairs.<sup>89</sup> Secondly, the economic and procedural barriers to access to the services of the Protective Commissioner of the Supreme Court have been greatly reduced. Under the new legislation the Court may receive evidence in such manner as it sees fit and may make an order where it is satisfied as to the inability of the person affected.<sup>90</sup> This is designed to allow the Court to devise flexible procedures (including chambers applications) and to permit medical practitioners (or other more relevant parties such as psychologists or social workers) to tender evidence by affidavit.<sup>91</sup> By this device it is assumed that the heavy costs associated with the previous jurisdiction of the Supreme Court will become a thing of the past.<sup>92</sup> Finally the legislation provides for the question of capacity to manage property to be routinely assessed in the case of certain patients<sup>93</sup>; and for management on application (terminable on request).<sup>94</sup> It also maintains the ability to appoint private citizens as managers, allows interim orders to be made, and provides that a 'guardian of the person' may be appointed for certain mentally ill people whose property is protected.<sup>95</sup>

These reforms of the New South Wales law will certainly ameliorate some of the worst features of the antiquated legislative legacy which has discriminated against the interests of intellectually disadvantaged people in that State in the past. Yet, as the Government itself recognises, this softening is but a sidewind of reforms whose prime purpose is unrelated to the needs of intellectually disadvantaged people. In debate on these bills, a government back-bench Member noted that (with the exception of the provisions for children admitted as wards previously described<sup>96</sup>) 'adequate guardianship legislation . . . is lacking' and that what was needed was 'a graduated form of guardianship . . . that would allow them to function adequately as normal people in the community'.<sup>97</sup> The Minister of Health, Mr Brereton, in closing the debate, frankly acknowledged this point and 'agreed' with the Member's comments.<sup>98</sup> Ministerial and departmental discussions were said to be on foot and reference was made 'in particular [to] the recent valuable Victorian reports on this question'.<sup>99</sup>

It goes without saying that this latest legislative reform package, desirable though it is on other counts, is but of marginal benefit to intellectually disadvantaged persons. There are gains in the placing of intellectually disadvantaged people beyond the reach of the mental health laws and in the improved access provided to full guardianship over property. But satisfaction of the requirements of the Declaration to protection against exploitation, to adequate guardianship (especially partial guardianship) and to the least restrictive alternative must all await another day. Some comfort can be drawn from the Minister's statement that matters are under review, but much hangs on the urgency and the vigour with which that review is carried to fruition. On this score it seems that a discussion paper will be released in August 1985 and a Bill was to go to Cabinet at the time of writing.

<sup>89</sup>Protected Estates Act 1983 (N.S.W.), s. 13(1). This largely effects the reform advocated by Powell J in *G v. F* [1983] 1 NSWLR 54, 56.

<sup>90</sup>s. 13(2).

<sup>91</sup>N.S.W., Legislative Assembly, *Parliamentary Debates*, 22 November 1983, 3090-91.

<sup>92</sup>*ibid.*

<sup>93</sup>Protected Estates Act 1983 (N. S.W.), ss. 16-18.

<sup>94</sup>ss. 62, 64.

<sup>95</sup>ss. 22, 20, 68(1) respectively.

<sup>96</sup>N.S.W., Legislative Assembly, *Parliamentary Debates*, 22 November 1983, 51.

<sup>97</sup>N.S.W., Legislative Assembly, *Parliamentary Debates*, 29 November 1983, 3877 (Mr Page, Waverley).

<sup>98</sup>*ibid.*, 3897.

## South Australia

In South Australia, in 1981, some further reforms were recommended by the Bright Committee Report. However, no action has yet been taken to implement the recommendations of this report.<sup>107</sup>

### Authority

The committee recommended that a statutory authority be established under legislation such as an Intellectually Handicapped Persons Act. That authority would be responsible for the provision of services to intellectually disadvantaged persons, replacing the present system which charges the Health Commission with this task, and it would provide independent co-ordination of health, education and welfare services.

### Regionalisation

Decentralised service facilities were recommended as the preferred method of meeting the needs of intellectually disadvantaged persons. In order to move away from institutions, regional offices that would co-ordinate available services were proposed.

### Normal lifestyle

The report recommended the provision of increased homecare assistance and funding and the encouragement of alternative residential homecare and community living in place of institutional care. Planning laws, it said, should not inhibit the establishment of such schemes.

### Anti-discrimination

The Bright Committee Report recommended the protection of persons with intellectual 'handicaps' against discrimination either by amendment of the Handicapped Persons' Equal Opportunity Act 1981 (5 .A.) or by the establishment of a watchdog agency.

### Guardianship

Finally it was recommended that the Guardianship Board should have regard to the least restrictive alternative and that a watchdog agency have the function, inter alia, of acting as advocate for the intellectually disadvantaged.

## Victoria

In Victoria, a committee was set up in 1980 to report to the Government on the legal position of intellectually disadvantaged people. In December 1982, it presented its Guardianship Report<sup>101</sup> and on 30 May 1985 the Government introduced the Guardianship and Administration Board Bill (and allied Bills). This was based on the Report of the Victorian Committee which had proposed legislation that would bring about quite sweeping substantive reforms. The Report of the Minister's Committee advanced proposals for the adoption of systems of citizen and public advocacy for intellectually disadvantaged persons; for a Guardianship Tribunal that would have power to appoint limited or partially empowered guardians as well as plenary guardians;

<sup>107</sup>Bright Committee Report, vol. 2, pp. 252-7.

<sup>101</sup>Victoria, Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons Report, Victorian Government Printer, Melbourne, December 1982. Hereinafter this report will be cited as 'Victorian Minister's Committee Report'. The above report also contains proposed legislation cited hereinafter as 'Victorian Minister's Committee, Proposed Bill' to distinguish it from the report.

and limited or plenary estate administrators in addition to or as an alternative to a guardian. There was a recommendation in the body of the Report that a person aggrieved by an order of the Guardianship Tribunal should have a right of appeal but only on questions of law, to the Supreme Court. In the event the new Victorian legislation provides, in s. 65, a right of appeal on matters of fact as well as questions of law, so that it is in accord with a wide reading of the seventh right set out in the UN Declaration and the Human Rights Commission Act 1981 (Cwth). The court may make 'any other order as to the court seems just'. So arguably costs of an appeal could be reimbursed.

### **Guardian**

As proposed in the Report, there is to be provision for limited or partial guardianship tailored to the individual needs of each particular intellectually disadvantaged person. The acceptance by government of the suggestion that there be a Public Advocate, who is to be available to act as guardian of last resort in the absence of a qualified individual, is designed to ensure that these aims eventuate in practice. Unlike the South Australian Guardianship Board, which can become the guardian of an intellectually disadvantaged person and appoint someone as custodian, the Victorian model is that the Tribunal (or 'Board' as it is termed in the Government Bill) may appoint any suitable person as guardian if this is in the best interests of the person concerned. There is, moreover, a definition of 'best interests' in clause 28 of the Government's Bill.<sup>102</sup>

The Government's proposals will ensure that mental health legislation will no longer apply to intellectually disadvantaged persons in Victoria, and that the Guardianship Board will take over many of the functions of the Public Trustee and Supreme Court, not only in relation to the care of the person, but also in the care of the estate of intellectually disadvantaged people.

### **Anti-discrimination**

An Equal Opportunity (Discrimination Against Disabled Persons) Act 1982 (Vic.) passed both Houses of the Victorian Parliament in December 1982 and came into force in May 1983. By this Act, as in that of New South Wales, it becomes unlawful to discriminate on the ground of impairment against another person. 'Impairment' has been defined to mean '(c) malfunction of a part of the body', and 'Malfunction' of a part of the body includes:

- (b) a condition or malfunction as a result of which a person learns more slowly than persons who do not have that condition or malfunction.<sup>103</sup>

The Victorian Minister's Committee, by comparison, used the following definition in its Proposed Bill: "Developmentally disabled" in relation to a person, means having a disability arising from a limited development of intellectually functioning'. Under clause 22 of the Victorian Guardianship Bill the proposed Guardianship Board, if it is satisfied that an order would be in the best interests of the person concerned, and if it is satisfied that that person is 'developmentally disabled', over 18 years and 'unable to care for himself, and to make reasonable judgments in respect of all or any matters relating to his person, and is in need of a guardian', may make an order that appoints either a plenary or a limited guardian of that person.

<sup>102</sup>Guardianship and Administration Board Bill 1985 (Vic.), cl. 28. See also text to footnote 113 at Chapter Six below, where the definition of the 'best interests' of a guardian's ward is set out in full.

<sup>103</sup>Equal Opportunity (Discrimination Against Disabled Persons) Act 1982 (Vic.), s. 2.

## Rights

A plenary (i.e. full) guardian cannot be appointed unless the Board is satisfied that a limited guardian would not meet the needs of the person. Furthermore, if a limited guardian is appointed, the proposal is that the order made shall be that which is least restrictive of the person's freedom of decision and action as is possible in the circumstances. In addition, the Bill includes clauses that spell out the powers and duties of plenary and of limited guardians. These aspects, based as they are on the Victorian Minister's Committee's proposals, seem to be drawn up with the rights of the United Nations Declaration as the standard to which they are intended to conform. The Bill is to lie over for debate when Parliament resumes in Spring 1985.

## Queensland

In Queensland, two major Bills affecting intellectually disadvantaged persons were introduced into the Parliament in 1983. The first of these, the Intellectually Handicapped Citizens Bill<sup>104</sup> was subsequently withdrawn for redrafting in response to over 400 submissions. The questions raised by the public largely concerned the role of parents and the eligibility criteria for the 'legal friend', and whether the 'legal friend' was to make decisions falling outside those matters in which written consent is normally required.

The Intellectually Handicapped Citizens Act 1985 (Qld) took those concerns into account. Its passage through Parliament in March 1985 effected a major restructuring of laws governing the guardianship of intellectually disadvantaged persons, which is expected to come into operation towards the end of the year. The Act repeals the Backward Persons Act 1938 (Qld), and effects some changes to the Public Trustee Act 1981 (Qld). The major thrust of the Act is directed towards giving effect to the least restrictive alternative principle, this being specifically expressed in s. 5. Section 7 establishes a corporate body known as the Intellectually Handicapped Citizens Council of Queensland, whose functions include the appointment of guardians (who, under the Act are referred to as 'friends' of the intellectually disadvantaged person), and fostering a general improvement of the quality of life of intellectually disadvantaged citizens in that State.<sup>105</sup> The Council thus has similar (but wider) functions to those of the Guardianship Boards already in existence; although (as in the case of the South Australian Board) the Council itself is not eligible to be appointed as a 'friend'.<sup>106</sup> The composition of the Council is to be selected by the Minister of Health, and is to include persons who, in the opinion of the Minister, have appropriate knowledge in relation to intellectual disadvantage.<sup>107</sup>

Applications for the appointment of a 'friend' are governed by s. 27 which provides that any of a number of authorised persons (including the intellectually disadvantaged person) may apply, where the circumstances warrant such an appointment. In considering any application, the Council is required to have regard to a number of matters, including:

- the individual circumstances of the intellectually disadvantaged person, and the extent of intervention required in the particular case;
- the need to maintain the intellectually disadvantaged person's dignity and self-respect; and
- any special circumstances, such as cultural considerations.<sup>108</sup>

<sup>104</sup>The Bill was originally introduced by leave, on 22 March 1983.

<sup>105</sup>Intellectually Handicapped Citizens Act 1983 (Qld), s. 16.

<sup>106</sup>s. 16(2)(0, 37 require that a 'citizen', or in other words, a natural person of full age and capacity, be the friend. 'Citizen' is defined in s. 4.

<sup>107</sup>s. 8(1).

16(2)(a)(i)(k)(1).



The Council is to consider each application and, if it approves the application, then it shall establish the most appropriate form and extent of intervention to be provided. Section 16 also authorises the Council to inquire into the competence of the intellectually disadvantaged person to consent to medical and other forms of treatment. If the person is found to be lacking in competence, a 'legal friend' can be appointed to make the necessary decisions (after consulting parents where appropriate).<sup>109</sup>

Clause 28 of the 1983 Bill defined those persons who were eligible to be appointed as 'friends'. Those who were ineligible included, surprisingly, immediate relatives of the intellectually disadvantaged person, and those who worked in a paid capacity providing services to that person. This clause was one of those reconsidered because to the extent that immediate relatives may ultimately have been excluded, this would in at least some circumstances have been in contravention of the 'Normalisation' requirement (UN Declaration, paragraph 4). Section 37 of the 1985 Act, however, removes this concern. In general, 'friends' so appointed are required to advance the intellectually disadvantaged person's wishes, and his/her social and personal interests.<sup>110</sup> The Council is further required to review the needs, capabilities and wishes of the intellectually disadvantaged person at least every two years (or on application), and in so doing, may vary or terminate any intervention (including the appointment of a 'friend') as need

be. The Act also contains specific provisions dealing with the management of the estates of intellectually disadvantaged persons. Section 32 empowers the Public Trustee, upon notification by the Council, to become the manager of the estate of intellectually disadvantaged citizens who in the Council's opinion require estate management for the protection of either themselves or their dependants. The Public Trustee is authorised to assume management, except where a committee of the estate has already been appointed under other legislation.<sup>112</sup>

The Act also provides for appeals against any decision made under s. 16, regarding the provision, variation or termination of intervention. The appeal is to be *de novo*, and is to be made to a Judge of the Supreme Court, whose decision is final. Under the 1983 Bill, although legal representation would normally be required, the operative provision in relation to appeals (Clause 40), did not make reference to funding for an appeal, or to matters relating to representation. But s. 43 of the 1985 Act largely overcomes this objection.

The second Bill presented before the Queensland Parliament in relation to these matters, was the Mental Health Act and Criminal Code Amendment Bill.<sup>113</sup> Clause 4 of the Bill amended the title of the Mental Health Act 1974 to the Mental Health Services Act 1974-83 (Qld). The clause also effected the retrogressive measure of extending the ambit of the earlier Act — which dealt solely with mentally ill persons — to the 'training and care of intellectually handicapped persons'; thus, to some extent, running against the grain of the ameliorating reforms which the Intellectually Handicapped Citizens Act seeks to achieve. However, its short-term effect may not be so devastating, since for the time being only s. 54 of the Act, dealing with estate management, seems to affect intellectually disadvantaged persons (provided that they suffer also from mental illness, and are not 'Protected Persons' under the Public Trustee Act 1978-1981 (Qld)).<sup>114</sup>

<sup>109</sup>s. 16(2)(b), (c).

<sup>110</sup>s. 37(4).

<sup>111</sup>ss. 27, 28.

<sup>112</sup>s. 34(e).

<sup>113</sup>The Bill was also introduced by leave, on 22 March 1983.

<sup>114</sup>Mental Health Act and Criminal Code Amendment Bill 1983 (Qld), Clause 54, amending the Fifth Schedule to the Mental Health Act 1974. (This legislation is expected to come into force in July 1985.)

## COMMENTARY

Since many of these various new provisions have not yet been enacted or brought into effect, the position in the Australian States at the moment remains as it has been over the last few decades — that of a welfare/medical model which is based on the original institutional method of the Victorian era. In only a few of the Australian States has there been any attempt in existing legislation to provide for a right to all the possible least restrictive alternatives when the severity of the handicap suffered by intellectually disadvantaged persons makes it necessary to restrict or deny some or all of their rights (the United Nations Declaration, paragraph 1). Victoria's Guardianship and Administration Board Bill, and Queensland's Intellectually Handicapped Citizens Act attempt to do this, as does the legislation proposed to be introduced in Western Australia in Spring in 1985. However, at the time of writing, the Queensland Act was not due to come into force until the end of 1985; while Victoria's Bill was not to be debated until the Spring session. The New South Wales and Western Australian Governments may introduce reform Bills in the Spring 1985 session, while Tasmania is at the department review stage.<sup>15</sup> In short, there is still a long way to go.

Moreover, there are no provisions existing or proposed for a right to work within the community itself— such as is found in the 'enclave' system adopted in England and the 'work station in industry' system that has been developed in Nebraska, U.S.A. The sheltered workshops that are provided under Commonwealth legislation are isolated from normal life and thus contrary to the United Nations Declaration, paragraph 3. Similarly, there are no provisions for the family and community-based residential homes that are so vital to the achievement of living as closely as possible a normal life (the United Nations Declaration, paragraph 4).

To achieve suitable reform in these last two areas, it would be necessary to obtain the co-operation of the Australian Government and have amendments passed to extend the operation of Commonwealth legislation that funds facilities and services for persons under guardianship. Commonwealth funding should be made available to custodial and service facilities for intellectually disadvantaged people that are community and family based. The Report of the Commonwealth Handicapped Programs Review holds out some promise that this may occur.'

The extension to persons under guardianship, of legislation that prohibits discrimination, is another reform measure that may help to achieve the recognition of the general and special rights set out in the United Nations Declaration. To this end, the equal opportunity and anti-discrimination legislation of N.S.W. and Victoria has recently been amended and now applies to intellectually disadvantaged persons. The S.A. Bright Committee Report also recommended all these reforms (see above) but it has not yet been implemented.

It has already been pointed out that, with the exception of South Australia and to some extent Victoria, there is no existing or proposed legislation that provides a full, funded and represented right of appeal on both matters of fact and questions of law from Boards and Tribunals to higher authorities, with proper legal safeguards against every form of abuse (the United Nations Declaration, paragraph 7).

The old-fashioned legislative structures classified all intellectually disadvantaged people, whatever the nature of their disability, together with mentally ill people, as if they too were mentally ill. Although there may from time to time be sufferers from some mental illness to be found amongst intellectually disadvantaged people, it is inappropriate for the individuals in either of these categories to be mixed together in the government or public mind. It is, moreover, not in accordance with the United Nations

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<sup>15</sup>Personal communications with ministerial advisers and departmental officers in Queensland, N.S.W., Tasmania and Western Australia: 13 and 14 June 1985.

*New directions: report of the Handicapped Programs Review*, AGPS, Canberra, May 1985, pp. 29, 78, 100.

Declaration. As has been seen, the welfare/medical model legislation applies in a patchy fashion to people who are senile — that is to say, suffering intellectual handicap resulting from age — as well as to people such as those intellectually disadvantaged at birth, those whose incapacity does not arise until they are adult, and people suffering from mental illness.

In the past, it appeared that not only the label, but also the needs of all these groups were virtually the same, and that a single all-embracing legislative structure was therefore a suitable method of supplying all those needs. Nowadays, however, it is acknowledged that it is both offensive to and inappropriate for the senile aged, intellectually disadvantaged adults and children, sufferers from mental illness, other disadvantaged persons, and, as well, the families of these disparate groups of people, that they should be dealt with as if the mental element in their handicap were the *determining* factor whereby they are to be classified for the purposes of legislation. It can be argued that such a legislative structure is not in accord with the United Nations Declaration, because it takes no account of the differences between these various groups and thereby ignores the rights of the individuals who constitute them.

The problem can be solved by having quite separate legislation setting up two unrelated 'auspices' for services respectively for intellectually disadvantaged people and mentally ill people.<sup>117</sup> Once that division has been clearly established, it still makes good sense to enact a single flexible 'Guardianship Act' that contains suitable provisions for *all* of the different groups of disadvantaged persons. The Report of the Victorian Committee made a separate recommendation on this aspect of guardianship law, and referred to it as generic legislation.<sup>118</sup> The recommendation was to provide simply for the functional needs of disadvantaged persons (developmentally disabled) without identifying various groups of disadvantage. The Government Bill accepts that view and it is anticipated that Western Australia and N.S.W. will follow suit. This approach is in accord with the requirements of the UN Declaration, provided that a 'legalistic' model of guardianship is adopted. Undoubtedly, it would in any event go a long way towards meeting the rights of the persons concerned.

The proposed reforms in Victoria, Western Australia and New South Wales will, however, at least separate mentally ill from intellectually disadvantaged people, and the State Mental Health Acts will no longer apply to people who are not suffering from mental illness. However, as has been pointed out in the previous chapter, the A.C.T. Ordinance on mental health does not do this and, what is more, the provisions in the Mental Health Ordinance 1983 (A.C.T.) concerning compulsory treatment are clear violations of the human rights of intellectually disadvantaged persons, for they are included within the terms of the definition of people to whom the Ordinance is to apply.

Similarly, although Queensland's Intellectually Handicapped Citizens Act 1985 effects some useful reforms in that State, the proposed assimilation of the position of intellectually disadvantaged people and mentally ill people under the Mental Health Services Act 1974-83 (Qld) does, at least in principle, serve to frustrate those objectives.

<sup>117</sup>See for example the Intellectually Disabled Persons' Services Bill 1985 (Vic.) and the Mental Health Bill 1985 (Vic.).

<sup>118</sup>Victorian Minister's Committee Report, pp. 27, 95-96.

## Chapter Four

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# Services and facilities for intellectually disadvantaged people

The main focus of this monograph is on guardianship. However, there is some support for the view that guardianship is merely one element of a broad, flexible approach to dealing with the problems of intellectually disadvantaged people. In this chapter, other services and facilities which might be elements of this broad approach are briefly described, along with guardianship, and then the theory behind the broad approach is discussed in more detail.

### THE POWER OF ATTORNEY

The power of attorney is a legal mechanism by which one person transfers to another the legal authority to act on his/her behalf. The power may be general, or limited to certain transactions. Intellectually disadvantaged persons might decide that they need assistance with respect to certain transactions. That person could then execute a power of attorney over those affairs in respect of which they desire some assistance. This would not necessarily involve outside interference, and should not be brought about by coercion. In theory, the intellectually disadvantaged person would voluntarily vest some legal rights in the attorney.

However, there are some limitations on the use of powers of attorney by intellectually disadvantaged people. One limitation is the rule that the donor of the power must be capable of understanding the nature of the act or transactions which the particular power of attorney purports to authorise.<sup>1</sup> The result of this rule is that only those with a very mild degree of intellectual disadvantage will be able to make use of this device.<sup>2</sup>

Another limitation is the rule whereby a validly executed power of attorney automatically becomes of no effect as soon as the intellectual capacity of the donor deteriorates to such a degree that the donor can no longer understand the nature and consequences of the powers granted. Although this rule has been overcome in Victoria and four other jurisdictions<sup>3</sup>, the critical hurdle of understanding the nature of the grant at the time of execution of the power will still remain as a bar to many people suffering from a stable condition of intellectual disadvantage. For an enduring power may be executed only by a person with the required understanding. The reform simply enables that person to choose between a power which decays on loss of capacity and one which endures. However, legislation such as that enacted in Victoria or South Australia makes

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<sup>1</sup>South Australia, Committee on the Rights of Persons with Handicaps (C. H. Bright, Chairman), *The law and persons with handicaps, vol. 2, Intellectual handicaps*, Adelaide, 1981, p. 213. Hereinafter referred to as Bright Committee Report.

<sup>2</sup>T. Carney, 'Civil and social guardianship for intellectually handicapped people' (1982) 8 *Monash University Law Review*, 199, 209.

<sup>3</sup>See the Instruments (Enduring Powers of Attorney) Act 1981 (Vic.). The other jurisdictions are New South Wales (1983), South Australia (1984) and the two Territories. The main benefit of this legislation may accrue to 42 the infirm aged who are in a position to plan ahead.

the enduring power of attorney a possible least restrictive alternative for those mildly intellectually disadvantaged individuals who have the requisite understanding and wish to plan against the contingency of a subsequent deterioration in their mental capacities.<sup>4</sup>

## COMMUNITY WELFARE SERVICES

Intellectually disadvantaged people often have a greater need for medical, social, educational, vocational, protective and other human services than do other people. It has been suggested that a good system of community welfare services would reduce the need for guardianship in two ways: first, it would protect both the person and the property of the intellectually disadvantaged person; second (and more important) it would teach the fundamental skills which intellectually disadvantaged people need, to be able better to protect themselves.<sup>5</sup> However, for some intellectually disadvantaged people provision of such services in the community is not enough. It has been pointed out that in Canadian society, for example, the normal social protection mechanisms, such as the police, ombudsmen, Human Rights Commission, legal aid programs, the courts and the press, are used far less effectively on behalf of intellectually disadvantaged people than on behalf of many other segments of society.<sup>6</sup> Those intellectually disadvantaged people who are not able to avail themselves of welfare and protective services may, at least initially, require someone to act as an intermediary between them and the service providers. The increasing complexity and 'bureaucratisation' of government-provided community services makes this need more acute. The intermediary may be a social worker, a citizen advocate or a guardian.

The provision of community welfare services on a non-coercive basis has the potential to safeguard the welfare of intellectually disadvantaged individuals, and at the same time maximise personal freedom and thereby enhance self-respect.

## ADVOCACY

Advocacy has been defined as 'speaking on behalf of another person with vigour and vehemence, at some cost to the advocate, where the advocate has maximum freedom from conflict between his interests and those of the person for whom he is speaking'.<sup>7</sup>

There are several forms of advocacy: citizen advocacy is an agency based program that matches competent citizen volunteers on a one-to-one basis with impaired or disadvantaged persons, with a mandate to the volunteer to act as advocate for the person with whom he/she is matched; agency advocacy is advocacy by an agency on behalf of an individual; collective or corporate advocacy is advocacy by organisations (such as associations for intellectually disadvantaged people); class advocacy is advocacy by an individual on behalf of a group<sup>8</sup>; and self-advocacy occurs when people speak out for themselves or for others who share their problems.<sup>9</sup>

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<sup>4</sup>Carney, *op. cit.*, 209.

<sup>5</sup>Paul McLaughlin, *Guardianship of the person*, National Institute on Mental Retardation, Downsview, Ontario 1979, p. 30, citing M. Kindred, 'Guardianship and limitations on capacity', in M. Kindred and others (eds), *The mentally retarded citizen and the law*, The Free Press, New York, 1976, p. 16.

<sup>6</sup>*ibid.*, p. 22.

p.26.

<sup>8</sup>*ibid.*

<sup>9</sup>Victoria, Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, *Report*, Victorian Government Printer, Melbourne, December 1982, p. 22. Hereinafter cited as 'Victorian Minister's Committee Report'. The above report also contains proposed legislation cited hereinafter as 'Victorian Minister's Committee, Proposed Bill', to distinguish it from the report.

Citizen advocacy is the form of advocacy which has received the most attention. Wolfensberger<sup>10</sup> defines a citizen advocate as 'a mature, confident citizen volunteer representing as his own the interests of another citizen who is impaired in his instrumental capacity or who has major expressive needs which are likely to remain unmet without special intervention'. Examples of how a citizen advocate might assist an intellectually disadvantaged person are: contacting the department of social security to ensure that clients are receiving benefits to which they are entitled; contacting a lawyer when some legal problem arises; writing to government departments or to other organisations on behalf of a person; providing assistance, where necessary, in budgeting; or simply acting as a friend by providing companionship and emotional reinforcement.<sup>11</sup> Matters which might be discussed are accommodation, personal relationships, clothing, entertainment, health, contraception, employment and domestic matters.<sup>12</sup> A citizen advocacy scheme needs to be backed up by an advocacy office. This office would be responsible for making the public aware of the advocacy concept, recruiting citizens for advocacy roles, screening of potential advocates, arranging training programs for advocates, arranging specific advocacy relationships, supporting those relationships by legal, professional and administrative assistance and reviewing advocacy relationships.<sup>13</sup>

Citizen volunteers are preferred to professional social workers for carrying out social advocacy because the social workers face an inevitable conflict of interests. When they are caught between the legitimate demands of their employers and the equally legitimate but incompatible demands of clients (or between equally legitimate but incompatible demands of different clients) the vigour of their advocacy is bound to suffer.<sup>14</sup>

It has been suggested that resort to formal legal protective mechanisms such as guardianship would be less likely to be necessary in a society which encouraged citizen and self-advocacy.<sup>15</sup> Citizen advocacy is seen as a means of encouraging the dignity of intellectually disadvantaged people in a positive way that protective systems cannot match.<sup>16</sup> There is potential for developing long-term continuity of independent protection after the death of the parents of intellectually disadvantaged people, and for developing informal social supports for people who do not have families and who are unlikely to develop normal informal social supports on their own.<sup>17</sup> In bringing an intellectually disadvantaged person into contact with ordinary services when they are needed, a citizen advocate can help that person to avoid crises which would necessitate the provision of more costly services by the state. If an intellectually disadvantaged person becomes familiar with the range of services available, that person's need for advocacy may disappear. Thus citizen advocacy is valuable as a means by which the rights of intellectually disadvantaged persons may be enhanced and protected on a non-custodial basis.

<sup>10</sup>Bright Committee Report, p. 194, citing W. Wolfensberger, *Citizen Advocacy - a Canadian program for the mentally retarded*, Department of Social Security, Ottawa, 1975. Wolfensberger has founded several advocacy schemes in North America and Canada.

<sup>11</sup>Victorian Minister's Committee Report, pp. 21-2.

<sup>12</sup>Bright Committee Report, p. 195.

<sup>13</sup>Paul McLaughlin, *Guardianship of the person*, National Institute on Mental Retardation, Downsview, Ontario, 1979, p. 27. This publication also contains proposed legislation hereinafter cited as 'McLaughlin, Draft Statute', to distinguish it from the above title.

<sup>14</sup>Bright Committee Report, p. 194.

<sup>15</sup>McLaughlin, op. cit., p. 26.

Where a community does not appear to be ready for citizen advocacy, there may nevertheless be a need for an advocacy agency to supplement existing services and protective agencies with consumer advice and independent evaluations. This advocacy or 'watchdog' agency would be independent of service delivery and have a number of important functions, such as:

- (i) disseminating publicity, advice and information in relation to existing services and benefits for intellectually disadvantaged people, and trying to overcome bureaucratic obstacles to access;
- (ii) investigation of discrimination on the basis of intellectual disadvantage;
- (iii) making guardianship applications where this appears to be appropriate;
- (iv) promoting the concept of citizen advocacy in the community;
- (v) advising the Minister on legislative reforms required to better assist intellectually disadvantaged people to lead full lives.<sup>18</sup>

Most of the above functions could be carried out by an agency that was actually administering a citizen advocacy program. There seems to be no reason why an advocacy agency could not make the transition from promoting the concept of citizen advocacy to administering a citizen advocacy scheme when it was satisfied that the community was ready for it.

In nine states of the United States, and in three provinces in Canada, there are state-level offices co-ordinating citizen advocacy programs.<sup>19</sup> The idea has been slower to catch on in Australia, but it is reported that there has been a citizen advocacy program running for some time at Victoria College (Burwood Campus). Also in Victoria, the Reinforce Union of Intellectually Disadvantaged Citizens, a self-advocacy group, has grown to a membership of about 200.<sup>20</sup> In South Australia, the work done by Mental Health Visitors, in developing close relationships with residents and encouraging them to work towards independence, drew favourable comment from the Bright Committee.<sup>21</sup>

One example of an advocacy agency is the Mental Health Advisory Service in Los Angeles, which provides free legal advice and representation to mentally ill and intellectually disadvantaged people.<sup>22</sup> The Advocacy Alliance is another pilot project for resident advocacy in three hospitals for intellectually disadvantaged people in England. It is to be run by volunteer advocates, preferably recruited locally, who develop a 'one-to-one' relationship with the patient and whose job it is to:

- (i) pursue a resident's statutory entitlement;
- (ii) assist with access to services, leisure facilities, education and habilitation services;
- (iii) secure assistance for financial management; and
- (iv) discuss and seek to redress the resident's problems and seek a high quality of life.<sup>23</sup>

## INSTITUTIONALISATION

### History

The first institutions for intellectually disadvantaged people were opened in the mid-19th Century in Europe and in the United States. These institutions emphasised education, particularly sensory and motor training programs. The object of this care was the 'treatment' of intellectually disadvantaged persons with a view towards returning them to the community.<sup>24</sup>

<sup>18</sup>Bright Committee Report, pp. 197-203.

<sup>19</sup>Susan Hayes & Robert Hayes, *Mental retardation - law, policy and administration*, Law Book Company, Sydney, 1982, p. 7.

<sup>20</sup>Victorian Minister's Committee Report, p. 22.

<sup>21</sup>Bright Committee Report, p. 22.

<sup>22</sup>J. B. Dawson, 'A summer in mental health advocacy in Los Angeles' (1982) *New Zealand Law Journal*, 57.

<sup>23</sup>H. Kramer, 'Mental health advocacy — a comparison' (1982) *7 Legal Service Bulletin*, 174, 176.

<sup>24</sup>Hayes & Hayes, *op. cit.*, p. 141.

However, many people misunderstood the objectives of these early schools, expecting complete and rapid 'cures' and seeing lesser accomplishments as failures.<sup>25</sup> When performance failed to match expectations, the early rehabilitative principles were forgotten, and the institutions moved towards long-term custodial care, reflecting an attitude of pity and charitable benevolence towards intellectually disadvantaged people.

At about the turn of the century the 'genetic' argument emerged. Its proponents came to believe that, in almost all cases, 'feeble-mindedness' was an inherited characteristic, transmitted from generation to generation. All sorts of social vices, from juvenile delinquency and adult crime, to poverty, prostitution and the spread of venereal disease, came to be regarded as traits of 'feeble-mindedness'. The development and widespread use of IQ tests provided a ready means of categorisation and the perception of intellectual impairment as an unchangeable, inherited characteristic precluded further research into training or education.<sup>26</sup>

It was little wonder that society sought security from the intellectually disadvantaged. They were incarcerated in institutions to protect society from their characteristic degeneracy and lack of control, to protect themselves from being led into lives of vagrancy, crime and drunkenness', and to stop them breeding (in order to 'safeguard the future of the human race').<sup>28</sup>

### Modern institutions

Although the idea of the intellectually disadvantaged person as a social menace has almost disappeared, the institutions which reflected that idea when built still persist.<sup>29</sup> In Australia, the early pattern is still followed. Large institutions housing the intellectually disadvantaged persons along with the mentally ill persons are located in remote areas, are administered by government, are out of the mainstream of medical advances and education, and often have no staff skilled in designing educational or psychological programs and no educational facilities within the hospital. A medical model which does not even keep in step with advances in the hospital mainstream still persists.<sup>30</sup>

The persistence of the medical model is rightly seen as 'insidious'. The role of medicine, and especially psychiatry, in providing solutions to the problems of intellectual disadvantage is greatly over-estimated. According to Kindred, this reflects an inaccurate perception of intellectual disadvantage as an illness which, with appropriate treatment, may be cured.<sup>31</sup> However, these days even supporters of the medical model would see their efforts as palliative, not curative.

Large institutions usually combine a number of services at the one location — medical and paramedical services; education; sheltered employment; rehabilitation; and recreation, for example. Some patients are so severely disabled as to require around-the-clock nursing care, but most impaired residents of institutions are healthy and can get around.

Some of the main disadvantages of large institutions are: lack of privacy for residents, who often live in wards with 20 or more others, with a bed and hospital locker as their only personal domain; lack of opportunity to express individuality in day-to-day living; lack of opportunity to experience normal household living and tasks; decision-making being taken out of the hands of the residents; little opportunity to form relationships with community dwellers; little use of communication facilities; and deprivation

<sup>25</sup>Bright Committee Report, p. 11. p.

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<sup>27</sup>Hayes & Hayes, op. cit., p. 142. <sup>28</sup>Bright Committee Report, p. 15. <sup>29</sup>Hayes & Hayes, op. cit., p. 142, citing Kindred, op. cit., p.410.

<sup>30</sup>Hayes & Hayes, op. cit., p. 143.

p. 144, citing Kindred, op. cit., p. xxvi.



resulting from 'efficient' administrative decisions, such as routine administration of sedative drugs for the convenience of nursing staff. Without proper nursing, dental and medical care, and without proper diet or exercise, residents of institutions are apt to become sluggish, apathetic, deficient in normal social skills and adaptability, and low in self-esteem.<sup>32</sup>

In spite of the increase in the range of alternative types of residential facility for intellectually disadvantaged people, it was reported in 1981 that in at least one State of Australia, in recent years, existing institutions had been enlarged and improved, new institutions had been established in remote or inconvenient locations, and multi-purpose centres with residential, recreational, vocational, education and training facilities in one place had been developed. Each of these features was criticised as serving to segregate intellectually disadvantaged people from the rest of the community and reinforcing the perception of intellectually disadvantaged people as different.<sup>33</sup>

Many typical members of society live in 'institutions' without losing their independence, social skills, or individuality. However, intellectually disadvantaged people in institutions have no say in how the facility is run, nor an opportunity to participate in rule-making; they cannot make personal decisions and choices or maintain their privacy, and would have difficulty organising consumer reaction if the facility did not meet their needs or expectations. Also, institutions for the intellectually disadvantaged tend to be run on a medical model, rather than on a residential, vocational or educational model.<sup>34</sup>

Some of the problems outlined above can be eliminated, even in large, remote, 'medical model' institutions, with some forward thinking. With minimal building alterations (such as putting partitions in wards and bathrooms, or attaching kitchens to living areas), and changes in institutional procedures, a much more normal lifestyle can be achieved. In some Scandinavian countries residents have representation on management boards, and can go on strike if living and working conditions are unsatisfactory. Relatively minor changes in rules and institutional environment can result in the institution becoming resident orientated.<sup>35</sup>

### **The effects of institutionalisation**

Many studies are inconclusive because they do not specify the type of situation with which they deal (that is, whether they concern a large 'traditional' institution or a community-based, educationally orientated facility). However, there has been one study which demonstrates that many of the effects of early exposure to an institutional environment have far-reaching effects in later life, effects which cannot be easily (if ever) reversed.<sup>36</sup>

There are also solid economic reasons against institutionalisation. From what studies have been done it clearly emerges that community-based facilities are cheaper.<sup>37</sup> Proponents of institutionalisation argue that every negative aspect of a large (or not so large) residential institution can occur in a community-based residential facility or service program, and that the institution offers a more 'efficient' method of delivering up-to-date care, be it medical, social, or educational. This is simply not based on reality. It is theoretically possible, but much more unlikely, for the 'negative aspects' to occur in an open, integrated setting, where the normal legal constraints are likely to apply.

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• p. 147. "Bright Committee Report, p. 14.

<sup>32</sup>Hayes & Hayes, *op. cit.*, p. 146. p. 147.

• p. 149.  
• p. 151.

As for the latter part of the assertion, if it is more efficient for intellectually disadvantaged people to live in an institution where all the major functions of society (domicile, school, work, recreation, place of worship, medical care and detention) are combined, why is it not so for everyone? One possible answer is that it is not more efficient for intellectually disadvantaged citizens either.<sup>38</sup>

Even if living in an institution were more efficient, non-disadvantaged people would not capitulate to the force of a mere economic argument. Unlike the disadvantaged, they already have the capacity to assert their right to be self-determining. If intellectually disadvantaged people were to be given assistance in locating the services they require, or in asserting their rights to autonomy, a non-institutional mode of living would be just as efficient and satisfying for them as it is for the rest of the community. There would be no justification for denying the intellectually disadvantaged the assistance they need to be self-determining, and no need for considerations of efficiency (whether based on myth or reality) to enter the debate.

Why do the institutions survive? The suggested answers do no credit to modern society. They range from the public investment on buildings; financial interests of those who provide equipment, services and food to institutions; the high turnover of staff, which defuses a potential source of outrage against institutional conditions; through to the institutional bureaucracy which tends to identify with the institution and feels threatened by the existence of community services.<sup>39</sup>

Of course, there will always be intellectually disadvantaged people who require some form of congregate accommodation, perhaps on a protective or custodial basis. If the rights of such people are to be safeguarded, and if they are not to be subjected to the degradations which are known to occur in large, traditional institutions, they should preferably be housed in small, community-based residential facilities, or 'group homes'. Further, people housed in such facilities should have access to an independent advocate or guardian who takes an interest in their progress and who can act on their behalf and uphold their rights when they are threatened. This need is all the greater when accommodation is provided on a protective or custodial basis.

## GUARDIANSHIP

Since the various aspects of and models for guardianship are discussed in detail in the chapters which follow, the concept is introduced only briefly here. The term 'guardianship' refers to a legally recognised relationship between a specified competent adult and another specified person, the 'ward', who, because of his/her tender age or because of some significant degree of intellectual disability, is considered to lack legal capacity to exercise some or all of the rights pertaining to adults generally. The guardian is specifically charged with protecting the ward's interests and, for certain purposes, exercising essential rights on the ward's behalf.<sup>40</sup>

Thus a guardian is a person who guards, protects and preserves the welfare and interests of the person for whose care he/she has been made responsible. This role involves both powers and obligations—powers to make relevant decisions affecting the interests of the subject of the guardianship, and obligations to act reasonably, caringly and independently in attending to those interests.

Guardianship may refer to guardianship of the person, or of a person's property, or both. Personal guardianship refers to the control which may be exercised and protection which may be afforded in relation to personal life decisions. Personal life decisions concern all those matters (excluding financial ones) which can affect a person's welfare.

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p. 152.

<sup>38</sup>ibid.

<sup>39</sup>McLaughlin, *op. cit.*, p. 54.

The breadth of decision-making power is similar to that of a parent in relation to a child, that is, it encompasses decisions as to where and with whom a person lives, what medical care a person should receive and what vocational training should be afforded.<sup>41</sup>

When a person lacks the ability to make these sorts of decisions and when there are no available support services to help to make a considered and independent decision, that person may be in need of guardianship. If the person has attained the age of eighteen years, his/her parents cease to be the guardian(s) even if he/she is severely or profoundly intellectually disadvantaged. This may mean that a guardian needs to be appointed.<sup>42</sup>

In most Australian jurisdictions there are currently several avenues to the appointment of a guardian. A guardian may be appointed by the Court in respect of a person who is a 'patient' or is admitted for training under relevant mental health legislation, or in respect of a person who has been declared 'an infirm person' by the Public Trustee (or equivalent public official). A guardian may also be appointed in respect of a person who has been found by judicial enquiry to be intellectually defective and incapable of managing his/her affairs.<sup>43</sup>

Traditionally, guardianship has been an all or nothing affair. The appointed guardian has assumed the same powers with respect to the 'ward' that a parent has in relation to a child. More recently, there has been a call for a limited form of guardianship which reduces the opportunity of the guardian to become overprotective and stifle any attempt by the ward to become independent. Clearly, limited guardianship has the potential to provide protection for intellectually disadvantaged people in those areas in which they need it, while at the same time allowing them to exercise independence in other areas of their lives. Limited guardianship, and the issues it raises are discussed later in this work.

## THE BROAD APPROACH

Some writers argue that the services and facilities which are discussed above should all be co-ordinated in a broad, flexible approach to caring for and protecting intellectually disadvantaged people.<sup>44</sup> They also acknowledge that the services and facilities are not enough on their own. Information and advice must also be provided if intellectually disadvantaged people are to be able to make sense of and take full advantage of what is available. Supporters of the broad, co-ordinated approach are of the opinion that any less exhaustive approach is incapable of catering to the needs of individuals at every level of intellectual disadvantage, and especially incapable of doing so if a 'least restrictive alternative' standard has to be met.

Attention has already been drawn to the infinite range of levels of intellectual disadvantage. This in turn leads to an infinite range of levels of disability in human functioning, which is what we are really interested in. Thus Frolik writes of a:

continuum stretching from the rational, careful individual who never or only rarely makes decisions not in his interest to the incompetent individual who is incapable of understanding or making decisions in his own interest.<sup>45</sup>

Under the broad approach a variety of services and programs are included in an attempt to cater for intellectually disadvantaged people at every level of disability in human functioning, and with emphasis on the use of the least restrictive alternative. This emphasis reflects growing recognition of the fact that intellectually disadvantaged people

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<sup>41</sup>Victorian Minister's Committee Report, p. 18.

p. 19.

<sup>42</sup>Ibid., pp. 23-4. The details of the present law in the various States and Territories may be found in Chapters Two and Three above.

<sup>43</sup>Bright Committee Report, pp. 249,251; McLaughlin, *op. cit.* pp. 17-34.

<sup>44</sup>Lawrence A. Frolik, 'Plenary guardianship: an analysis, a critique and a proposal for reform' (Spring 1981) 23 *Arizona Law Review*, 599-660 (hereinafter cited as Frolik).

are best served by an environment which is as close as possible to a normal one. This is the principle of normalisation, a basic precept of which is the reduction of stigmatisation of intellectually disadvantaged people.<sup>46</sup>

In terms of the least restrictive alternative, citizen advocacy may in some cases be a substitute for guardianship, and may also be complementary to the provision of community welfare services. A helpful and positive attitude on the part of professional staff manning such services may also obviate the need for guardianship, and possibly even for institutionalisation. Persons who are incapable of caring for themselves in relation to some but not all aspects of their personal lives may need a guardian to exercise control only with respect to certain aspects of their personal lives. This notion of limited guardianship is able to replace plenary (or full) guardianship in many cases, and thus is an important device for maximising the freedom of intellectually disadvantaged people who need guardians.

Services and facilities by themselves are not enough. Co-ordination, information and advice are required so that intellectually disadvantaged people are not forced into forms of protection that are either overly restrictive, thereby depriving them of their right to the maximum degree of freedom which they are capable of enjoying, or less restrictive than their level of disability warrants, thereby depriving them of their right to adequate protection.

The Bright Committee reported that in South Australia there was no access to a single person who could help a family with an intellectually disadvantaged child to choose between the available options. Instead, the family had to find each separate agency, often by trial and error and with considerable delay. This shows a need for a single person or agency to help determine the best combination of assistance out of all the services and facilities which are available and to ensure that the assistance is implemented.<sup>47</sup>

The Bright Committee recommended that a statutory authority be established, independent of health, education and welfare authorities or departments, to co-ordinate, encourage and ensure the use by intellectually disadvantaged persons of generic services such as the Education Department, the Housing Trust, the Department of Community Welfare and the Health Commission. The authority, it was argued, should also provide services which no other organisation can readily provide, and should also set standards and policies and be the body responsible for funding of services and policy for intellectually disadvantaged persons in the State. The basis of the authority's policy and planning should be the three principles of rights, normalisation, and the least restrictive alternative. The authority should ensure the co-ordination of advice and assistance at a practical level through regional services.<sup>48</sup>

Another important but often overlooked aspect of the broad approach is public education. The public must be educated to have an awareness of: the problems of intellectually disadvantaged people; the fact that intellectually disadvantaged people are individuals with dignity and certain rights; the potential of intellectually disadvantaged people; the great diversity of intellectual impairment; and the role of every member of the public in ensuring that services for intellectually disadvantaged people are not thwarted or rendered useless by negative community attitudes. Without some sort of general public education program, the most elaborate services and facilities will be struggling to secure human and civil rights to people who, through no fault of their own, lack in varying degrees the mental agility needed to cope with living and asserting their rights in modern urban societies.

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<sup>46</sup>McLaughlin, *op. cit.*, pp. 28-9.

<sup>47</sup>Bright Committee Report, p. 249.

<sup>48</sup>*ibid.*, pp. 248,251.

Advocacy, especially citizen advocacy, has an important role to play in the broad approach. First, citizen advocacy provides a less formal and less restrictive alternative to guardianship.

Second, it has been suggested that resort to formal legal protective mechanisms would be less likely to be necessary in a society which encourages citizen and self-advocacy.<sup>49</sup> For example, it has already been noted that a good system of community welfare services may reduce the need for guardianship by teaching fundamental skills which intellectually disadvantaged persons need in order to be able better to protect themselves. The effectiveness of this teaching process could be enhanced if the intellectually disadvantaged person had recourse to an advocate who could advise, at least initially, as to how to make the best use of available services. In bringing an intellectually disadvantaged person into contact with ordinary services when they are needed, a citizen advocate can help that person avoid crises which would necessitate the provision of more costly services by the state. Once an intellectually disadvantaged person becomes familiar with the range of services available, the need for assistance in that regard, or indeed the need for advocacy at all, may disappear.

The addition of a suitable guardianship program to the points outlined above would give us the essentials of the broad approach. However, if intellectually disadvantaged persons are to be cared for and protected by means of the least restrictive alternative, detailed information is required about their capabilities. Possibly some sort of enquiry should be held whenever it appears that a particular person, perhaps believed or known to be intellectually disadvantaged, is at risk. Such a report might come from a relative, neighbour, friend, social worker or other professional providing personal services.

Present experience appears to be, however, that nothing is done until some crisis is reached, then the panic button is pressed and guardianship is sought.<sup>59</sup> Subject to the observation noted above, namely that bringing an intellectually disadvantaged person into contact with ordinary services when they are needed may avoid crises which would necessitate the provision of more costly services by the state, such a 'crisis-intervention' model may be a good thing in that it would not lead to unnecessary intervention.

However, the fact that an enquiry into the competence of an intellectually disadvantaged person usually arises in the context of a guardianship application does not mean that it should only be directed towards determining whether there is a need for guardianship. In fact, according to the principle of the least restrictive alternative, the decision-maker should strive to avoid appointing a guardian unless it is clear that no less restrictive alternative would provide adequate protection and assistance.

## THE AMERICAN BAR ASSOCIATION MODEL STATUTE

A model which reflects the broad approach is the Model Statute proposed by the American Bar Association (hereinafter ABA) in its Discussion Edition entitled 'Guardianship and conservatorship'<sup>51</sup> This model expressly provides for a range of less restrictive alternatives to be canvassed at several stages in the procedure.

The statute provides for intervention proceedings to be brought by petition. The petition must include a statement to the effect that the petitioner has had discussions with a worker known as a disabilities resources officer.<sup>52</sup> The disabilities resources

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p. 27.

<sup>49</sup>Frolik, *op. cit.*, p.625.

<sup>51</sup>American Bar Association, *Guardianship and conservatorship*, American Bar Association, Chicago [n.d.]. This publication also contains proposed legislation hereinafter cited as 'American Bar Association, Model Statute', to distinguish it from the above title. 'Conservatorship' is the term used by the ABA to denote guardianship of the estate: see footnote 27 at Chapter Six below.

<sup>52</sup>American Bar Association, Model Statute, s. 6(1)(a), (b)(xiv).

officer has an obligation to develop and maintain a current knowledge of the full range of public and private personal and financial services and programs available to assist disabled persons and their families.<sup>53</sup> The petitioner should discuss with the disabilities resources officer the facts alleged in the petition, the effect of the appointment of a personal guardian or conservator, and the alternative services and procedures which are available. The petition should also include an explanation as to why the requested type of protection and assistance is the least restrictive 'dispositional alternative' which will meet the needs of the person subject to the petition.

When the petition is filed, a multidisciplinary evaluation team must be appointed by the Court.<sup>54</sup> This team then submits a report detailing, among other things: the disabilities from which the person subject to the petition suffers, and any other problems; the services being made use of and the type(s) and extent of any assistance required by the person to manage his or her financial resources, to protect his or her rights, and/or to meet the essential requirements for his or her physical health or safety, and why no less restrictive alternative would be appropriate; together with an opinion regarding the probability that the extent of any of the person's disabilities may significantly lessen, and the type of services or treatment which will facilitate improvement in the person's condition, behaviour or skills.

After the report is completed, a pre-hearing conference must be held between the parties and a disabilities resources officer.<sup>55</sup> This is another opportunity to discuss, in the light of the report, whether the person subject to the application is in need of protection and assistance and, if so, whether non-custodial treatment or services available on a voluntary basis may obviate the alleged need for a guardian or conservator. If agreement is reached, the petition may be withdrawn or suspended for 90 days while non-custodial treatment or services are given a try. If no agreement is reached the matter goes on for hearing.

At the hearing, the Court has to decide whether or not the person subject to the petition is a partially disabled or disabled person.<sup>56</sup> If the person is found to be neither partially disabled nor disabled, the petition must be dismissed.<sup>57</sup> But if there is a finding of partial disablement or disablement, the Court may choose from the following list of dispositional alternatives:

- (a) directing the provision of necessary medical, mental health, counselling, social, advocacy, educational, therapeutic, rehabilitative, homemaking, recreational, financial or other services to the respondent on a non-custodial basis;
- (b) authorising or ratifying a contract or transaction entered into by a partially disabled or disabled person to meet his or her essential requirements for physical health or safety, to protect his or her rights, to manage his or her financial resources and/or to develop or regain his or her abilities to the maximum extent possible;
- (c) directing establishment of a trust of which the respondent and any individuals legally dependent on the respondent are the beneficiaries;
- (d) directing the provision of residential services to the respondent in a small, licensed, community-based residential home which houses not more than six disabled or partially disabled persons and which provides room and board, personal care, habilitation services and supervision in a family environment;
- (e) appointing a limited conservator or conservator;
- (f) appointing a limited personal guardian.<sup>58</sup>

<sup>53</sup>s. 4(2)(i).

<sup>54</sup>s. 9.

<sup>55</sup>s. 9.

<sup>56</sup>s. 10(1)(d), (2)(d). The definitions of these expressions are examined at Chapter Six below.

<sup>57</sup>s. 11(1).

<sup>58</sup>s. 11(2).

One feature of the ABA Model Statute which marks it out from other proposed and existing guardianship legislation is that the financial and personal needs of the person subject to the petition may be examined together in one decision-making process. The reason for this is that an order appointing a guardian of the property of a person (i.e. a conservator) is seen as less restrictive of a person's liberty than an order appointing a personal guardian. It is therefore a possible, least restrictive alternative and should be available to the Court.

It is worth noting at this stage that the ABA proposal looks expensive, and not all aspects of it have yet been covered. This cost factor may make the Model Statute inappropriate for smaller Australian States and Territories.

The Guardianship Bill proposed by the Minister's Committee in Victoria also reflects a broad approach, but it is not as exhaustive as the ABA Model Statute. There is no requirement that an applicant have discussions with a disabilities resources office, there is no requirement that a pre-hearing conference be held, and dispositional alternatives falling short of guardianship in terms of restrictiveness are not expressly spelled out. However, after spelling out the criteria which may justify the appointment of a guardian<sup>59</sup>, the draft Bill goes on to provide as follows:

- (2) In determining whether or not a person is in need of a guardian, the Tribunal shall consider whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action.
- (3) The Tribunal shall not make an order [appointing a guardian] unless it is satisfied that the order would be in the best interest of the person in respect of whom the application is made.
- (4) The Tribunal shall not make an order appointing a plenary guardian unless it is satisfied that a limited guardianship order would be insufficient to meet the needs of the person in respect of whom the application is made.
- (5) Where the Tribunal makes an order appointing a limited guardian in respect of a person the order shall be that which is the least restrictive of that person's freedom of decision and action as is possible in the circumstances.<sup>60</sup>

Thus the Tribunal is clearly directed to look for the least restrictive alternative which will satisfy the particular needs of a person subject to a guardianship application. It is worth pointing out that no extra cost is incurred by including such a direction in the legislation, except perhaps that the decision-making body may take a little longer to make up its mind. This may be of relevance to the smaller States and Territories.

McLaughlin, himself an active proponent of the broad approach, apparently does not see a need either for the discussion and pre-hearing conference required by the American Bar Association's Model Statute, or for any exhaustive particularisation of matters which must be considered by the decision-making body in reaching its decision. Apart from the primary criteria<sup>61</sup>, McLaughlin's Draft Statute requires only that the appointment of the proposed guardian be in the best interests of the person subject to the application<sup>62</sup>, and that a plenary guardian not be appointed unless the Court is satisfied that an order appointing a limited guardian would be insufficient to meet the needs of the person subject to the application.<sup>63</sup> These requirements are very similar to those of the Alberta Dependent Adults Act 1976.<sup>64</sup>

<sup>59</sup>Victorian Minister's Committee, Proposed Bill, s. 27(1)(a)—(d); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 22(1)(a)—(d).

<sup>60</sup>Victorian Minister's Committee, Proposed Bill, ss. 27(2)—(5); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 22 (2)—(5).

<sup>61</sup>McLaughlin, Draft Statute, s. 5(1)(a).  
62, 5(1)(b).

<sup>63</sup>S- 5(2).

<sup>64</sup>Dependent Adults Act 1976 (Alberta, Canada), ss. 5, 6(2), (3).

The lack of a clear direction to the Court to look for less restrictive alternatives falling short of limited guardianship makes it difficult to regard these models as truly reflecting a broad approach to the care and protection of intellectually disadvantaged people. This is because the

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Services and facilities

~~underlying philosophy of the broad approach~~ is that guardianship, including limited guardianship, is to be avoided if the provision of community welfare services, advocacy or some other non-custodial service or facility would adequately satisfy the needs of a particular person.

The cost of having disabilities resources officers, a guardian oversight commission and a multidisciplinary evaluation team, as recommended by the ABA, is likely to prove prohibitive for the smaller States and Territories. However, there seems no reason why such jurisdictions could not adopt legislation particularising a range of less restrictive alternatives falling short of limited guardianship, as in the ABA Model Statute, or at least clearly directing the decision-maker to address itself to such less restrictive alternatives and look for the least restrictive of them which is appropriate to the needs of a particular person, as in the Proposed Bill of the Victorian Minister's Committee.



assist in say the education of a disadvantaged child prior to adulthood — it does not follow that all (or indeed any) of these people require guardianship. This is really the nub of the matter, for it squarely raises the question of policy.

Assuming for the moment that the class of people to be covered could somehow be established with precision (and precise it must be if the law is not to have the effect of stripping competent non-disadvantaged adults of 'self guardianship'), there would still be the question of the application of the principle of the least restrictive alternative. For automatic guardianship would, at worst, be plenary guardianship or, at best, over-generous guardianship. One cannot tailor a suit for a client whose measurements and needs remain unknown; equally, it is not possible to limit the powers of the guardian to the bare essentials necessary for that person if the law is required to be 'automatic' in its operations. Guardianship would inevitably be of the 'off the peg' variety; and it would be manufactured to accommodate the client whose needs were the most extensive. In place of least restrictive guardianship we would be ushering in a 'most restrictive' guardianship regime; it would automatically appoint guardians for people who do not require them, and it would clothe many guardians with powers substantially in excess of that required to meet the needs of the particular disadvantaged person.

This chapter puts such impractical schemes to one side and concentrates attention on those guardianship options which are both workable and consistent with the basic guiding principles laid down in such documents as the United Nations Declaration. The models to be explored here result from a serious attempt to devise workable models which are broadly consistent with these guiding principles. One of the fundamental questions which must, however, be addressed in this context is whether limited guardianship should be made available. This matter is also considered in this chapter.

## THE LEGALISTIC OR 'SUBSTITUTED JUDGMENT' MODEL

### Introduction

McLaughlin<sup>2</sup> and Frolik<sup>3</sup> both acknowledge that the expressions 'legalistic' and 'substituted judgment' may be used to describe the same model for guardianship. The following discussion uses the expression 'legalistic' wherever possible, in order to avoid confusion.

McLaughlin commences his discussion of the legalistic model of guardianship by quoting the following definition of guardianship:

The term 'guardianship' refers to a legally recognised relationship between a specified competent adult and another specified person, the 'ward' who, because of his tender age or because of some significant degree of mental disability, judicially verified, is considered to lack legal capacity to exercise some or all of the rights pertaining to adults generally in the country of which he is a citizen. The guardian is specifically charged with protecting his ward's interests and, for certain purposes, exercising essential rights on his behalf.<sup>4</sup>

This definition, says McLaughlin, makes it clear that guardianship is essentially a legal device by which:

- (i) the exercise of certain rights is transferred from one person who lacks mental capacity to another person with legal capacity; and
- (ii) certain duties of protection are imposed on the person to whom the rights are transferred.

<sup>2</sup>*ibid.*, pp. 54-5.

<sup>3</sup>Lawrence A. Frolik, 'Plenary guardianship: an analysis, a critique and a proposal for reform' (Spring 1981) 23 *Arizona Law Review*, 599-660.

<sup>4</sup>McLaughlin, *op. cit.*, p. 54, quoting the 1969 San Sebastian Symposium on Guardianship.

# Options in caring for and protecting intellectually disadvantaged people

## INTRODUCTION

In Chapter One two competing goals in the care and protection of intellectually disadvantaged persons (on the one hand, maximising the freedom of the individual, and on the other hand, protecting the welfare of the individual) were discussed. Most programs for the intellectually disadvantaged attempt to steer a middle course between these goals. There are several ways of doing this, and the course chosen determines, in a rough way, the relative weight to be accorded to each goal. This chapter commences a more detailed discussion of guardianship schemes, both existing and proposed.

There are two questions to be addressed in discussing guardianship alternatives. First, what type or model of guardianship is to be preferred? Second, what sort of administrative delivery structure should underpin the preference for a particular model of guardianship? The first question involves choosing between three models:

- a legalistic or 'substituted judgment' model which aims to facilitate only a person's legal functioning in the community;
- \* a welfare oriented or therapeutic model which strives to bring a wider range of benefits to the person; and
- \* a 'parent-child' or developmental model which aims to promote the development of the individual's functioning in a range of areas.

The second question involves choosing from volunteers backed up by a co-ordinating agency, social work professionals employed by a public or private agency, and an agency which may seek guardianship but whose prime function is the delivery of social services.

Some delivery structures may be capable of delivering more than one type of guardianship, but there are inherent limitations which will emerge from the discussion which follows. In his discussion of models for guardianship, McLaughlin notes that the conflicting internal logics of the various solutions seem to make it impossible to form a hybrid model of the best aspects of each.'

The field of choice is also narrowed by some practical considerations and by the impact of principles such as that of the least restrictive alternative.

Some parents, for example, suggest that the law should 'automatically' continue their guardianship rights when their handicapped offspring reach adulthood. The insuperable practical barrier to such a scheme is that of classification; intellectually disadvantaged people cannot readily be identified by their behaviour, by their history of utilisation of specialist services, or from any public records. Most people will not classify themselves or be universally regarded by their close family as being disadvantaged to the degree which would justify appointment of someone as their guardian. Even where this identity is established it will not generally be known to any public agency. And where an agency does have a record—such as would be the case where services have been supplied to

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<sup>1</sup>Paul McLaughlin, *Guardianship of the person*, National Institute on Mental Retardation, Downsview, Ontario, 1979, p. 53. This publication also contains proposed legislation hereinafter cited as 'McLaughlin, Draft Statute', to distinguish it from the above title.

In other words, the guardian becomes a 'substitute decision-maker' for the person subject to the guardianship, and is given legal responsibility for the protection of that person.<sup>5</sup>

What group of intellectually disadvantaged people does the substituted judgment model of guardianship address?

McLaughlin has identified three broad groups in relation to which the question of a need for guardianship might arise. The first group includes severely and profoundly intellectually disadvantaged individuals, among others, who have a need for valid consents to be given to medical procedures and other forms of treatment, therapy and rehabilitation, and for assistance in matters of day-to-day living, because they do not have the mental capacity to understand the information that underlies the validity of consents. This group most clearly requires guardianship to enable its members to interact legally with the world, and its members frequently require protection as well since they are very dependent upon others for even basic life functions. They have extremely limited communication skills, paid human service workers are often the only people aware of their existence, and they are often housed in institutional settings where individual needs give way to institutional maintenance.

The other two groups identified by McLaughlin are: those mildly and moderately intellectually disadvantaged persons who do have the mental capacity for forming legal relationships, but who exercise that capacity in a way that is perceived by other people as not being in their best interests, probably because they just cannot keep pace with the demands of modern life; and those intellectually disadvantaged adults who are in situations where there is a risk of physical, sexual or economic abuse or exploitation from which they are unable or unwilling to extricate themselves.'

The legalistic model addresses neither of these groups. Members of the former group primarily require guidance and counselling. However, proponents of the legalistic model argue that guardianship is not an appropriate vehicle for the provision of such services, because they can be provided without the imposition of authority and resultant restriction of rights that guardianship entails. Guardianship according to the legalistic model is not a social service; it should only be used where a substitute decision-maker is needed to facilitate legal relationships.<sup>8</sup>

In relation to the latter 'at risk' group, McLaughlin argues that guardianship should not be used to deal with issues of neglect, abuse or exploitation, and recommends that society should be more ready to make use of criminal sanctions against those responsible for such situations. After all, that is how people are normally protected in our society.<sup>9</sup>

The legalistic model for guardianship is based on the presumption that everybody is entitled to exercise all the rights generally available to all persons within the jurisdiction.<sup>10</sup> Thus it has been said that:

. . . every human being should be presumed to have [the basic rights of privacy established by the Supreme Court of the United States] unless someone can show an almost certain probability of disastrous consequences if he exercises them . . . There is a fundamental right to be left alone, a right to be allowed to succeed or fail, a right to ignore gratuitous advice, a right not to tell every problem to the social worker, and a right not to answer the door."

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<sup>5</sup>ibid., p. 54.

<sup>6</sup>ibid., pp. 86-7.

<sup>7</sup>ibid., pp. 89-91.

<sup>8</sup>ibid., p. 59.

<sup>9</sup>ibid., pp. 90-1. <sup>10</sup>ibid., pp. 54-5. "Wald, 'Basic personal and civil rights', in Michael Kindred et al. (eds) *The mentally retarded citizen and the law*. The Free Press, New York, 1976, pp. 4-5; quoted in McLaughlin, op. cit., p. 58.

Persons who lack sufficient mental capacity to participate intellectually in certain legal acts, such as the giving of a consent which waives the right not to be touched by another person, may not engage in these legal acts. This is a serious deprivation of the legal right of such people, but McLaughlin argues that it is necessary 'if the enforcement of legal relationships is to have any moral foundation'.<sup>12</sup>

The dangers of over-protection have already been referred to. One way of avoiding them is to make use of limited or partial guardianship schemes. This form of guardianship is discussed in more detail later in this chapter. The main aim is to take away legal decision-making power only in those areas of a person's life in which he/she has been found to lack legal competence. It is a sophisticated modification of traditional guardianship schemes, and is directed towards implementation of the principle of the least restrictive alternative. With its emphasis on legal functioning, it would fit in well with the legalistic model.

The legalistic model seeks to deal with the dangers of over-protection and abuse of control by restricting the size of the group on which guardianship may be imposed and the purposes for which it may be used. According to McLaughlin, the appointment of a guardian under the legalistic model is effected by a court in a juridical proceeding, and the guardian is personally subject to the supervision of the court.<sup>13</sup> However, in recent times there has been support for guardianship tribunals composed of experts in the field of intellectual impairment and incompetence, and chaired by lawyers, to be placed in charge of guardianships.<sup>14</sup> If the principles of the legalistic approach to guardianship were set out in the enabling legislation as goals for which such a tribunal should strive, there seems to be no reason why it could not administer a legalistic type of guardianship.

Because of the serious deprivation of legal rights under guardianship, proponents of the legalistic model argue strongly for extensive due process and evidentiary safeguards in order to minimise infringement of the rights of persons who are capable of exercising legal rights themselves. Such arguments accord with the views expressed in paragraph 7 of the *Declaration on the rights of mentally retarded persons*.<sup>15</sup>

In theory, there are two main possible effects of extending due process and increasing evidentiary standards. First, there might be a decrease in the number of cases in which a guardian is unnecessarily appointed. This is obviously a good effect, because it reduces the number of people who are unjustly deprived of their liberty. Second, there might be an increase in the number of cases where no guardian is appointed although one is necessary for the welfare of some person. This may be a bad effect. However, advocates of the legalistic approach believe that the good effect outweighs the bad, on the basis that we are all better off in a society which minimises the denial of liberty to its members.<sup>16</sup>

This issue is complicated by the fact that we are unlikely to know whether the first or the second effect has occurred in a particular case. This is because we cannot truly categorise all individuals as either intellectually competent or intellectually incompetent. The notion of a continuum of levels of human capability has already been discussed. The legalistic approach here is to say that, at most, expanded due process and increased evidentiary standards will reduce the number of guardians appointed in the 'grey area' where no judgment is certain or where conflicting values bar agreement as to the correct outcome.<sup>17</sup> In other words, persons who fall within this 'grey area' will receive the benefit of the doubt.

<sup>12</sup>McLaughlin, *op. cit.*, p. 55. <sup>13</sup>McLaughlin, *op. cit.*, p. 58. <sup>14</sup>See Victorian Minister's Committee, proposed Bill; Mental Health Act 1976-7 (S.A.).

<sup>15</sup>See 'The human rights context' at Chapter One above.

<sup>16</sup>See Frolik, *op. cit.*, 635.

<sup>17</sup>Frolik, *op. cit.*, 633.

Such reforms would effectively make guardianship proceedings more adversarial, and might result in a decline in the use of guardians, as their appointment becomes more costly and more time consuming, and as incompetency becomes more narrowly defined.<sup>18</sup> Deterrence due to the increased costs and time-consuming nature of guardianship proceedings appears to conflict with the ideas expressed in paragraph 5 of the *Declaration on the rights of mentally retarded persons*.<sup>19</sup>

Indeed, McLaughlin cites limited availability as the major weakness of the legalistic approach to guardianship.<sup>20</sup> However, a decline in the use of guardians for people who fall within the 'grey area' referred to above is one of the goals of the legalistic model. The due process and evidentiary safeguards are necessary to ensure that the narrower definition of incompetence is adhered to.

While the time factor cannot be reduced significantly if adequate due process is to be accorded to persons subject to guardianship proceedings, some of the costs can be absorbed by the state as a way of relieving the burden on applicants in guardianship proceedings. In the Alberta Dependent Adults Act 1976, the court has authority to assess costs against the Crown in right of Alberta.<sup>21</sup> McLaughlin achieves a similar result in his Draft Statute by allocating costs through legal aid.<sup>22</sup> There is also a cost saving under the legalistic approach due to volunteers being used as guardians.<sup>23</sup>

### The doctrine of substituted judgment

The legalistic model of guardianship is derived from the legal doctrine that the court, acting in equity, has the right to substitute its judgment and to act for a legally incompetent person in **all** matters affecting that person's well-being.<sup>24</sup> The doctrine first arose in the 1816 English case of *Ex Parte Whitbread*<sup>25</sup>, in which the court authorised certain expenditures from the estate of an incompetent person to provide for his needy relatives. The court justified this on the ground that 'what the lunatic would probably do and what . . . would be beneficial to him should be done'.<sup>26</sup>

A modified form of the doctrine of substituted judgment appeared in America in 1844. In *In Re Willoughby*<sup>27</sup> the court held that it had the power to deal with the estate of an incompetent person 'as it supposes the lunatic himself would have acted had he been of sound mind'.<sup>28</sup> In this case there was evidence which indicated that prior to his incompetency the ward did not consider that his step-daughter was entitled to support from him. On the basis of this evidence, the court refused to approve gifts from the estate of the ward to his step-daughter.<sup>29</sup>

<sup>18</sup>ibid., 624-5.

<sup>19</sup>See 'The human rights context' at Chapter One above.

<sup>20</sup>McLaughlin, O. cit., p. 59.

<sup>21</sup>Dependent Adults Act 1976 (Alberta, Canada), s. 48.

<sup>22</sup>McLaughlin, Draft Statute, s. 13.

<sup>23</sup>Paul McLaughlin, *Guardianship of the person*, National Institute on Mental Retardation, Downsview, Ontario, 1979, p. 60.

<sup>24</sup>Frolik, O. cit., 618.

<sup>25</sup>*Ex Parte Whitbread* (1816) 35 ER 878.

<sup>26</sup>ibid., 879. This policy was endorsed in *Re R and the Mental Health Act* [1983] 1 NSWLR 557, 564.

<sup>27</sup>*In Re Willoughby* 11 Paige 257 (NY Ch. 1844).

<sup>28</sup>ibid., 258.

<sup>29</sup>ibid., 260.

Two principles emerge from the early cases. First, the assets of the ward may be used for the benefit of someone other than the ward. Second, the court should apply the assets of the ward in a manner consistent with evidence of the ward's intent. However, where the ward had expressed no prior competent intent, the court came to rely on a reasonable man standard.<sup>31</sup>

In this way the doctrine of substituted judgment has enabled courts to approve actions by guardians that were not based upon the expressed intent of the ward.<sup>31</sup> For example, in *In Re Quinlan*<sup>32</sup>, the Supreme Court of New Jersey held that evidence of Karen Quinlan's attitude toward being kept alive by a respirator was not of sufficient probative weight for the court to be able to 'discern her supposed choice'. Instead, the court permitted Karen's guardian and family to determine whether Karen would have chosen to exercise her right not to be kept alive by the respirator. The court gave no indication as to how such a determination might be made, but did defend the anticipated choice of turning off the respirator by reference to what would be acceptable to the overwhelming majority of the community.<sup>33</sup>

Where the ward has been incompetent since birth, there can be no prior competent expression of intent. In such a case the test is not what the reasonable man would do, but what the reasonable incompetent man would do. Thus, in a recent Massachusetts case<sup>34</sup>, the court refused to approve painful chemotherapy for a profoundly retarded sixty year old leukemia sufferer. It was held that this was a refusal which 'would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter the decision-making process of the competent person.'<sup>35</sup>

The use of substituted judgment in cases where there has been no prior competent expression of intent by the ward has been criticised. Allen E. Buchanan<sup>36</sup> argues that the doctrine of substituted judgment is inapplicable in such cases, and criticises the decisions in *In Re Quinlan* and *In Re Saikewicz* for adopting 'different, but equally desperate, strategies for avoiding an uncomfortable conclusion: that because the standard of substituted judgment could not be successfully applied, no exercise of the incompetent's right of self-determination was possible'.<sup>37</sup>

Buchanan also argues that reliance on a reasonable person standard will not always result in the de facto exercise of an incompetent person's right of self-determination. The right of self-determination should be a right to choose a course of action which diverges from that which is preferred by the majority of reasonable people. The view that a person in an irreversible vegetative state ought not to be resuscitated is founded upon a certain conception of personhood and upon certain substantive moral views. There can be no guarantee that a ward who has made no prior competent expression of intent would conform to these views if they were competent.<sup>38</sup>

Frolik supports this criticism, arguing that in a case where there has been no prior competent expression of intent by the ward, the court can only make a reasoned guess at what the ward would have chosen to do. The guess is based upon a reasonable person standard and upon an assumption as to what is rational behaviour. Since the court is relying on the probability that the ward would have behaved rationally, there is no

<sup>30</sup>Frolik, op. cit., 619.

<sup>31</sup>*In Re Quinlan*, 70 NJ 10, 41; 355 A 2d 647, 664 (1976).

<sup>32</sup>Frolik, op. cit., 621.

<sup>33</sup>*Superintendent of Bekhertown State School v. Saikewicz* 373 Mass. 728; 370 NE 2d 417 (1977).

<sup>34</sup>*ibid.*, 373 Mass. 752-3; 370 NE 2d 431 (1977).

<sup>35</sup>A. E. Buchanan, 'The limits of proxy decision-making for incompetents' (1981) 29 *UCLA Law Review*, 386.

<sup>36</sup>*ibid.*, 393.

<sup>37</sup>*ibid.*, 403.

assurance that its decision reflects what the ward would have done. According to Frolik, the doctrine of substituted judgment boils down to a legalistic rationalisation of the imposition of 'rational' societal values upon intellectually incompetent persons.<sup>39</sup>

But what are the alternatives? Buchanan argues that a strong case can be made for following the wishes of the family of an incompetent person in a case where repeated resuscitation will at best restore cardio-pulmonary functioning for a very brief period.<sup>46</sup>

He also suggests that a 'cognitivist or higher brain function concept of death' would change the relevant question from 'How can this person's right of self-determination be exercised?' to 'What rights and interests do the family and the state have in determining what may be done with the mortal remains of what was formerly a person, and how are these rights and interests affected by the rights and interests of a living person in determining what is to be done with his remains when he dies?'<sup>41</sup>

This approach, says Buchanan, meets the issues directly and avoids the confusions of decisions such as *Quinlan* and *Saikewicz*. Certainly, the reasoning in those cases was confusing. However, some people would find the consequences of adopting a higher brain function concept of death quite alarming. In any case Buchanan's solution cannot be applied to those who, while profoundly impaired, retain some higher brain function.

Another criticism of the substituted judgment approach to guardianship is its limited availability. McLaughlin says that the present guardianship system is virtually unavailable to those who need it, and that the situation under the substituted judgment model will probably continue to be *ad hoc* and dependent upon the actions of individuals. The problem is that there is unlikely to be an adequate mechanism for mobilising volunteers to act as guardians or for matching volunteers with persons who need guardians.<sup>42</sup> McLaughlin seems to suggest, however, that citizen advocacy might be a means of getting this organised.<sup>43</sup>

In spite of the limited availability and confusing aspects of legalistic guardianship, McLaughlin recommends it as the 'least worst' solution to the guardianship problem. He appears to have been swayed by the fact that the legalistic model contains better safeguards of the rights of intellectually disadvantaged individuals than either the welfare model or the developmental model (both of which are discussed below).

## THE WELFARE MODEL

### Introduction and history

McLaughlin, using the expression 'social work-istic'<sup>44</sup>, and Frolik, using the term 'therapeutic'<sup>45</sup>, both describe another model for guardianship which has a social services or welfare orientation. We shall refer to this model as the welfare model.

According to Frolik, the origins of the welfare model for guardianship lie in the responsibility of the state, acting under its *parens patriae* power, to protect orphans and incompetent persons. The burden on the state was tempered by the economic interest of the King; by protecting orphans and incompetent persons, he also protected revenue accruing to the Crown from their estates.<sup>46</sup>

<sup>39</sup>Frolik, *op. cit.*, 622.

<sup>40</sup>Buchanan, *op. cit.*, 401.

<sup>41</sup>Buchanan, *op. cit.*, 404.

<sup>42</sup>McLaughlin, *op. cit.*, p. 59.

<sup>43</sup>McLaughlin, *op. cit.*, p. 60.

<sup>44</sup>McLaughlin, *O. cit.*

<sup>45</sup>Frolik, *O. cit.*, 611.

<sup>46</sup>Frolik, *O. cit.*, 611-12; see also T. Carney, 'Civil and social guardianship for intellectually handicapped people' (1982) 8 *Monash University Law Review*, 205-6.

Later, guardianship began to attract advocates of the therapeutic state. They saw that the control which a guardian exercised over the ward would provide an opportunity for the state to assist the ward beyond merely providing protection for person and property. They argued for guardianship to be integrated into a total system of delivery of state services, so that adequate legal consent could be obtained even if the ward either could not or would not allow the state to help.<sup>47</sup>

### Rationale

Advocates of the welfare approach see guardianship as a service which should be available to social workers along with medical and social services, fiduciary services, legal services and so forth. Since there is often no one else willing or able to act as the guardian of an intellectually disadvantaged person, it is thought appropriate for social workers to fill this role. The professional ethics of such people are said to be one of the main safeguards against abuse of control."

This view of guardianship as a service appears to differ from the view (attributed by Frolik to advocates of the therapeutic state) that guardianship provides a vehicle for the delivery of services to disabled persons. However, this difference may not be significant. What is significant is the prevailing mentality. Both views set guardianship in the context of service delivery, which means that there will always be a temptation for service providers to use guardianship as a means of securing consent to further services and treatments. This is far removed from the legalistic approach, which sees guardianship simply as a device for facilitating the legal functioning of legally incompetent persons.

Frolik gives as more extreme examples of the welfare model the Protective Service Programs which incorporate guardianship into the delivery of a broad spectrum of state provided services.<sup>49</sup> This concept was initially developed for the elderly, but current proposals cover all 'at-risk' adults. The aim is to eliminate the risk of harm to the client by providing or securing a range of services tailored to the particular needs of the individual. According to one definition, the program should be based on the principles of the least restrictive alternative and gradualism.<sup>50</sup> Although protective service advocates profess a desire to promote the client's independence, they concede that under a protective services program there is understood to be the potential for legal intervention. Frolik sees the expression 'legal intervention' as a euphemism for guardianship (and civil commitment), which may be necessary in order to force social services upon an unwilling client.<sup>51</sup> The Special Committee on Ageing put it this way: 'Guardianship . . . enables the individual or agency to assist the person without his consent'.<sup>52</sup>

This has an ominously authoritarian ring to it. It is doubtful whether professed adherence to the principles of the least restrictive alternative and gradualism is a sufficient safeguard against abuse of a system in which guardianship is 'a tool of professional service providers'<sup>53</sup>, to be resorted to whenever consent to proposed treatment or services cannot be obtained. This also raises the problem of conflict of interests, which is discussed later.

<sup>47</sup>Frolik, op. cit., 612.

<sup>48</sup>G. Horowitz & V. Estes, 'Protective services for the aged', cited in McLaughlin, op. cit., p. 62.

<sup>49</sup>Frolik, op. cit., 616.

<sup>50</sup>E. Ferguson, 'Protecting the vulnerable adult: a perspective on policy and program issues', cited in Frolik, op. cit., 617.

<sup>51</sup>Frolik, op. cit., 617.

<sup>52</sup>Senate Special Committee on Ageing, 95th Congress, 1st session, *Protective services for the elderly: a working paper*, cited in Frolik, op. cit., 617.

<sup>53</sup>Frolik, op. cit., 618.



This preoccupation with services and service delivery diverts attention away from any consideration of the rights of individuals subject to guardianship. Guardianship in any form severely derogates from the legal rights of individuals subject to it. Their power to make decisions affecting their lives is restricted, and these decisions are made for them by others. The legalistic response to the rights issue is to use procedural safeguards and stricter 'eligibility' criteria in order to ensure that only those who really require facilitation with legal functioning are subjected to guardianship.

However, if the rights issue is ignored or glossed over, the benevolent aspects of guardianship are highlighted; and the rationale for restricting admission to guardianship disappears. This appears to be a danger with the welfare approach to guardianship. In fact, welfare model advocates have argued that guardianship should be more widely available. To this end, they advocate a broadening of the definition of those eligible for guardianship to accommodate everyone who might benefit from it. This involves eliminating the traditional requirement that the ward lack intellectual capacity or suffer from some identifiable disorder. Instead, the decision whether to admit a person to guardianship is based solely upon the behaviour of that person, and individuals who demonstrate that they cannot make or communicate reasonable decisions would be candidates.<sup>54</sup> Thus the criterion for admission to guardianship is wholly functional, and would cover any person whose functional capacity was impaired, irrespective of the cause of impairment.

There is a danger that non-categorical criteria could be seen as lending credibility to the now discredited notion that intellectually disadvantaged people are mentally ill. With the service and treatment delivery orientation of welfare guardianship, there is an implicit suggestion that members of the two groups require similar treatment and services, and this may tend to blur the distinction between them.

This danger is not so great when non-categorical criteria are coupled with a legalistic model of guardianship which is independent of service delivery, because this form of guardianship emphasises facilitation of legal functioning. To say that both intellectually disadvantaged and mentally ill people may require assistance with legal functioning due to their being legally incompetent does not run the same risk of blurring the distinction between the two groups. It recognises that members of the two groups require different treatment and services to alleviate their problems, although they share the same need for legal facilitation. But when built into a welfare model there is a credible case to answer.

Another variation on criteria for admission to guardianship is to link the decision to appoint a guardian to the potential benefit to the person, rather than basing it strictly upon the person's intellectual competence.<sup>55</sup> Frolik comments that this will result in determinations of legal incapacity varying according to the relative value of the proposed guardianship. Such a flexible definition of incapacity represents a marked change from the common law, in which incompetency was perceived as a permanent point on the spectrum of mental ability.<sup>56</sup>

Taking into account the potential benefit of guardianship shows a medical approach to decision-making. Whereas the common law based its decision on the status of the person subject to the guardianship application (either competent or incompetent), the medical approach selects a response based upon the potential for benefit to the person, even though the cause of the ailment is unknown.<sup>57</sup>

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<sup>54</sup>*ibid.*, 612-13.

<sup>55</sup>Uniform Probate Code, adopted by the Council of the American Association on Mental Deficiency (AAMD) *Guardianship for mentally retarded persons*, Position Papers of the AAMD 16 (1975), cited by Frolik, *op. cit.*, 616.

<sup>56</sup>Frolik, *op. cit.*, 616.

According to McLaughlin, one of the essential weaknesses of this form of guardianship is its inability to say clearly who should have a guardian, and why. The problem is in determining who should be subject to guardianship in social work terms. McLaughlin refers to Kindred, who argues that guardianship is not a social service, because social services attempt to expand choices, whereas guardianship limits them.<sup>58</sup> Thus the welfare model is based on a false premise.

#### The use of agencies

One feature of welfare guardianship is that it is administered through a social work agency.<sup>59</sup> The rationale of welfare guardianship is based on a desire to fulfil the state's residual responsibility (based on its *parens patriae* power) to provide on-going protection for at-risk adults for whom there is no-one else to care. Proponents of this form of guardianship believe that carriage by an agency is necessary if there is to be continuity and permanence in the protection provided for intellectually disadvantaged persons where their families are no longer able to provide protection or where they have no family.<sup>60</sup> However, they do not explain what happens to the 'continuity and permanence' of the protection when agency staff retire, resign, or are transferred. One commentator has suggested a variant that the protective guardianship service be statutorily authorised and legislatively vested in a public agency or network of agencies.<sup>61</sup> While this may inject a degree of continuity and public accountability into the marketplace it would appear to further impersonalise the contacts. Nor would all agree that such an arrangement would necessarily lead to more independent and objective decision-making (and less incursion into civil rights).

McLaughlin sets out three types of agencies which could be responsible for administering guardianship according to the legalistic model. The first is an agency with an exclusive mandate to provide guardianship. This type of agency was recommended in passing at the San Sebastian Symposium, and is implicit in the Alberta Dependent Adults Act.<sup>62</sup> It can be called a public guardianship agency. The second type is an agency which may seek guardianship, although its primary function is the delivery of social services such as case management, counselling and outreach. The Protective Service Programs referred to above follow this model. The third possibility is to make use of an agency staffed by guardianship professionals. This was also covered in the report on the San Sebastian Symposium. However, there seems to be no evidence of the emergence of such a class of professionals, either now or in the future, and McLaughlin dismisses this recommendation as wholly idealistic and impractical.<sup>63</sup>

The major problem with using agencies for guardianship is one of conflict of interest. This problem was referred to briefly in the discussion on Protective Service Programs. Even where the agency has an exclusive mandate to administer guardianship, a conflict may arise. The agency has to carry out administrative matters such as record keeping, public relations and budgeting, on top of fulfilling its guardianship mandate. Employed social workers will not be able to serve the best interests of both the agency by which they are employed, and their individual clients, all of the time. Also, the interest of individual clients may sometimes conflict, as, for example, when two clients are confronted by major crises on the same day. No social worker can be in two places at once.<sup>64</sup>

<sup>58</sup>McLaughlin, *op. cit.*, p. 67, citing Kindred, *op. cit.*, p. 63.

<sup>59</sup>McLaughlin, *op. cit.*, p. 60.

<sup>60</sup>McLaughlin, *op. cit.*, p. 62.

<sup>61</sup>E. Helsel, 'History and present status of protective services' in W. Wolfensberger & H. Zauha, *Citizen advocacy and protective services for the impaired and handicapped*, 11, cited in McLaughlin, *op. cit.*, p. 62.

<sup>62</sup>Dependent Adults Act 1976 (Alberta, Canada), 55, 12, 13, 14.

<sup>63</sup>McLaughlin, *op. cit.*, pp. 60-1.

<sup>64</sup>*ibid.*, p. 63.

With the agency that is primarily responsible for providing social services and also has the power to seek guardianship if this is thought to be necessary, the problem of conflicting interests is far greater. Both the San Sebastian Symposium on Guardianship and the Stockholm Symposium on Legislative Aspects of Mental Retardation (1967) concluded that no person who is responsible for rendering a direct service to an intellectually disadvantaged person should be able to be appointed as guardian of that person.<sup>65</sup> Yet this is precisely what is contemplated by Protective Service Programs. If a social worker employed by the agency feels that an individual requires a certain service, but the individual refuses to co-operate, guardianship is sought in order for assistance to be given without consent. Once guardianship is established on this footing, the guardian may force any service or treatment which is thought appropriate upon the hapless ward. The potential for abuse here is enormous.

According to McLaughlin, there is a real danger that welfare guardianship will be used to effect institutionalisation of clients.<sup>66</sup> He sees this phenomenon of 'protective overkill' as being due to the lack of a clear distinction, in social work terms, between the need for protection through legal means and the need for social services.<sup>67</sup>

There are bound to be conflicts of interest for any guardian. Even a voluntary guardian appointed under the legalistic approach will be confronted by this problem. However, the conflicts faced are likely to be incidental, whereas the welfare approach is riddled with inherent conflicts. For this reason, McLaughlin concludes that welfare guardianship is almost bound to be worse than the legalistic model in this regard.<sup>68</sup>

Another problem with agencies relates to delegation of guardianship authority. McLaughlin predicts that delegation from the Public Guardian to other persons, as provided for by the Alberta Dependent Adults Act<sup>69</sup>, will substantially weaken the accountability of guardians, because the person actually exercising the guardianship authority will not be directly responsible to the court. The system would have to rely on normal bureaucratic reporting and tracking methods to monitor the activities of the people actually exercising the guardianship authority.<sup>70</sup> In the larger States of Australia the physical distances between the field workers and the head office would make it almost impossible for such monitoring to be effective. Regional administration would reduce but not entirely overcome this problem.

Also relevant are Levy's findings in relation to the Minnesota Public Guardianship Scheme established in 1917. The Commissioner's policy was for selective use of public guardianship, and for availability of services and institutionalisation without commitment. However, Levy found that the Commissioner's views were not influential, and that the Commissioner seldom had timely knowledge of the actions of the County Welfare Boards to whom the actual practice of guardianship was entrusted. There was pressure at both county and local level for guardianship to be extended to as many intellectually disadvantaged persons as possible, and Levy found that many were placed under guardianship 'of doubtful need'.<sup>71</sup>

The 'continuity and permanence' cited by proponents of welfare guardianship as one of its advantages merely reflects the relationships between the client and the legal personality represented by the agency. In fact, this model would produce discontinuity

<sup>65</sup>Robert J. Hodgson, 'Guardianship of mentally retarded persons: three approaches to a long neglected problem' (1973) 37 *Albany Law Review*, 407, 422.

<sup>66</sup>McLaughlin, *op. cit.*, p. 65. p.

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<sup>67</sup>*ibid.*, p. 63.

<sup>68</sup>Dependent Adults Act 1976 (Alberta, Canada), 5.12(2).

<sup>69</sup>McLaughlin, *op. cit.*, p. 64.

<sup>70</sup>Hodgson, *op. cit.*, 412.

in the personal relationships between clients and social workers exercising the guardianship authority of the agency. Staff turnover would break off such personal relationships—which are very important if guardianship is to be successful:<sup>72</sup>

Finding sufficient numbers of adequately qualified personnel is another problem. According to Hodgson, the ordinary welfare systems have trouble in this regard, and their clients are often capable of full decision-making and self-help and, in some cases, are articulate and organised. A system which does not successfully deal with the problems of these groups is hardly likely to succeed under the greater strain of dealing with the problems of intellectually disadvantaged persons.<sup>73</sup>

### Costs and other matters

The question of how much welfare guardianship would cost is a matter of great concern in times of increasing government restraint. The money which would be required to set up a guardianship agency might be more productively spent in other ways. McLaughlin asks:

Does it make good economic sense to hire social workers to act as guardians for persons who have no residential or vocational options? Or does it make more sense to use the funds to establish the residential and vocational options, and thus reduce the need for guardianship?<sup>74</sup>

The first alternative would serve a relatively small group of persons who are in great need, whereas the development of citizen advocacy is of potential benefit to a much larger group of persons who have varying degrees of need. Agency guardianship might turn out to be a very expensive way of accomplishing only a small part of the goal of protection.<sup>75</sup> And it gives less consideration to the goal of maximising the freedom of individuals than do the legalistic and developmental (to be discussed later) models. The cost factor should be borne in mind when dealing with jurisdictions which have small populations, such as the Territories of Australia.

The welfare model for guardianship attempts to meet the problem of residual responsibility (i.e. the responsibility of the state to care for those who have no one else). Under the Alberta Dependent Adults Act, the Public Guardian may become the guardian of a person where no one else is willing, able or suitable to act as guardian of that person.<sup>76</sup> The Public Guardian is also *ex officio* guardian of any person whose guardian has died and in respect of whom no alternative guardian has been appointed.<sup>77</sup>

However, the non-categorical, generic eligibility criteria favoured by proponents of the welfare model would vastly increase the size of the group for which the state was 'residually responsible'.<sup>78</sup> According to McLaughlin, if the Public Guardian were to take the mandate seriously, they would have to make hundreds if not thousands of guardianship applications:<sup>79</sup> He feels that it is unlikely that any jurisdiction in Canada or the United States would be willing to pay what would be required to make a public guardianship agency based on the Dependent Adults Act model truly effective in providing protection for all who need it.<sup>80</sup>

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<sup>72</sup>McLaughlin, *op. cit.*, p. 64-5.

<sup>73</sup>Hodgson, *op. cit.*, 423.

<sup>74</sup>McLaughlin, *op. cit.*, p. 67.

<sup>75</sup>Dependent Adults Act 1976 (Alberta, Canada), s. 13. <sup>76</sup>s. 20.

<sup>77</sup>s. 6(1).

<sup>78</sup>McLaughlin, *op. cit.*, p. 68.

p. 69.

Thus McLaughlin rejects the welfare oriented, public guardian approach to guardianship and to meeting the question of residual responsibility.<sup>81</sup> His main reasons appear to be the lack of any likelihood that this model would work, the danger of 'protective overkill' in any model for guardianship based on a social work or therapeutic (or medical) approach, and the likelihood of a better return from spending the same money on broad social reforms based on the elements of the broad approach which have been discussed in Chapter Four.

Other commentators though assert that some direct effort must be made to meet the problem of residual responsibility. The Minister's Committee in Victoria reported that 'the need for a guardian of last resort is beyond question'.<sup>82</sup> It recommended:

- . . the creation of a new government functionary which would not provide services to developmentally disabled persons and which should act as the guardian of last resort . . . [to] be known as the Public Advocate.<sup>83</sup>

The Public Advocate is partially modelled on Alberta's Public Guardian. Its primary function is to act as a guardian of last resort where no individual is ready, willing or able to act as guardian.<sup>84</sup> However, the Public Advocate would also be responsible for: promoting community involvement in decision-making for developmentally disabled persons<sup>85</sup>; the investigation of abuse or exploitation of developmentally disabled persons<sup>86</sup>; advising the Minister on any aspect of the operation of guardianship legislation<sup>87</sup>; and general advocacy on behalf of developmentally disabled persons.<sup>88</sup>

Hodgson feels that Levy's findings, among others, raise serious doubts as to the desirability of any form of public guardianship. He recommends that the need, if any, for a 'back-up public guardianship alternative' (the Victorian Minister's Committee was emphatic that there is such a need)<sup>89</sup> should be met at a local parish or county level.<sup>90</sup> This would presumably translate to 'suburban or shire level' in Australian terms.

It is difficult not to agree with those who argue that some effort must be made to meet the question of residual responsibility, although there appear to be real pragmatic objections to a welfare oriented public guardianship scheme. However, the imperfections of agency guardianship are no reason to deprive the abandoned intellectually disadvantaged members of society of a guardian if they need one. If the criteria for admission to guardianship were stringent, as they should be under a legalistic approach to guardianship, 'guardianship of last resort' should not generate the huge expenditure which McLaughlin fears would be required to fund a welfare oriented public guardianship scheme.

<sup>81</sup>Victoria, Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, *Report*, Victorian Government Printer, Melbourne, December 1982, p. 53. Hereinafter this report will be cited as 'Victorian Minister's Committee Report'. The above report also contains proposed Legislation cited hereinafter as 'Victorian Minister's Committee, Proposed Bill', to distinguish it from the report.

<sup>82</sup>*ibid.*

<sup>83</sup>Guardianship and Administration Board Bill 1985 (Vic.), s. 23 (4).

<sup>84</sup>s. 89(a)(iv).

<sup>85</sup>s. 90(h). <sup>86</sup>s. 89(d). <sup>87</sup>s. 89(e)(1).

<sup>88</sup>Victorian Minister's Committee Report.

<sup>89</sup>Hodgson, *op. cit.*, 440.

## THE PARENT—CHILD' OR DEVELOPMENTAL MODEL

### Introduction

This is the other model for guardianship discussed by Frolik. Under this model, an analogy is drawn between the functional relationship between a guardian and ward and that between a parent and child. Frolik refers to the commonly held view that intellectually disadvantaged persons are oversized children who need protection from a world which they will never comprehend.<sup>91</sup> However, the notion of the eternal child is not really reflected in this model, which emphasises that all intellectually disadvantaged persons have some potential for development.

Both the minor child and the intellectually incompetent adult are potentially dangerous to themselves because they lack the ability to act according to their own best interests or because they lack an appreciation of the consequences of their actions. Intervention in their lives is necessary for their interests to be protected, and should not be condoned for any other reason.<sup>92</sup>

The best interest standard encourages the belief that a guardian is something of a caretaker whose primary duty is to preserve the person or property of the ward until competence is regained. In the case of intellectually incompetent adults, competence may never be regained. But because of the possibility that it will be, there is a traditional belief that a good guardian is one who acts conservatively and maintains the status quo.<sup>93</sup>

Frolik suggests that the view of the guardian as a caretaker may be the genesis of the idea that there are limits to the power of a guardian and that certain acts are beyond his/her power." Under the developmental model, any change in the status of the ward must be justified under a rigorous best interests test. Thus a guardian of an aged, senile ward is likely to seek court approval before placing the ward in a nursing home even though the need for such action may be apparent. According to Frolik, the acts of a guardian under the developmental model must be so conservative and so commonplace as to be beyond reproach.<sup>95</sup>

Although the words 'conservative' and 'commonplace' have a negative ring to them, it seems more likely that guardians will consider the rights of wards when making decisions affecting their lives if they are conscious of some restraints.

### Lack of procedural safeguards

Another feature of the developmental model is a distinct lack of concern for procedural safeguards. Frolik suggest that this is due to the notion that guardianship serves the best interests of the ward. Guardianship hearings under this model tend towards a non-adversarial style with the judge cast in the role of an inquisitor in search of the truth, as opposed to that of an arbitrator between opposing litigants. There was often (and still is) a lack of adequate notice, with hearings being held *ex parte*, and the person subject to the application appearing without counsel. Traditionally, guardianship hearings had no opposing sides, because the only interests to be served were those of the person subject to the application. The applicant could not 'win', because he had nothing to gain. A 'loss' for the alleged incompetent was really a victory in that he gained what he needed, the

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<sup>91</sup>Frolik, op. cit., 606.

<sup>92</sup>ibid., 607.

<sup>93</sup>ibid.

<sup>95</sup>ibid., 608.

protection of a guardian.<sup>96</sup> Since the loss of liberty associated with a guardianship order was not equated with the loss of liberty which may arise from criminal conviction, strict procedures were not thought necessary or desirable.<sup>97</sup>

### Developmental aspect

In this respect, the developmental model shows scant regard for the civil rights of intellectually disabled persons. Recently it has become recognised that, on the 'scale' of intellectual capacity, there is a 'grey area' in which no judgment about intellectual capacity is certain, and in which conflicting values bar agreement as to the 'correct' result.<sup>98</sup> Also, attention has been focused on the loss of liberty and civil rights which guardianship entails. There has been some concern that individuals who fall within the 'grey area' should not be subjected to guardianship, since this may involve the unjustified deprivation of their rights. The only way to prevent this is through stringent procedural safeguards. The arguments for and against adversarial guardianship hearings are addressed elsewhere.<sup>99</sup>

According to Frolik, the label 'developmental' reflects the growing belief that in addition to providing protection, the guardian must also assist in developing the ward's abilities and capabilities.<sup>100</sup> The ultimate goal is to help the ward overcome the disadvantage and thereby eliminate or minimise the need for guardianship. Under the developmental model, the role of the guardian is expanded due to the emphasis placed on the responsibility of the guardian to assist in the development of the ward. There is an implicit assumption that the ward is capable of development. This reflects the emerging realisation that every disadvantaged individual, no matter how severe the disadvantage, is capable of learning some skill. One of the chief duties of the guardian of an intellectually disadvantaged adult is to ensure that the ward receives individualised habilitation and education.<sup>101</sup>

This approach is consistent with the 'qualified freedom' version of the goal of maximising the freedom of the individual, discussed in Chapter One. The rights of self-development (if possible) and development of self by others (if self-development is not possible) are secured by express recognition of the individual's potential for development, and by making the guardian responsible for assisting the ward in this development.

It is argued that traditional plenary guardianship is at odds with the goal of maximising the development of the ward, because the broad authority of a plenary guardian 'pre-empts all decisional responsibility'.<sup>102</sup> Proponents of the developmental model for guardianship advocate the use of limited guardianship which would grant the guardian only as much power and authority as is necessary for the wellbeing of his ward.<sup>103</sup>

According to Frolik, a pure developmental model of guardianship would divide power over the ward's person between the ward and the guardian, and the guardian's authority would be subject to fine-tuning in response to changes in the ward's abilities. Frolik compares this form of guardianship with the authority of a parent gradually

<sup>96</sup>ibid., 609-10.

<sup>97</sup>ibid., 610.

<sup>98</sup>ibid., 633.

<sup>99</sup>See text to footnotes 16-18 above.

, op cit., 610.

<sup>100</sup>ibid., 610-11. 'Habilitation' is defined as 'the acquisition of life skills that enable the individual to deal with his environment. It includes, but is not limited to, formal education'. See also text to footnote 91 above.

<sup>101</sup>Frolik, op. cit., 611.

<sup>102</sup>ibid. See also the discussion 'Limited guardianship' below.

relaxing control over a growing child, and concludes that the developmental model of limited guardianship 'envisions a flexible zone of authority and power that contracts, expands, and adapts to the particular developmental status of the ward'.<sup>154</sup>

This sounds almost Utopian, but what does Frolik mean by 'a flexible zone of authority'? Is it up to the guardian, within this flexible zone, to contract, expand and adapt authority and power to the developmental status for the time being of the ward? The reference to the relationship between parent and growing child suggests that this is what Frolik was thinking of. If the discretion did rest with the guardian, it is hard to escape the conclusion that within the specified flexible zone of authority the guardian's authority would 'pre-empt all decisional responsibility'. In other words, whether the flexible zone concept lives up to Frolik's description will depend upon how well it is understood by the guardians.

The alternative is for every contraction, expansion and adaptation within the flexible zone of authority to be effected by court order. Not only would this render the flexible zone superfluous, but also it would be totally impracticable. Courts cannot be expected to monitor day-to-day or even month-to-month changes in intellectual capacity. This is one of the hurdles facing the implementation of limited guardianship, since intellectual capacity is situational and varies over time.<sup>155</sup> Obviously, guardianship orders must be subject to periodic review. But if the reviews were sufficiently regular to monitor every change in intellectual capacity, the cost would be prohibitive.<sup>106</sup>

The paradox of the parent-child or developmental model for guardianship is that the substantive provisions relating to the type of guardianship that is to be implemented appear to be built around the rights of self-development and development of self, whereas in the procedural provisions little attention is given to the rights of individuals subject to guardianship applications. With no procedural safeguards it is inevitable that individuals whose needs could be satisfied by less restrictive measures will be subjected to guardianship and the substantial deprivations of civil rights and liberties that go with it.

## LIMITED GUARDIANSHIP

A guardian is a person who guards, protects and preserves the welfare and interests of the person for whose care he has been made responsible. The role of a guardian involves both powers and obligations—powers to make relevant decisions affecting the interests of the subject of guardianship . . . and obligations to act reasonably, caringly and independently in attending to those interests.<sup>107</sup>

The above is a general definition of guardianship. As has already been noted, guardianship has traditionally been an all or nothing affair, involving a complete abrogation of the civil rights of the person in respect of whom the guardian is appointed.

In this all or nothing form of guardianship, which has become known as plenary guardianship, the guardian acquires power to make all decisions affecting the interests of the person subject to guardianship. This is obviously a very drastic step, placing the person subject to the guardianship under a blanket of legal disability which hinders the exercise of most civil rights.

The extent of the abrogation of civil rights involved can be seen from some examples of modern guardianship legislation, both existing and proposed. A plenary guardian is generally granted express power to form legally binding relationships and give legally.

<sup>154</sup>See discussion 'Limited guardianship' below.

<sup>106</sup>The question of periodic reviews is discussed in 'Review of guardianship orders' at Chapter Six below. <sup>107</sup>Susan Hayes & Robert Hayes, *Mental retardation—law, policy and administration*, Law Book Co., Sydney, 1982, p. 217.



binding consents in relation to the whole range of matters affecting the person subject to the guardianship<sup>108</sup> (McLaughlin calls these 'significant personal matters'). In addition to this, a plenary guardian is usually granted the same powers and duties in relation to the person subject to guardianship as a sole parent has in relation to a child under the age of 14 years.<sup>109</sup>

The drastic nature of plenary guardianship and the emerging realisation that mental incapacity is not a cut and dried affair have prompted widespread demand for more flexible forms of guardianship to be made available. More specifically, there has been heavy demand in recent years for partial or limited guardianship programs to be instituted.

The appointment of a limited or partial guardian generally requires the court or other decision-making body to specify the significant personal matters which are to be subject to the power and authority of the guardian and in relation to which the person subject to the guardianship order is deemed unable to give legally binding consents and form legally binding relationships.<sup>110</sup>

Existing forms of guardianship have been criticised for their inflexibility." This inflexibility is said to be based on an assumption that if people are mentally retarded, they are incapable of making any decision about their life or property.<sup>112</sup> McLaughlin complains that the law has not kept pace with the revolutionary advances we have made in our knowledge of mental retardation:

The law has generally retained the concepts that mental incompetency is an absolute reality, without degrees, changes over time, or situationality; that persons may on medical or some other form of professional evidence be determined by courts to be either wholly mentally competent, and not in need of a guardian, or wholly mentally incompetent, and in need of a guardian; that there are no grey areas between the extremes; and that once persons have been found to be mentally incompetent, they should be under a blanket of legal disability that prevents the exercise of any civil rights.<sup>113</sup>

As noted several times already in this work, there is no evidence to support these concepts and plenty to refute them. It cannot always be said of people that they are either intellectually competent or intellectually incompetent. There are gradations in capacity, ranging from full capacity through degrees of impairment of capacity to substantial impairments of capacity. All of us may suffer from some degree of intellectual incapacity at some time in our lives, whether from accident, drugs, alcohol, pain, disease or whatever.<sup>114</sup> Furthermore, intellectual capacity may depend on the familiarity of the situation in which people find themselves, and it may vary over time. It has been shown that, given a patient and loving environment, even severely intellectually disadvantaged persons can overcome the effects of institutionalisation and over-protection, learn to trust their social surroundings, begin to engage once more in trial and error learning and make substantial gains in functioning ability and competence.<sup>115</sup>

<sup>108</sup>McLaughlin, Draft Victorian Statute, ss. (1)(i), 7(1); Dependent Adults Act, 1976 (Alberta, Canada), s. 9 (1)(a)—(i); Minister's Committee, Proposed Bill, s. 29(1)(a)—(d); Guardianship and Administration Board Bill 1985 (Vic.) s. 24 (2)(a)—(d).

<sup>109</sup>McLaughlin, Draft Statute, s. 7(2); Dependent Adults Act 1976 (Alberta, Canada), s. 9 (1)(j); Victorian Minister's Committee, Proposed Bill, s. 29(1); Guardianship and Administration Board Bill 1985 (Vic.) s. 24(1).

<sup>110</sup>McLaughlin, Draft Statute, s. 6(1)(a), (b); Dependent Adults Act 1976 (Alberta, Canada) s. 10(2)(a)—(i); Victorian Minister's Committee, Proposed Bill, s. 30(1); Guardianship and Administration Board Bill, 1985 (Vic.) s. 25(i).

<sup>111</sup>McLaughlin, *op. cit.*, p. 70; Hayes & Hayes, *op. cit.*, p.236.

<sup>112</sup>Hayes & Hayes, *op. cit.*, 'p. 236.

<sup>113</sup>McLaughlin, *op. cit.*, pp. 70-1.

<sup>114</sup>*ibid.*

<sup>115</sup>*ibid.*, p. 72.

### The argument of limited guardianship

An inflexible approach to guardianship law may result in some people who need only partial guardianship getting no guardianship at all because potentially willing guardians are not prepared to subject a person to the complete deprivation of rights that plenary guardianship entails. It may also result in others with a pressing need for some protection falling short of plenary guardianship being subjected to a complete deprivation of rights when a more limited form of supervision or guidance would be sufficient.<sup>116</sup>

Proponents of limited guardianship argue that it can help reduce the risk of either of these undesirable results occurring. Guardianship is almost always sought in response to some specific precipitating crisis; for example, when the person subject to the guardianship application is faced with a decision of such complexity that he/she cannot understand or cope with it alone. It is rarely sought for the sole purpose of assisting a person with day-to-day living, because most intellectually disadvantaged people live in the community and cope very well.<sup>117</sup> It seems that society is quite capable of providing day-to-day supervision of such people without the need to subject them to formal guardianship.<sup>118</sup>

It seems that there would be very few intellectually disadvantaged people who required a guardian in respect of all significant matters affecting their personal lives. In almost all cases, the need for a personal guardian reduces itself to a need for substituted consent for particular situations. Many intellectually disadvantaged adults can manage their day-to-day lives if they are freed of the responsibility of managing their finances.<sup>119</sup> Others may need someone to consent to a needed medical procedure on their behalf.

Limited guardianship is seen as a device by which intellectually disadvantaged people can receive such assistance, support and protection as would be of benefit to them without a complete abrogation of civil rights.<sup>120</sup> It enables the court or other body responsible for deciding whether to appoint a guardian to take cognisance of each individual's needs and tailor-make a guardianship scheme that suits that individual.<sup>121</sup>

The ability to tailor-make a guardianship order which provides wards with no more and no less protection and assistance than their intellectual capabilities warrant, is seen as valuable by those who argue that no justifiable societal purpose is served by greater interference in the life of an individual than is demanded by the circumstances. Indeed, Frolik argues that the loss of autonomy and responsibility which inevitably arises when a person is subjected to plenary guardianship is counter-therapeutic. He says that the disadvantaged are best served by being forced to care for themselves to the limit of their abilities, a course of action which is incompatible with plenary guardianship. Similarly, some mentally ill people need to be forced to take responsibility for their own behaviour as a means of preventing them from retreating into the shelter of the role of an irresponsible, mentally ill incompetent.<sup>122</sup>

### Problems

Despite its theoretical attractiveness, the successful operation of limited guardianship cannot be taken for granted. McLaughlin doubts that the prevailing rationale for partial guardianship is convincing, particularly if guardianship is to be restricted to those persons who clearly lack the intellectual capacity to establish legal relationships. The intellectual capacity of intellectually disadvantaged persons, particularly of those persons

<sup>116</sup> Hayes & Hayes, op. cit., p. 236.

<sup>117</sup> Frolik, op. cit., 650.

<sup>118</sup> *ibid.*, 651.

<sup>119</sup> McLaughlin, op. cit., p. 73.

<sup>120</sup> Hayes & Hayes, op. cit., p. 236.

<sup>122</sup> Frolik, op. cit., 653.

who would be candidates for limited guardianship, varies over time. Our ability to predict future developments is much lower than we thought. While information about long-term continuity in the intellectual capacity of the subject of a guardianship application is needed to make a decision, the court cannot be expected to monitor day-to-day or even month-to-month changes in that intellectual capacity.<sup>123</sup>

These objections strike at the heart of the rationale put forward for limited guardianship by its proponents. How can a guardianship scheme be tailor-made to meet the precise needs of a person when those precise needs cannot be ascertained? This is not an objection to the principle of limited guardianship. Rather, it is directed to its practical implementation. It might be argued by way of reply that the same problem of evaluation faces a court or other decision-making body which has to decide whether to appoint a plenary guardian. However, it seems that more would be involved in determining the precise areas of human functioning in which a person is legally incompetent than in determining whether or not a person has the intellectual capacity to form legally binding relationships in general. Fears have been expressed in the United States that limited guardianship would create a tremendous burden for judges, and that the notion of 'a little incompetency' poses danger to all citizens in that there would be an increased chance of being eligible for guardianship.<sup>124</sup>

This latter problem may arise in practice due to judges' and courts' misunderstanding of the rationale of limited guardianship. This rationale is not that the threshold for a finding of incompetency should be reduced but rather that the specific areas in which a person is found to be intellectually incompetent should be set out. This must be made clear to the people responsible for administering a limited guardianship scheme. According to McLaughlin, many problems that are described as problems to be solved through limited guardianship should not be solved through guardianship at all, but through one or more of the other elements of the broad approach to protection which he advocates.<sup>125</sup>

Another fear that has been expressed is that third parties might be reluctant to risk entering into transactions with persons under limited guardianship where uncertainty exists as to their exact legal disabilities or as to the scope of the guardian's authority.<sup>126</sup> There may well be zones of authority about which the order describing the grant of authority to the guardian is unclear. In such a case either the parties would have to reapply to the court for clarification of the original order or the third party would have to make the transaction with the guardian and take the risk of its being declared void if it proves to be beyond power.

One solution to this problem suggested by Frolik is to draft the order granting the limited guardianship with great particularity so that the scope of the authority of the guardian is clear both to the guardian and to any third party with whom he/she might deal. The problem of an ambiguous grant of power might be more common initially. Over time, Frolik expects that litigation would define and clarify what is meant by the use of particular language, and standard methods of describing authority would evolve.<sup>127</sup> However, anyone who is familiar with the law would be well aware that judicial meddling is quite capable of having the opposite effect. Another solution suggested by Frolik is to define within the grant of guardianship those powers that are

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<sup>123</sup>McLaughlin, *op. cit.*, p. 75.

<sup>124</sup>Committee on Legal Incapacity, Probate and Trust Division, 'Limited guardianship: survey of implementation considerations' (1980) 15 *Real Property, Probate and Trust Journal*, 544-6 (hereinafter cited as 'Committee on Legal Incapacity').

<sup>125</sup>McLaughlin, *op. cit.*, p. 75.

<sup>126</sup>Frolik, *op. cit.*, 656.

<sup>127</sup>*ibid.*, 656-7.

not available to the limited guardian. This procedure is merely the negative of the procedure by which the areas in which the guardian is to have authority are specified, and one might again expect standard methods of excluding authority to evolve.

Frolik also feels that the probability of ambiguous authority is likely to be limited, because the powers of a guardian will not usually be limited to specific acts but to particular aspects of the life of the person subject to the partial guardianship. For example, a limited guardian might be authorised to commit the ward to a nursing home and consent to non-life-threatening medical procedures. Such a grant of authority is fairly clear as to its scope. Obviously, the guardian cannot contract on behalf of that person in matters not immediately concerned with a nursing home, but would seem to have broad powers in relation to nursing home and non-life-threatening medical procedures.<sup>128</sup>

The notion of limiting the powers of a guardian by reference to particular aspects of an individual's life, rather than by reference to particular acts which the guardian may perform, is the one favoured by McLaughlin. He questions whether one can meaningfully partialise an individual's personal life in such a way as to provide a basis for court orders covering some parts but not all parts of it. For example, does it make sense and is it really practicable to appoint a guardian with authority over where a person lives, but not over medical treatment? Or having authority over whom the person associates with, but not over behaviour? McLaughlin thought that the answer to this question was unknown at the time that he wrote, but still saw this as the most promising approach to limited guardianship. He argues on the basis that intellectual capacity is situational, and that the situation which gives rise to the need for the facilitation and protection of a guardian should fall within one or more definable categories. Thus it should be possible to respond to a particular situation without having to revoke all a person's rights.<sup>129</sup>

A troublesome aspect of this approach to limited guardianship is whether a person subject to limited guardianship can act in a legally binding manner in areas in respect of which authority is not granted to the guardian. Here there may be a clash between the developmental approach to guardianship and the legalistic approach. Under the developmental approach, the theory of which is that a person's capabilities will be fully realised only if he/she is allowed to act on his/her own behalf, it is critical that the person be allowed to act in all areas in respect of which authority has not been specifically granted to the guardian<sup>130</sup>

However, the theory behind the legalistic approach to guardianship is that the person subject to guardianship lacks, with certain exceptions, the capacity to make legally binding decisions. This apparent incompatibility should be able to be overcome if the doctrine of substituted judgment can be modified to accept the view that intellectual incapacity is contextual and varies from situation to situation. On this view, a person may be competent to make certain decisions but incompetent to decide more serious issues.<sup>131</sup> The effect of guardianship on the legal capacity of the ward will be discussed in detail in Chapter Seven.

In spite of these reservations, McLaughlin recommends the adoption of new guardianship laws providing for limited guardianship, seeing it as necessary to increase the flexibility of courts in dealing with complex situations. Factors such as the capabilities and willingness to act of the proposed guardian, the demands of the situation out of which the need for guardianship arises, and the length of time for which it may be needed, can all vary. For example, a plenary guardian would not be justified where assistance was required only on an ad hoc basis for a particularly complex matter relating

<sup>128</sup> *ibid.*, 657.

<sup>129</sup> McLaughlin, *op. cit.*, p. 78.

<sup>130</sup> Frolik, *op. cit.*, 657.

<sup>131</sup> *ibid.*

to residential placement or surgery; in such a case a limited guardianship plan attuned to the needs of the situation should be available. As a parting shot, McLaughlin warns that limited guardianship should not be used as a vehicle for quasi-parental counselling and guidance, which is better delivered through other, non-coercive mechanisms.<sup>132</sup>

### Practical implementation

The Alberta Dependent Adults Act, McLaughlin's Draft Statute, the ABA Model Statute, the Guardianship Bill proposed for Victoria and Western Australia and the proposed guardianship legislation of the Saskatchewan Law Reform Commission, all provide for the appointment of either a plenary or a limited personal guardian. Usually the court or other decision-making body has to be satisfied that limited guardianship will be incapable of providing the protection and assistance required by a person subject to a guardianship application before it may appoint a plenary guardian

Frolik goes further than this. He argues that when a limited guardianship scheme is put in place the legislation providing for plenary guardianship should be abolished. Frolik admits that there is no logical reason not to use limited and plenary guardianship to provide a full range of alternatives. However, he refers to the experience of states that have added limited guardianship to existing plenary guardianship schemes—it has been found that limited guardianship is rarely used so long as plenary guardianship remains available. Plenary guardianship is favoured because it is familiar and practitioners and courts feel comfortable with what they know. Lacking an appreciation of the advantages of limited guardianship, they tend automatically to request the appointment of a plenary guardian. Frolik feels that an education campaign among the bench and bar may be necessary if more use is to be made of limited guardianship.<sup>133</sup>

He goes on to say that the problem runs even deeper, and that plenary guardianship is favoured over limited guardianship because it offers the flexibility of unlimited power. Judges may be swayed to appoint a plenary guardian in the belief that plenary power will provide the guardian with sufficient authority to handle any circumstances that might arise. They may feel that a limited guardian's powers might prove inadequate to the changing needs of the person subject to the guardianship, necessitating a re-hearing. Plenary guardianship has the dubious advantages of being familiar, uncomplicated and potentially time-and-effort saving, and Frolik feels that there is little likelihood of a limited guardian being appointed so long as there is discretion to appoint a plenary guardian<sup>134</sup>

The advantages he sees in the exclusive use of limited guardianship are that it would promote autonomy, self-determination and individual dignity; discourage the overreach of societal interference and manipulation; and promote the use of the least restrictive alternative. Further, the abolition of plenary guardianship should see an end to the more crucially overreaching aspects of guardianship, such as the power of a guardian to commit the ward to a mental institution, to have the ward sterilised without court approval or otherwise interfere with the ward's right to marry or procreate, and to consent to medical experimentation on the ward. Such acts should take place only after a court hearing on the merits of the proposed course of action.<sup>135</sup>

This leaves three options: plenary guardianship only; a combination of plenary and limited guardianship; and limited guardianship only. The combination of plenary and partial guardianship, with a directive to the decision-making body that plenary guardianship only be resorted to where it is clear that limited guardianship will not meet the needs of the person subject to the guardianship application, seems to have won the

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<sup>132</sup>McLaughlin, *op. cit.*, p. 75.

<sup>133</sup>Frolik, *op. cit.*, 653-4.

<sup>134</sup>*ibid.*, 654.

<sup>135</sup>*ibid.*, 654-5.

most support amongst commentators and others working in the area. The Committee on Legal Incapacity found that the essential question appears to be not whether to adopt limited guardianship, but how much detail is necessary for its effective implementation.<sup>136</sup>

### Legislative examples

Legislative responses to limited guardianship follow a similar pattern. The Alberta Dependent Adults Act goes about the task very thoroughly. Section 9(1) provides that a plenary guardian shall have power and authority over such things as where the person subject to the guardianship is to live; with whom they are to live and consort; questions of social activities, work, educational, vocational and other training; whether the person should be able to apply for any licence, permit, approval consent or other authorisation required by law; legal proceedings; health care; and normal day-to-day decisions including matters of diet and dress. In addition, the guardian has any powers not already granted which a father would have in respect of a child under 14 years of age. Section 10(1) provides that the court shall grant to a partial guardian only such power and authority as is necessary for the guardian to care for or assist in caring for the ward. Under s. 10(2) the court must specify which one or more of the listed matters relating to the ward are to be subject to the power and authority of the guardian. The sub-section goes on to list all the matters which, under s. 9(1), are subject to the power and authority of a plenary guardian, except for the provision giving a plenary guardian the authority of a parent over a child under 14 years of age.

McLaughlin's Draft Statute takes a slightly different approach. In the definitions section, under 'significant personal matters', are listed matters of personal daily living, including work, residence, social and recreational activities; control of behaviour where there is imminent danger of physical injury to the person subject to the guardianship or others; health care, training, education, therapy and habilitation; applications for licences, permits, approvals or other consents or authorisations required by law but not relating to the estate; legal proceedings not relating to the person's estate; and other matters as the court specifies.

Under s. 6(1)(a) the court must specify the significant personal matters in relation to which the ward lacks legal competence. By s. 6(1)(b) the limited guardian assumes legal authority on behalf of the ward in relation to these significant personal matters. By s. 6(2) the limited guardian has, in relation to these significant personal matters, the power and authority of a parent with respect to a child under the age of 14.

The Victorian Government Bill<sup>137</sup> and the Proposed Legislation of the Saskatchewan Law Reform Commission<sup>138</sup> follow a similar format, although the list of significant personal matters from which the court or other decision-making body may choose is less exhaustively stated.

All of the abovementioned examples follow the approach of limiting the guardian's power by reference to areas of the life of the person subject to the guardianship. This was the approach favoured by McLaughlin<sup>139</sup>, and Frolik thought it would result in less confusion as to the scope of the guardian's authority than if the guardian were granted power to perform specific acts on behalf of the person subject to the guardianship.<sup>140</sup>

<sup>136</sup>Committee on Legal Incapacity, *op. cit.*, p. 553.

<sup>137</sup>Guardianship and Administration Board Bill 1985 (Vic.), as. 24,25:

<sup>138</sup>Saskatchewan Law Reform Commission, *Tentative proposals for a Guardianship Act, Part I: Personal guardianship*, Saskatchewan Law Reform Commission, Saskatoon, 1981. This publication contains proposed legislation hereinafter cited as 'Saskatchewan Law Reform Commission, Proposed Legislation'. This note refers to s. 7 of the proposed legislation.

<sup>139</sup>McLaughlin, *op. cit.* pp. 77-8.

<sup>140</sup>Frolik, *op. cit.*, 657.

The American Bar Association (ABA) for its part, prefers a two-tiered approach to this problem. Section 17(3)(a) provides that the court 'may assign to a limited personal guardian any portion of the duties and powers listed . . . for those particular areas in which the partially disabled person lacks the capacity to meet the essential requirements for his or her physical health or safety.' The first step, then, is to ascertain the areas in which the person lacks capacity. That is, of course, what is required by the models discussed above. But the ABA then goes a step further. In relation to these areas of incapacity, the court may assign to the guardian 'any portion of the powers and duties listed' in s. 17(4)(a)(ii)—(vi). The list includes powers and duties to:

- (ii) Assure that the disabled person has a place of abode in the least restrictive, most normal setting consistent with the essential requirements for his or her physical health or safety;
- (iii) Assure the care or comfort of the disabled person;
- (iv) Assure that the disabled person receives the services necessary to meet the essential requirements for that person's physical health and safety as well as the services necessary to develop or regain, to the maximum extent possible, his or her capacity to meet those essential requirements;
- (v) Provide any required consents or approvals on behalf of the disabled person; and
- (vi) Expend sums from the financial resources of the disabled person to cover the reasonable costs incurred on behalf of that person . . .

It is arguable that an attempt to outline the particular acts which a personal guardian may perform on behalf of the ward could lead to more confusion than it saves. However, a closer look at the list reveals that it is partly situational anyway. For example, subparagraph (ii) relates to residence, (iv) relates to provision of services, and (v) relates to consents or approvals. Thus it may overlap, rather than complement, the earlier determination of areas of incapacity.

Another aspect to look at is the areas which are expressly excluded from being within the sole authority of a guardian. The Government Bill in Victoria<sup>141</sup>, the Law Reform Commission of Saskatchewan<sup>142</sup> and the ABA<sup>143</sup>, all require questions of sterilisation, abortion, and removal of non-regenerative tissue to be considered by the court or other body responsible for appointing the guardian. These matters are dealt with in Chapter Seven. The Saskatchewan and American Bar Association models also require the question of voluntary commitment to a mental institution and some other matters to be considered by the court.

However, the Alberta Dependent Adults Act and McLaughlin's Draft Statute have no such provisions. Under both of these pieces of legislation, the matters mentioned above could presumably be placed within the sole province of the guardian if the court thought it to be in the best interests of the ward. However, it is unlikely that a court would come to this conclusion.

<sup>141</sup>Guardianship and Administration Board Bill 1985 (Vic.), ss. 37, 38.

<sup>142</sup>Saskatchewan Law Reform Commission, Proposed Legislation, s. 7(3).

<sup>143</sup>American Bar Association, *Guardianship and conservatorship*, American Bar Association, Chicago [n.d. This publication also contains proposed legislation, hereinafter cited as 'American Bar Association, Model Statute', to distinguish it from the above title. This note refers to s. 17(5) of the Model Statute.

## Chapter Six

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# Features of guardianship legislation

### THE POPULATION TO BE SERVED

In this chapter provisions containing criteria for admission to guardianship are discussed first, because of the influence they have on procedural provisions.

#### Criteria for admission to guardianship

Generally a guardian can only be appointed in respect of a person who has been adjudged legally incompetent according to some standard of intellectual capacity. Intellectual incapacity may, of course, result from some physical or intellectual disability. The view that physical or intellectual disability causes intellectual incapacity which in turn causes legal incompetence assumes that the primary causes of incapacity, mental illness and intellectual disadvantage, are identifiable medical conditions. Traditional guardianship statutes therefore define incapacity in terms of mental illness, assuming that it can be identified and diagnosed like any other physical ailment.<sup>1</sup> The view that intellectual disadvantage is a medical condition, or indeed a form of mental illness, is now discredited.<sup>2</sup> However, this does not necessarily mean that guardianship is not a suitable vehicle for facilitation of the legal rights of members of both these groups.<sup>3</sup>

If the medical view were correct, the problem of guardianship would be mainly one of diagnosis; if the diagnosis of intellectual disability were accurate, a court should have little discretion but to appoint a guardian. If diagnosis were reliable, the only question then would be whether the diagnosed intellectual disability resulted in a lack of intellectual capacity. For this information we would look to the behaviour of the individual, or to a medical expert's explanation of the probable effects of the intellectual disability.<sup>4</sup>

An approach based on the requirement of a finding of intellectual incapacity assumes that intellectually disabled people can be distinguished from non-disabled people.<sup>5</sup> Problems in relation to this assumption are discussed elsewhere in this work. There is an implication here that a person of full intellectual capacity may not be a proper subject for guardianship, no matter how stupidly they behave. This is because society only allows individuals who have a free will to act irresponsibly. For example, no one is legally empowered to stop a non-disadvantaged person from engaging in the sport of hang-gliding. However we might not allow a disadvantaged person to go hang-gliding, even though the disadvantage does not increase the risk of injury, because we will not allow a person to take a risk the nature of which he/she does not understand!

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<sup>1</sup>Lawrence A. Frolik, 'Plenary guardianship: an analysis, a critique and a proposal for reform' (Spring 1981) 23 *Arizona Law Review*, 599-660.

<sup>2</sup>See the discussion in Chapters Four and Five above, and in this chapter.

<sup>3</sup>See the discussion in Chapter Five above.

<sup>4</sup>Frolik, *op. cit.*, 626.

<sup>5</sup>See Chapter Five above, and this chapter.

<sup>7</sup>Frolik, *op. cit.*, 627.



What is the justification for this? Do intellectually disadvantaged people wish to go hang-gliding because they do not appreciate the risk involved, or because, regardless of whether they appreciate the risk or not, they, along with many non-disadvantaged people, like to experience the thrills of hang-gliding?

The shortcomings of the 'incapacity' model have led some critics to argue for its abandonment as a prerequisite for a finding of incompetency. It is argued that incompetency should be found whenever there is a failure to meet functional criteria of behaviour. This represents the influence of the 'therapeutic model', under which any behaviour that is self-harmful gives reason for state intervention.<sup>8</sup> This model has been discussed in detail earlier in this monograph.<sup>9</sup>

In the therapeutic state, one is not free to act in a way which is harmful to oneself. This view is derived from the theory that man is a rational creature who acts to promote his own best actions. Actions not in one's own interest are evidence that something is wrong, and it is the humanitarian duty of the state to intervene, remove or cure the motivating cause of the harmful behaviour and attempt to restore the person to behaviour that is self-promoting rather than self-destructive.<sup>10</sup>

Frolik argues that the traditional requirement of incapacity serves as a bar to an undue expansion in findings of incompetency. If incompetency were viewed as a standard of behaviour rather than as a condition, decision-makers might feel free to apply their own notions as to what is 'incompetent' behaviour. The requirement of incapacity is no guarantee against an expansion in numbers of persons declared incompetent, but it does serve as an evidentiary barrier at which counsel for the alleged incompetent can attempt to make a stand, or at least find grounds for appeal. Without such a barrier, the problem of guardianship boils down to fundamental philosophical questions, such as whether a person should be allowed to live in a self-destructive manner.

Frolik concludes that even if traditional theories of incapacity are not true, they nevertheless serve the valuable function of limiting the expansion of the concept of legal incompetency.<sup>11</sup> The question is whether they do so in a systematic or an arbitrary fashion. The answer to this question probably depends more upon procedural provisions of the guardianship legislation than upon the actual criteria for admission to guardianship. For example, the 'legalistic model' for guardianship emphasises procedural safeguards in order to steer clear of the 'grey area' in which judgments about intellectual capacity are uncertain due to inadequate evaluation techniques and conflicting values. This is one way of avoiding arbitrariness. On the other hand, the 'parent—child model' practically ignores procedural safeguards. Given the difficulty of evaluating intellectual capacity, there must surely be a risk that the line between competence and incompetence will be drawn arbitrarily under such an approach.

## Legislative examples of criteria for admission

### Alberta's 'inability to care' limb

The heart of the definition in the *Dependent Adults Act 1976* (Alberta, Canada) has two elements.<sup>12</sup> First, is the person able to care for himself/herself? It has already been pointed out that an inability to care for oneself may result from shortage of human services and social protection mechanisms, or from lack of access to family supports or

<sup>8</sup>*Ibid.*, 628.

<sup>9</sup>See Chapter Five above.

<sup>10</sup>Frolik, *op. cit.*, 628.

<sup>11</sup>*Ibid.*, 628.

<sup>12</sup>*Dependent Adults Act 1976* (Alberta, Canada), s. 6 (1)(b).

advocacy. If this is to be a criterion for the appointment of a guardian, it might be better if there were also a requirement that the judge be satisfied that there are no other less restrictive alternatives available before appointing a guardian.

There is no directive to the court in the Dependent Adults Act that the 'least restrictive alternative' be adopted. This must affect the ability of the legislation to maximise the freedom of individuals who come under it.

The requirement is also vague — does it mean 'unable to care for oneself at all' or 'unable to care very well'? Judges are likely to get one-sided evidence and opinions from family members and professionals who are anxious to rescue intellectually disadvantaged people from what they perceive to be circumstances which are not in their best interests. They may be imposing middle-class values in a situation where they are irrelevant. Independence may be worth more to an intellectually disadvantaged person than creature comforts, nutrition, good health and even life itself.<sup>13</sup>

### A 'reasonable judgment' limb?

The other element of the Alberta definition relates to the inability of the person subject to the guardianship application to make reasonable judgments in respect of all or any matters relating to his/her person. This question overlaps extensively with the question of being unable to care for oneself. They may even be the same questions, since a person's inability to care for himself/herself probably arises from the inability to make reasonable judgments in relation to matters affecting the person.<sup>14</sup> The 'mentalist' element which this requirement introduces is necessary because it is the lack of intellectual capacity which theoretically gives rise to the need for guardianship in order to facilitate a person's legal interaction with the rest of the world.

However, this provision also injects vagueness into the inquiry by use of the word 'reasonable'. How is a judge to measure the reasonableness of another person's judgments on matters pertinent to personal affairs? What sort of evidence will be before the court when it makes this judgment? To what extent is the appearance of unreasonableness due to the lack of alternatives? Will it be possible to develop (or use existing) alternatives short of guardianship which would allow the person to exercise a reasonable judgment? The lack of answers to such questions in the Alberta legislation leaves McLaughlin pessimistic about the chances of consistent interpretations of its provisions.<sup>15</sup>

A similar problem is encountered in the Proposed Bill of the Victorian Minister's Committee. The Committee resolved that a guardian should be appointed only in respect of a person who is developmentally disabled, unable to care for himself/herself or make reasonable judgments in some or all of the matters relating to the person, and in need of a guardian. A complex definition of 'developmentally disabled' was rejected for fear that it would open up a legal minefield, and the formula 'having a disability arising from a limited development of intellectual functioning' was adopted.<sup>16</sup>

<sup>13</sup>Paul McLaughlin, *Guardianship of the person*, National Institute on Mental Retardation, Downsview, Ontario, 1979, p. 95. This publication also contains proposed legislation, hereinafter cited as 'McLaughlin, Draft Statute', to distinguish it from the above title.  
<sup>14</sup>*ibid.*

p. 96.

<sup>15</sup>Victoria, Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, *Report*, Victorian Government Printer, Melbourne, December 1982, hereinafter cited as 'Victorian Minister's Committee Report'. This report also contains legislation, cited hereinafter as 'Victorian Minister's Committee, Proposed Bill', to distinguish it from the report. For this reference see Victorian Minister's Committee, Proposed Bill, ss. 2(1), 27(1). Compare Guardianship and Administration Board Bill 1985 (Vic.), s. 3(1): 'disability', s. 22(1).

Again, it is the expression 'reasonable judgments' which injects the element of vagueness and subjectivity into the decision-making process. The Committee itself foresaw this danger, and warned that the simplicity of the formulation should not be allowed to 'mask the considerable difficulties which face its practical implementation'.<sup>17</sup> How susceptible to undue influence need an intellectually disadvantaged person be before warranting the description 'unable' to make a judgment? How reasonable must that judgment be?

The Committee offered the example of an intellectually disadvantaged adult who, having got in with a 'bad crowd', goes out drinking every night. The resultant unreliability leads to threats of dismissal and the person's parents, having pleaded unsuccessfully for him/her to stay at home, now apply for guardianship.

Do we say that this person has been influenced by the new friends to the point where he/she is no longer the person he/she was, so that the person may be said to be unable to make reasonable judgments in one aspect of his/her life? Or do we argue that the person has the right to make mistakes? The opportunity to learn from one's mistakes is a valuable part of the process leading to independent decision-making. Since we would not impose guardianship on a non-disadvantaged adult who did the same thing, the Victorian Minister's Committee suggests that to do so because the person is intellectually disadvantaged is to discriminate.<sup>18</sup>

There is no easy resolution of this dilemma. Do intellectually disadvantaged persons indulge in behaviour which gives rise to concern because they do not appreciate the risks associated with that conduct or because, along with many non-disadvantaged people, they enjoy indulging in the particular behaviour and do not give a second thought to the associated risk?

### **A purist 'legal function' test?**

McLaughlin attempts to avoid the minefield of trying to resolve this issue by taking an approach which differs from the two discussed above. The heart of the definition in McLaughlin's Draft Statute is that the person subject to the guardianship application must have such an impairment in intellectual functioning that he/she lacks the intellectual capacity to give legally binding consents and to form legally binding relationships in relation to one or more 'significant personal matters'.<sup>19</sup> 'Significant personal matters' are defined as personal matters that are of significance to the person subject to the guardianship application.

The focus here is on the lack of intellectual capacity to give legally binding consents and to form legally binding relationships. That is, the emphasis is on 'legal functioning', not on 'social functioning'. This definition is generic rather than narrowly categorical. Thus it would include any person who lacked the required intellectual capacity. This lack of intellectual capacity would be due to any one of a number of different causes: intellectual disadvantage; mental illness; senility; or brain damage due to accident, alcoholism or chronic drug abuse.

There is some controversy over whether people with such disparate problems should be grouped together under the same guardianship scheme. There is a risk that this will encourage the public to think of them as members of one large group of intellectually incompetent persons.. It has already been argued that this risk would be greatest under a social welfare model of guardianship; because the service orientation of that model could

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<sup>17</sup>Victorian Minister's Committee Report, p. 74.

<sup>18</sup>*ibid.*

<sup>19</sup>See McLaughlin, Draft Statute, s. 5(1)(a)(ii).

give the impression that these people all require similar treatment and services, and therefore suffer from the same problem.<sup>20</sup> However, under a legalistic model which emphasises facilitation of legal functioning, this risk should not be significant.

The definition attempts to remove the 'value judgment' element brought into the Dependent Adults Act by use of the adjective 'reasonable'. In McLaughlin's draft, the question is not whether consents and other legally binding relationships can be made 'well', but whether they can be made at all.<sup>21</sup>

'Legally binding consent' is defined as consent given by a person who has been fully informed as to the probable consequences of a proposed action or program in relation to one or more significant personal matters, who has understood the information, and who has given the consent voluntarily, without force, fraud, duress or deception.<sup>22</sup>

### **A combined 'socio-legal' approach?**

The American Bar Association, in its Model Guardianship and Conservatorship Statute, adopts an approach which is similar to that favoured by McLaughlin in some matters of substance, although it follows a different format and is more comprehensive in its detail. Reference has already been made to one unusual feature of this model statute. Under it the court may deal with property matters and personal matters in a single proceeding.<sup>23</sup>

'Partially disabled persons' are defined as 'adults whose ability to receive and evaluate information effectively and/or communicate decisions is impaired to the extent that they lack the capacity to manage at least some of their financial resources and/or meet at least some of the essential requirements for their physical health or safety without court-ordered assistance or appointment of a limited personal guardian . . .'.<sup>24</sup>

'Disabled persons' are defined as 'adults whose ability to receive and evaluate information effectively and/or communicate decisions is impaired to such an extent that they lack the capacity to manage their financial resources and/or to meet essential requirements for their physical health or safety even with court-ordered assistance or the appointment of a limited personal guardian

Again this shows a functional rather than categorical approach to the definition of disability, focusing on the extent to which an impairment of an individual's ability to understand and appreciate the facts necessary to reach an informed decision and convey it, impedes that individual from taking those actions necessary to protect his or her personal health or safety and/or manage his or her financial resources. However, the emphasis is not solely on legal functioning, as in McLaughlin's Draft Statute. There is an element of social functioning introduced by the reference to being able to meet the essential requirements for one's physical health or safety.

This approach recognises that the possible causes of the disability are of little relevance in determining whether a person's legal capacity to act on his or her own behalf should be transferred to another person or a corporate entity. The definition aims to limit the extent to which value judgments can enter into the decision-making, since individuals with disabilities should have no less a 'right to be wrong' than those without disabilities. Hence there is no requirement that decisions regarding person or property should be 'responsible ones'.<sup>26</sup>

<sup>20</sup>See footnote 3, above.

<sup>21</sup>McLaughlin, *op. cit.*, p. 98.

<sup>22</sup>See McLaughlin, Draft Statute, s. 1(g).

<sup>23</sup>See Chapter Four above; property matters are discussed further at Chapter Seven.

<sup>24</sup>American Bar Association, *Guardianship and conservatorship*, American Bar Association, Chicago [n. d.]. This publication also contains proposed legislation, hereinafter cited as 'American Bar Association, Model Statute', to distinguish it from the above title. This note refers to s. 3(1) of the Model Statute.

<sup>25</sup>American Bar Association, Model Statute, s. 3(2).

<sup>26</sup>American Bar Association, *op. cit.*, p. 78.

Because of the vastly differing abilities and disabilities of people in respect of whom applications may be made, the Model Statute differentiates between individuals who require some assistance in performing certain of the functions necessary to meet particular health care, nutritional, clothing, housing and hygiene needs, or to manage particular property, benefits or income, and those who require an individual or entity to make all decisions on their behalf.

Section 10 relates to the hearing of an application. Section 10(1) provides that where a petition requests court-ordered assistance not related to the management of the respondent's resources and/or the appointment of a personal guardian, the following matters shall be determined at the hearing:

- (a) the essential requirements for the respondent's physical health and safety;
- (b) the skills and knowledge necessary to meet those needs;
- (c) the nature and extent of respondent's disabilities, if any; and
- (d) whether the respondent is a partially disabled or disabled person as defined in [the Model Statute].

Section 10(2) provides that where a petition requests court-ordered assistance related to the management of the respondent's financial resources and/or the appointment of a conservator<sup>27</sup>, the following matters shall be determined at the hearing:

- (a) the type and amount of the respondent's financial resources;
- (b) the skills and knowledge necessary to manage those financial resources;
- (c) the nature and extent of the respondent's disabilities, if any; and
- (d) whether the respondent is a partially disabled or disabled person as defined in [the Model Statute].

These provisions set out 'roadmaps' which must be followed by the court in a guardianship proceeding. First, the needs which must be met, or the financial resources which have to be managed, must be considered. Then the skills necessary to meet these needs and/or manage these resources must be identified. Third, the respondent's disabilities, if any, must be considered to determine whether he or she has the necessary skills. Finally, if an impairment is found, the court must determine: whether the respondent is able to meet the essential requirements for physical health or safety, and/or manage financial resources without court-ordered assistance or without the establishment of a guardianship or conservatorship; whether some form of court-ordered assistance and/or some restriction on the respondent's legal capacity to act on his or her own behalf is necessary to assure that these needs are met and/or resources managed; or whether even with court-ordered assistance and a limited personal guardian or limited conservator, the respondent would be unable to protect physical health, safety or property.<sup>28</sup>

Thus the formulation requires explicit consideration of the relationship between the need to protect a person's health and financial resources and the person's abilities and disabilities. The factors to be considered are spelled out, providing clarity in a difficult and complex decision-making process, and giving added assurance that individuals who require protection and assistance will receive it in the form of the least restrictive alternative.

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<sup>27</sup>The American Bar Association uses the word 'conservator' to describe the guardian of a person's property: American Bar Association, *op. cit.*, pp. 1, 81.  
<sup>28</sup>American Bar Association, *op. cit.*, p. 95.

The Model Statute goes on to give a list of 'dispositional alternatives', arranged in order of increasing restrictiveness. This list is reproduced earlier in this monograph.<sup>29</sup> If the respondent is found not to be disabled or partially disabled, the petition must be dismissed.<sup>30</sup> But if a finding of partial disablement or disablement is made, the court may choose from the list of dispositional alternatives.<sup>31</sup>

The Proposed Bill of the Victorian Minister's Committee does not go so far as to list dispositional alternatives. But it does contain exhaustive provisions directing the Guardianship Tribunal to search for the least restrictive alternative.<sup>32</sup> The Victorian Minister's Committee's Proposed Bill also requires that the person subject to the application be 'in need of a guardian'.<sup>33</sup> An identical provision in the Dependent Adults Act was criticised by McLaughlin, who thought that it seemed 'redundant and self-evident' in view of what was contained in the rest of the definition. McLaughlin's view was that a requirement that a guardianship order be in the best interests of the person subject to the application is probably a better vehicle for ensuring that consideration is given to whether the person's needs in relation to self-care and making judgments will in fact be met by the appointment of a guardian.<sup>34</sup>

However, the Victorian Committee saw two uses for the 'in need of a guardian' requirement. First, it would force the Tribunal to consider whether the person would derive a real benefit from the appointment of a guardian. It is probably true that this purpose would be equally well if not better served by the 'best-interests' requirement.

Second, it would force the Tribunal to consider whether there is a less restrictive alternative to guardianship. For example, when an intellectually disadvantaged person is having difficulty coping in the community, the Tribunal should be obliged to consider the availability and suitability of community support services (including citizen and self-advocacy programs) which could avoid the need to resort to the formal and potentially coercive guardianship powers.<sup>35</sup> This may be true, but surely the purpose is better served by the provisions described above<sup>36</sup> as 'directing the Guardianship Tribunal to search for the least restrictive alternative'. In the light of these provisions, it appears that McLaughlin's criticism of the 'in need of a guardian' requirement of the Minister's Committee's Proposed Bill is well grounded.

The legislation proposed by the Law Reform Commission of Saskatchewan defines a person for whom a guardian would be appropriate as one who 'lacks sufficient capacity to understand the nature and appreciate the consequences of decisions in respect of matters relating to his or her personal care and welfare and who is in need of care or supervision'.<sup>37</sup> This shows a reversion back to social functioning criteria which may invite the sorts of criticisms that McLaughlin levelled at the Alberta legislation.

<sup>29</sup>See Chapter Four above.

<sup>30</sup>American Bar Association, Model Statute, s. 11(1).

<sup>31</sup>See footnote 29 above.

<sup>32</sup>Victorian Minister's Committee, Proposed Bill, s. 27(2), (3), (4), (5), reproduced in Chapter Four above. See also Guardianship and Administration Board Bill 1985 (Vic.), s. 22(2)—(5).

<sup>33</sup>s. 27(2). See also Guardianship and Administration Board Bill 1985 (Vic.), s. 22(1)(d).

<sup>34</sup>McLaughlin, *op. cit.*, p. 96.

<sup>35</sup>Victorian Minister's Committee Report, p. 75; see also Victorian Minister's Committee, Proposed Bill, s. 27(2).

<sup>36</sup>See text to footnote 32 above; Victorian Minister's Committee, Proposed Bill, s. 27(2)—(5).

<sup>37</sup>Saskatchewan Law Reform Commission, *Tentative proposals for a Guardianship Act, Part I. Personal guardianship*, Saskatchewan Law Reform Commission, Saskatoon, 1981. This publication contains proposed legislation, hereinafter cited as 'Saskatchewan Law Reform Commission, Proposed Legislation', to distinguish it from the above title. This note refers to s. 3(1) of the proposed legislation.

## An overview

To sum up: at one end of the scale is the legalistic model put forward by McLaughlin. The criteria are purely functional, with the emphasis wholly on legal functioning.

Then there are models with functional criteria which could cover both legal and social functioning. Examples of this approach are the model statutes of the American Bar Association and the Saskatchewan Law Reform Commission.

There are also models which introduce a specific element of social functioning into the criteria. In the Alberta Dependent Adults Act, in addition to being unable to care for himself, the proposed ward must be unable to make reasonable judgments in respect of matters relating to his person. In the Proposed Bill of the Victorian Minister's Committee, these elements are presented as alternatives. In other words, under the Proposed Bill, a guardian could be appointed without reference to the 'reasonable judgments' requirement if the 'unable to care for himself' requirement, as well as the requirements that the proposed ward be developmentally disabled and in need of a guardian, were satisfied. This has been rectified by clause 22(1) of the Guardianship and Administration Board Bill 1985 (Vic.).

These models both tend towards the welfare or service-oriented approach. However, the Alberta Dependent Adults Act is closer to the 'therapeutic state' notion because it contains no requirement of intellectual incapacity.

## PROCEDURAL MATTERS: GENERAL

The role of procedural safeguards in preventing the appointment of guardians in unsuitable cases has already been referred to briefly. Support for procedural safeguards is found in the *Declaration on the rights of mentally retarded persons*. Paragraph 7 of the Declaration reads:

Wherever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for the restriction or denial of right must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

Some issues relating to procedural matters are discussed in this section.

## Evaluation in guardianship proceedings

If we are to be able to care for and protect an intellectually disadvantaged person in the least restrictive way, or according to some other standard, we need detailed information about that person's capabilities, as well as the machinery to process and evaluate this information. It has already been pointed out that classification into discrete 'levels' of intellectual capacity provides little information about the needs of intellectually disadvantaged individuals.<sup>38</sup> Categorisation is usually based on an I.Q. test. While this may predict performance in some areas, it is of very limited value in most areas of human functioning. What is required is factual information about the individual's strengths and weaknesses, and the kinds of support that are most beneficial to that person.

Under the American Bar Association's Model Statute, the method of assessing the capabilities of the person subject to the application is exhaustive and thorough. Before an application for guardianship can be brought a disabilities resources officer must be

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<sup>38</sup>See Chapter One above.

consulted. The disabilities resources officer should discuss with applicants the availability of less restrictive alternatives and consequences on individuals of a guardianship order.<sup>39</sup>

When the application is brought, a multidisciplinary evaluation team must be appointed by the court.<sup>40</sup> This team, chosen from a list of suitably qualified individuals who are prepared to serve in this capacity, then has to submit a detailed report covering, among other things: the disabilities from which the person subject to the application suffers; any other problems; the services being made use of and the type(s) and extent of any assistance required by the person to manage financial resources, to protect rights, and/or to meet the essential requirements for physical health or safety, and why no less restrictive alternative would be appropriate; and an opinion regarding the probability that the extent of any of the person's disabilities may significantly lessen, and the type of services or treatment which will facilitate improvement in the person's condition, behaviour or skills.<sup>41</sup>

After the report is completed, a pre-hearing conference must be held.<sup>42</sup> This is an opportunity for the parties to discuss, in the light of the report, whether some less restrictive alternative may be sufficient. If agreement is reached, the application may be withdrawn or suspended for 90 days while voluntary, non-custodial services are tried out. If no agreement is reached the matter goes on for hearing.

This approach follows the recommendations of the San Sebastian Symposium on Mental Retardation.<sup>43</sup> The participants noted that it had been observed that a co-operative effort by persons with different skills is likely to yield a more valid assessment of social competence than medical diagnoses, educational assessments and psychometric (or measured intelligence) levels. So the Symposium recommended the multidisciplinary team approach, taking responsibility for professional evaluation of an individual's competence and the extent and character of the need for guardianship out of the hands of the physician or psychiatrist alone. It was suggested that the multidisciplinary team could be drawn from such people as psychiatrists, psychologists, social workers, educators and other trained observers of social behaviour, as well as anyone who has had the opportunity to observe the person in question over a prolonged period of time.

McLaughlin comments that the Symposium participants 'probably over-emphasised the importance of the multidisciplinary team, which could become quite costly', but he accepts that the medical profession should not have a monopoly over evaluation of the intellectual capacities of persons who are the subjects of guardianship applications.<sup>44</sup> The cost of setting up the apparatus required to administer a system based on the use of multidisciplinary evaluation teams<sup>45</sup> probably makes this approach inappropriate to the needs of the smaller States and Territories in Australia.

It is a common feature of guardianship legislation to require that applicants provide a report written by a professional person confirming the need for guardianship. In New South Wales affidavits sworn by two medical practitioners are required.<sup>46</sup> The Alberta Dependent Adults Act requires a report of a physician, psychologist or therapist, and in

<sup>39</sup>This is by implication. See American Bar Association, Model Statute, s. 6(1)(b)(xiv).

<sup>40</sup>American Bar Association, Model Statute, s. 8(1).

<sup>41</sup>s. 8(4).

<sup>42</sup>

<sup>43</sup>Cited in McLaughlin, *op. cit.*, p. 109.

<sup>44</sup>American Bar Association, *op. cit.*; s. 5 deals with the Guardianship/Conservatorship Oversight Commission, whose job it is to maintain a list of suitable individuals who are qualified to serve on multidisciplinary evaluation teams.

<sup>45</sup>Victorian Minister's Committee Report, p. 37, citing N.S.W. Supreme Court Rules, rule 14.



Ontario two medical opinions plus one other non-medical opinion are required. Such requirements have been criticised for adding a further procedural barrier, and more expense, to the process of making a guardianship application.

Initial cost of the applicant may be avoided if there is provision for the court or decision-maker to appoint some person to prepare a report on the person subject to the application. Thus the Dependent Adults Act provides that the court may, if in doubt as to the need for a guardian, appoint a person to prepare a report on any or all of the physical, mental, social, vocational, residential, educational and other needs of the persons subject to the application, also looking generally at their ability to care for themselves and make reasonable judgments with respect to matters relating to their person.<sup>47</sup> The person appointed may be a local association for the intellectually disadvantaged or a citizen advocacy agency, bringing a broader group of professionals and professional interest to bear on the question of the need for a type of guardianship than is possible where physicians and psychologists are specified.<sup>48</sup>

McLaughlin's Draft Statute provides that the court may require a report by a public official known as the 'Official Guardian' on various relevant matters in relation to a person who is subject to a guardianship application.<sup>49</sup> The Victorian Minister's Committee suggested that a Guardianship Tribunal, as part of its active fact-finding role, should be able to call upon evidence from a professional or non-professional person, if it sees a need for this and neither of the parties shows any inclination to do so.

The Victorian Minister's Committee also proposed that the final decision in the guardianship hearing be made not by a court of law but by a Guardianship Tribunal, constituted by a President and such other members as are necessary for its proper functioning.<sup>50</sup> Members of the Tribunal (a 'Board' in the 1985 Bill) are to be chosen having 'regard to the matters the Tribunal has jurisdiction to hear and determine' and to the need for it to be comprised of people with suitable knowledge and experience.<sup>51</sup> In South Australia there is a Guardianship Board, consisting of five members, one of whom is the Chairman and must be a lawyer. There must also be a psychiatrist, a psychologist who has experience with intellectually disadvantaged people, and two others with 'appropriate qualifications for membership of the Board'.<sup>52</sup>

Putting the decision-making power in the hands of an experienced and expertly qualified body may be a good alternative to the multidisciplinary evaluation team approach of the American Bar Association. It appears to be less cumbersome, but still ensures that the fate of the person subject to the application receives the consideration of a variety of professional and non-professional people. Although the use of a multidisciplinary evaluation team might be costly, the extra opportunities for discussion of alternatives provided by the American Bar Association's draft statute would probably increase the chances of avoiding the cost of a hearing. This seems to be one of the main advantages of this approach.

In summary, there appear to be several options for evaluating the capabilities of people subject to guardianship applications. One is to appoint a multidisciplinary evaluation team to report on any individual subject to a guardianship application before the hearing and to have the report made available to the court. Alternatively, a tribunal composed of experts in the field of the intellectually disadvantaged may be appointed.

<sup>47</sup>Dependent Adults Act 1976 (Alberta, Canada), s. 4(2). The common law also recognises this inquisitorial dimension: *Re Magavalis* [1983] Qd R 59,63.

<sup>48</sup>McLaughlin, *op. cit.*, pp. 109-10.

<sup>49</sup>McLaughlin, Draft Statute, s. 4(3), in McLaughlin, *op. cit.*, p. 120. See also Saskatchewan Law Reform Commission Proposed Legislation, s. 4.

<sup>50</sup>Victorian Minister's Committee, Proposed Rill, s. 3(2); see also-Guardianship-and-Administration-Board-Bill 1985 (Vic.), s. 5(2).

<sup>51</sup>Victorian Minister's Committee, Proposed Bill, s. 5(2).

<sup>52</sup>Mental Health Act 1976-7 (S.A.), s. 20.

Such a tribunal, or indeed an ordinary court, may be granted the power to seek the independent opinion of another professional (or non-professional) if that is thought to be desirable. There is also the option of charging some public official with responsibility for reporting on anyone in respect of whom a guardianship application has been made.

The use of juries in guardianship proceedings is, however, rejected by Frolik: Mental capacity is a vague and slippery concept, and the outcome rests more upon the experience of the court than on the application of precise legal theory . . . An experienced judge who has presided over a number of guardianship hearings will have been exposed to a great deal of unusual and odd behaviour. A judge may be less likely to assume that anti-social behaviour is necessarily evidence of a mental incapacity.<sup>53</sup>

The precise means of obtaining and evaluating information in relation to guardianship applications is not necessarily determined by the model of guardianship which is adopted. However, the following comments may be made.

Under the legalistic model for guardianship, one would expect the hearing to take place before an ordinary court, although it is possible that a tribunal with court-like procedures could conduct a hearing which would satisfy the legalistic proponents. For those models which attach little importance to procedural safeguards (the protective service programs and the 'developmental model' spring to mind), an informal administrative tribunal might be appropriate.

Proponents of both the 'legalistic' and 'developmental' models for guardianship claim to be guided by the principle of the least restrictive alternative. One way of meeting the standard of the least restrictive alternative is to adopt limited guardianship (see Chapter Five). If such goals are to be realised, it would seem appropriate for the opinions of a wider range of professionals than just physicians and doctors to be available to the decision-making body. The multi-disciplinary team approach leaves nothing to chance in this regard, but its expense would be a problem. In most cases obtaining the report of a public official with the responsibility of providing such reports, or appointing another professional to make a report, would probably be adequate.

## Representation

According to Frolik, there has been an almost universal call for people subject to guardianship applications to be represented by counsel in guardianship proceedings.<sup>54</sup> This is reflected in the American Bar Association's Model Statute<sup>55</sup>, and to a lesser extent in the Proposed Bill put forward by the Victorian Minister's Committee.<sup>56</sup> However, the Alberta Dependent Adults Act and McLaughlin in his Draft Bill do not mention representation, and 27 states in America still have no requirement in this regard.<sup>57</sup> Nor does the legislation proposed by the Saskatchewan Law Reform Commission.<sup>58</sup> Moreover, the Victorian Committee suggested that 'it is expected that in a large number of cases, the non-legal [advocate] would be preferred'.<sup>59</sup> This accords with the Victorian Committee's rejection of an adversarial approach to guardianship hearings. They attempted to balance the competing goals of adherence to natural justice and informality by giving the Chairman of a Division of the Tribunal the choice of hearing evidence upon

<sup>53</sup>Frolik, *op. cit.*, 639-40.

<sup>54</sup>Frolik, *op. cit.*, 629.

<sup>55</sup>American Bar Association, Model Statute, s. 31(1).

<sup>56</sup>Victorian Minister's Committee, Proposed Bill, s. 19(1); see also Guardianship and Administration Board Bill 1985 (Vic.), ss. 9, 10.

<sup>57</sup>Frolik, *op. cit.*, 634.

<sup>58</sup>Saskatchewan Law Reform Commission, *op. cit.*

<sup>59</sup>Victorian Minister's Committee Report, p. 32.

affirmation, oath or declaration, and the ability to formalise proceedings in other respects (for example, by altering the physical environment in which the hearing is to be held).<sup>60</sup>

The Minister's Committee gave three reasons for rejecting an adversarial approach. First, it tends to suggest that the applicant is in conflict with the person subject to the application; second, the adversary system would produce excessive delays in the presentation of clear-cut cases; and third, persons appearing before a tribunal often have difficulty giving instructions to their representatives.

By contrast, Frolik is emphatic that a person subject to a guardianship application should be represented by legal counsel, who should act as an adversarial advocate rather than as the promoter of what he sees as the 'best interests' of the person.<sup>61</sup> This is to ensure that expert testimony is challenged, either by effective cross-examination or by introducing experts with opposing points of view, and to ensure that the presence of counsel is not merely a procedural formality aimed at legitimising the routine approval of guardianship applications.<sup>62</sup> To allow counsel to act as promoter of what in his view were the 'best interests' of the client would allow him to make a decision regarding the intellectual capacity and well-being of that client, something which he is totally unqualified to do. It is for the court or other body entrusted with final decision-making power to decide such matters.

In theory, there are two main possible effects of the presence of adversarial counsel. First, it might decrease the number of cases in which a guardian was unnecessarily appointed. This must be seen as a good effect, for it prevents some people from being unjustly deprived of their liberty. Second, it might increase the number of cases where no guardian was appointed even though this was necessary for the welfare of the client. This would be seen as a bad effect. Frolik argues that the good effect outweighs the bad here, because we are all better off in a society that minimises the denial of liberty to its members.<sup>63</sup> This indicates his preference for the maximisation of freedom rather than welfare; someone with the opposite preference would come to a different conclusion.

The issue is complicated by the fact that we are unlikely to know whether the first or the second effect has occurred in a particular case. This is because we cannot truly categorise all individuals as either intellectually competent or intellectually incompetent. The notion of a continuum of levels of human capability has already been discussed, and Frolik concludes on this point that, at most, the presence of counsel will reduce the number of guardians appointed in the 'grey area' where no judgment is certain or where conflicting values bar agreement as to the 'correct' outcome."

One would have thought that under a legalistic approach to guardianship, legal representation would be insisted upon. It is therefore surprising that McLaughlin, who appears to be a proponent of the legalistic model, does not include a provision relating to representation in his Draft Statute.

Under models which are based upon the view that persons who are subject to guardianship proceedings have everything to gain and nothing to lose from being admitted to guardianship, there is unlikely to be any requirement of representation at all. The more extreme welfare-oriented models (protective service programs, the 'therapeutic state' model) and the development model are likely to take this approach.

<sup>60</sup>See also Victorian Minister's Committee, Proposed Bill, s. 13, and Guardianship and Administration Board Bill 1985 (Vic.), s. 8(2) Schedule 2.

<sup>61</sup>Frolik, *op. cit.*, 634.

<sup>62</sup>American Bar Association, Model Statute, s. 31(1)(a); the ABAmodeLguarantees\_theright-to-cross-examine, call witnesses etc. (p. 134).

<sup>63</sup>Frolik, *op. cit.*, 635.

<sup>64</sup>Frolik, *op. cit.*, 633.

## Notice

Adequate notice of proceedings is another requirement of a just guardianship law. McLaughlin sees the giving of adequate notice to a significant number of interested people as being of the utmost importance in preventing the railroading of persons into guardianship where it is not appropriate. However, if notice is given too broadly, the person subject to the application may be stigmatised unnecessarily, and the processing of the application may be delayed.<sup>68</sup>

Most modern existing and proposed legislation requires that notice be given to the person subject to the guardianship application, to a nearest relative, and to a range of other people such as any trustee or administrator of the estate of the person subject to the application, the person proposed as guardian (if not the applicant), and the person in charge of any institution of which the person subject to the application is an inmate.<sup>66</sup> Where guardianship hearings are to take place in the ordinary courts, notice provisions in the guardianship legislation may be superfluous, because the court may have already made provision for notice in its own Rules of Court or Rules of Practice.<sup>67</sup>

While the nearest relative served with notice should obviously be an adult, McLaughlin did not include the requirement of the Dependent Adults Act that the older of two nearest relatives be served, because this could result in a very old relative with no interest in the welfare of the person subject to the application being served. McLaughlin makes other changes to the Dependent Adults Act to make it fit in with the scheme he proposes. He agrees that the court should be able to shorten the time for notice, but does not agree that it should be able to dispense with notice altogether, except in the clearest and most extenuating circumstances. The ability of the court to do this, and the circumstances in which it will be allowed, must be set out clearly and unambiguously for the notice requirements of the Rules of Practice of the relevant court to be overcome.<sup>68</sup>

Such provisions contemplate that there may be circumstances which would justify a guardianship hearing taking place without the person subject to the application receiving notice of it.<sup>69</sup> Such a possibility conflicts with paragraph 7 of the *Declaration on the rights of mentally retarded persons*, which requires that any procedure used for the restriction of denial of the rights of an intellectually disadvantaged person contain proper legal safeguards against every form of abuse. It is hoped that this power is used sparingly and that the right of the persons subject to the application to appear at the hearing is given strong consideration where the use of the power is suggested.

## Standard of proof and evidentiary standards

The same arguments that support the presence of counsel as a vigorous adversarial advocate for a person subject to a guardianship application are cited in favour of adopting the higher of the two common law standards of proof in guardianship proceedings (that is, 'beyond reasonable doubt' as opposed to 'clear and convincing evidence' or 'on the balance of probabilities')." The lower standard of proof would be likely to result in more guardians being appointed in respect of people who do not need guardianship at all, whereas the higher standard of proof might theoretically result in fewer guardians being

<sup>68</sup>McLaughlin, *op. cit.*, p. 106.

<sup>66</sup>Dependent Adults Act 1976 (Alberta, Canada) s. 3(1); McLaughlin, Draft Statute, s. 3(1); American Bar Association, Model Statute, ss. 7(2), 310); Saskatchewan Law Reform Commission, Proposed Legislation, s. 5(1); Victorian Minister's Committee, Proposed Bill, s. 24(1), (2); Guardianship and Administration Board Bill 1985 (Vic.), s. 19.

<sup>67</sup>Rule 217 of Rules of Practice of Ontario, cited in McLaughlin, *op. cit.*, 107.

<sup>68</sup>McLaughlin, *op. cit.*, p. 107.

<sup>68</sup>Saskatchewan Law Reform Commission, Proposed Legislation, 2. 5(2).

<sup>70</sup>Frolik, 640.

appointed in respect of people who do need some form of guardianship. Thus the standard of proof chosen depends on which of the above 'decisional outcomes' we favour." If we attach greater importance to the liberty of people, and if we are influenced by the difficulty of 'drawing the line' between intellectual competence and incompetence in this 'grey area', then we would favour the higher standard of proof.

It has been suggested that there is also potential for reform in the area of evidentiary standards. Even though the normal civil rules of evidence should apply in guardianship proceedings which take place in the ordinary courts, hearsay evidence in the form of letters or affidavits from physicians is often allowed in lieu of direct testimony. Frolik argues that cross-examination of the physician is essential given the overwhelming importance, if not dispositive nature, of medical judgment:<sup>72</sup> McLaughlin, however, sees no reason why evidence establishing the need for guardianship should not be in the form of sworn affidavits, although he would require the proposed guardian to appear personally for the court to judge his suitability." It has been suggested that most evidentiary concerns would be met if a vigorous, adversarial advocate were present to represent persons subject to the application and protect them from prejudicial or unreliable evidence.

In line with its rejection of an adversarial approach to guardianship hearings, the Victorian Minister's Committee suggested that the Guardianship Tribunal should play an active role in seeking information relevant to the guardianship application:<sup>74</sup> This would presumably enable the Tribunal to call witnesses of its own accord, cross-examine and introduce evidence not put forward by either party.

In the American Bar Association's Model Statute the burden of proof is on the 'petitioner' (or applicant) throughout and the standard of proof required is 'beyond reasonable doubt'." It is suggested that the burden of proof can be used as a powerful force in implementing a legislative policy such as the use of the least restrictive alternative.

## Broad standing provisions

The Victorian Minister's Committee suggested that persons should be encouraged to apply for guardianship where this would benefit the subject of the application, and were critical of existing legislation which sought to limit the categories of persons who are able to apply for guardianship. The Committee's recommendation was that any person should be able to apply to the Tribunal for an order appointing either themselves or someone else as guardian:<sup>76</sup>

The Dependent Adults Act provides that 'any interested person' may apply for guardianship", and defines 'interested person' to mean the Public Trustee, the Public Guardian, or any person over the age of eighteen who is concerned for the welfare of the person subject to the guardianship application. This is broad, but would exclude, for example, a creditor who was only concerned with the welfare of a debt. McLaughlin feels

<sup>72</sup>ibid., 639.

<sup>73</sup>McLaughlin, op. cit., p. 108.

<sup>74</sup>Victorian Minister's Committee, Proposed Bill, s. 17(1). See also Guardianship and Administration Board Bill 1985 (Vic.), s. 8(1)(3).

<sup>75</sup>American Bar Association, Model Statute, s. 44.

<sup>76</sup>Victorian Minister's Committee Report, p. 32. See also Victorian Minister's Committee, Proposed Bill, s. 23(1).

<sup>77</sup>Dependent Adults Act 1976 (Alberta, Canada), s. 2.

that it is inappropriate for the Public Trustee to be a guardian, and does not favour the appointment of a Public Guardian. His Draft Statute refers only to persons concerned for the welfare of the person subject to the guardianship application or review.<sup>78</sup> It has been suggested that broad standing provisions may play a part in frustrating the effective operation of a guardianship law by allowing each group to leave it to the other to take the initiative in mobilising the law. However, other factors such as lack of publicity and public explanation and education are probably far more decisive in the practical success or failure of a guardianship law.<sup>79</sup>

## OTHER PROCEDURAL ISSUES

### Who should be guardian?

There are several possible answers to this question. First, the court or other decision-making body might admit a person to its own guardianship. This is the approach of the South Australian Guardianship Board under the Mental Health Act 1976-7 (S.A.). The Guardianship Board delegates some of the functions of guardianship to other persons, but retains the power of guardianship itself. For example, the Board might place the ward in the care and custody of a relative or some other person, or order that the ward be placed in a specific facility for treatment.

A second possibility for the role of guardian is a government agency, either one which is already providing services to developmentally disabled persons or one which is responsible only for guardianship. Both of these possibilities, along with the arguments for and against them, are discussed in the section dealing with the welfare or service-oriented model of guardianship.<sup>81</sup> This form of guardianship would obviate the need for protracted agonising over the suitability of the person proposed as guardian, and the court or tribunal could concentrate on the question of whether the person subject to the application satisfies the criteria for admission to guardianship.

Another possibility is the use of non-profit corporations. This approach is popular in the U.S.A. It is seen as a means of exploiting the good will that exists in the service clubs and other suitable organisations. Jurisdictions which make provision for corporate guardianship are Washington State<sup>82</sup>, the State of New York<sup>83</sup>, Illinois<sup>84</sup>, Colorado<sup>85</sup> and Ohio.<sup>86</sup> The model statute of the American Bar Association provides for corporation (both non-profit and run-for-profit) to be appointed as conservators<sup>87</sup> (i.e. property guardians), but corporate guardianship was considered too impersonal for the role of personal guardianship. However, it felt that the good will existing in the service clubs could still be exploited by encouraging members to become volunteer personal guardians 88

<sup>78</sup>McLaughlin, O. cit., 104.

<sup>79</sup>See the discussion of the North Carolina legislation in T. Carney, 'Civil and social guardianship for intellectually handicapped people, (1982) 8 *Monash University Law Review*, 222.

<sup>80</sup>Victorian Minister's Committee Report, p. 46, citing s. 27 of the Mental Health Act 1935-79 (S.A.).

<sup>81</sup>See Chapter Five above.

<sup>82</sup>Victorian Minister's Committee Report, p. 47.

<sup>83</sup>Robert J. Hodgson, 'Guardianship of mentally retarded persons: three approaches to a long neglected problem' (1973) 37 *Albany Law Review*, 433.

<sup>84</sup>Victorian Minister's Committee Report, p. 47.

<sup>85</sup>Hodgson, op. cit., 434.

<sup>86</sup>Victorian Minister's Committee Report, p. 47.

<sup>87</sup>American Bar Association, Model Statute, s. 13.

<sup>88</sup>American Bar Association, op. cit, p. 99.

It is likely that the same problems with respect to delegation, responsiveness and accountability that arise with agency guardianship<sup>89</sup> would arise with corporate guardianship.<sup>90</sup> Moreover, the notion of corporate guardianship does not fit in with the goal of normalisation, which demands that intellectually incapacitated persons be placed in circumstances which are as close as possible to 'normal'.

The Victorian Minister's Committee, whose proposed guardianship scheme has as one of its goals the promotion of family and community involvement in decision-making for intellectually disadvantaged persons, preferred an approach which enables the appointment of individuals as guardians.<sup>91</sup> However, the Committee also favoured the appointment of a Public Advocate who would act as a guardian of last resort. McLaughlin saw the choice of a legalistic model for guardianship as excluding the use of government agencies (as well as corporations) from the role of guardian, which leaves only individual volunteers.<sup>92</sup>

So, what principles should guide the court or tribunal when it is faced with the task of deciding whether the person proposed as guardian is suited to the role?

One of the most important aspects of guardianship is the development of a relationship between the ward and the guardian which enables the guardian to make decisions in the best interests of the ward. This requires an empathy between guardian and ward, so that the guardian can place himself/herself in the ward's shoes when making decisions on his/her behalf.<sup>93</sup>

The ideal guardian should therefore be someone who is well known to the future ward and who has formed a mutual affection with the ward. The guardian should also have ready access to the ward, in order to be in a position to make decisions regarding the life of the ward. Finally, the guardian should not be in a position where self interests might conflict with those of the ward. That is, he/she should not be someone who is performing remunerative services for the ward, such as a doctor, teacher or lawyer."

Under the Model Statute of the American Bar Association, no person may become a guardian who:

- (i) Is performing or is responsible for performing some service other than a guardianship or conservatorship service for the respondent;
- (ii) Is providing some form of treatment or is responsible for providing such treatment to the respondent;
- (iii) Is a creditor of the respondent; or
- (iv) Has interests which may otherwise conflict with those of the respondent.<sup>95</sup>

Under McLaughlin's Draft Statute, the proposed guardian must not be:

. . . in a position where his personal or financial interests conflict with the personal or financial interests of the person subject to the guardianship application, and in particular, does not have a professional/client relationship with the person subject to the guardianship application nor is the officer, employee or agent of an agency that is delivering health or social services to the person subject to the guardianship application.<sup>96</sup>

<sup>89</sup>See Chapter Five above. . . 'McLaughlin, op. cit., p. 99. <sup>90</sup>Victorian Minister's Committee Report, p. 48.

<sup>91</sup>McLaughlin, op. cit., p. 99.

<sup>92</sup>Susan Hayes & Robert Hayes, *Mental retardation - law, policy and administration*, Law Book Co., Sydney, 1982, p. 220.

p. 222.

<sup>93</sup>American Bar Association, Model Statute, s. 13(1)(a).

<sup>94</sup>McLaughlin, Draft Statute, s. 5(3)(c).

The Alberta Dependent Adults Act,<sup>97</sup> and the Proposed Bill of the Victorian Minister's Committee<sup>98</sup> both exclude from the role of guardian persons whose interests generally conflict with those of the person subject to the guardianship application. The Proposed Legislation of the Law Reform Commission of Saskatchewan appears to have no such requirement.<sup>99</sup>

The Victorian Minister's Committee noted that professional people working in the field of developmental disability had expressed concern that they would be excluded from consideration as guardians.<sup>100</sup> The Committee thought that the exclusion should only operate against persons providing services of a direct nature to the person subject to the guardianship application, and not against those who, although delivering services to that person, are in a remote relationship with the person. The Committee added that the Guardianship Tribunal would have to give special attention to cases falling between the two extremes to which they referred.<sup>101</sup>

The Committee also noted some concern that parents of intellectually disadvantaged persons would be in a conflict of interest situation, saying that its belief was that, in a great many cases, parents would be the logical and desirable choice to fill the guardianship roles.<sup>102</sup> One of the considerations that the proposed Victorian Tribunal would have to take into account when deciding whether the proposed guardian is suitable is 'the desirability of preserving existing family relationships'.<sup>103</sup> Moreover, the Tribunal cannot rule that a parent is in a conflict of interest situation 'by virtue only of the fact that he is a parent'.<sup>104</sup> There is a similar provision in the American Bar Association's Model Statute.<sup>105</sup>

There will be situations, however, in which the parents are unsuitable as guardians. The New South Wales Anti-Discrimination Board reported just such a case in 1981.<sup>106</sup> It concerned a 30 year old moderately disadvantaged woman who attended a sheltered workshop and lived at home with her parents. Following a series of 'temper tantrums' she was admitted to hospital. The psychologist's view was that the woman's intellectual impairment and psychological problems were exacerbated by her parents' attitudes of fear, anxiety and over-protectiveness. The Board reported that the woman was frustrated because her parents treated her as a child, although she was physically mature. She feared what would happen to her when her parents died, but nothing was being done to prepare her for this.<sup>107</sup> The psychologist stated:

In my opinion . . . they are ignoring her potential and as a result are dragging her down to a much lower level than is necessary . . . This case is by no means a rare one, it is quite common especially with respect to young female intellectually handicapped adults.<sup>108</sup>

<sup>97</sup>Dependent Adults Act 1976 (Alberta, Canada), s. 7(1)(b).

<sup>98</sup>Victorian Minister's Committee, Proposed Bill, s. 28(1)(6); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 23(1)(b).

<sup>99</sup>Saskatchewan Law Reform Commission, Proposed Legislation; only s. 6 appears relevant.

<sup>100</sup>Victorian Minister's Committee Report, p. 50.

p. 51.

<sup>101</sup>Victorian Minister's Committee, Proposed Bill, s. 28(2)(a); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 23(2)(b).

<sup>102</sup>Victorian Minister's Committee, Proposed Bill, s. 28(3); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 23(3).

<sup>103</sup>American Bar Association, Model Statute, s. 13(1)(b).

<sup>104</sup>New South Wales Anti-Discrimination Board, *Discrimination and intellectual handicap*, N.S.W. Govt Pr., 1981.

<sup>105</sup>*ibid.*, 309-10.

<sup>106</sup>*ibid.*, 310.



Having set out the categories of persons who are excluded from acting as guardians, the American Bar Association's Model Statute gives a list of priorities to guide the court's selection:

- (i) The individual or corporation nominated by the respondent;
- (ii) The current . . . [personal guardian or conservator of the respondent];
- (iii) The respondent's spouse;
- (iv) An adult child of the respondent;
- (v) A parent of the respondent;
- (vi) An individual or corporation nominated by the will of a deceased parent;
- (vii) An individual with whom the respondent has been living for more than 6 months prior to the filing of the petition;
- (viii) A sibling of the respondent;
- (ix) A volunteer public guardian and/or a volunteer public conservator.<sup>109</sup>

The priority list is intended only as a guide, and this is brought out by s. 13(2)(b), which reads in part:

The court may select the individual or corporation best qualified and most willing to serve from among those of equal priority. In addition, the court may pass over a person or corporation having priority and appoint a person having less priority or no priority when it is demonstrated that the selection will be of greater benefit to the [proposed ward].

The Victorian Minister's Committee rejected the priority model, preferring a system which identifies the sorts of qualities which a good guardian should possess. Thus the Tribunal must be satisfied that the proposed guardian will act in the best interests of the person subject to the application, and is a suitable person to act as the guardian of that person.<sup>110</sup> In addition, the Tribunal must take into account:

- (a) the desirability of preserving existing family relationships;
- (b) the compatibility [sic] of the person proposed as guardian with the represented person and with the administrator, if any, of the represented person's estate;
- (c) the wishes of the represented person; and
- (d) whether the person proposed as guardian resides sufficiently near to the represented person (c) he is a suitable person to act as the guardian of the dependent adult, and

The Alberta Dependent Adults Act, the legislation proposed by the Saskatchewan Law Reform Commission and McLaughlin's Draft Statute all prefer the above approach to the priority model of the American Bar Association.

Under the Dependent Adults Act, the court may appoint as a guardian any person over 18 years of age who consents to the appointment and in respect of whom the court is satisfied that:

- (a) he will act in the best interests of the dependent adult,
- (d) he is a resident of Alberta.<sup>112</sup>

The requirements of McLaughlin's Draft Statute in this regard are substantially similar to those of the Dependent Adults Act.

<sup>109</sup>American Bar Association, Model Statute, s. 13(2)(a).

<sup>110</sup>Victorian Minister's Committee Proposed Bill, s. 28(1)(a), (c); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 23(1).

<sup>111</sup>Victorian Minister's Committee, Proposed Bill, s. 28(2); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 23(2).

<sup>112</sup>Dependent Adults Act 1976 (Alberta, Canada), s. 7(1).

Perhaps more important to the goal of securing human and civil rights for persons subject to guardianship are the legislative provisions setting out the duties of guardians and principles by which they are to be guided. The Proposed Bill of the Victorian Minister's Committee requires that:

- (1) A guardian shall act in the best interests of the represented person.
- (2) Without limiting the generality of sub-section (1), a guardian acts in the best interests of the represented person if he acts as far as possible —
  - (a) as an advocate for the represented person;
  - (b) in such a way as to encourage the represented person to participate as much as possible in the life of the community;
  - (c) in such a way as to encourage and assist the represented person to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person;
  - (d) in such a way as to protect the represented person from neglect, abuse or exploitation; and
  - (e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.<sup>113</sup>

McLaughlin's Draft Statute contains substantially similar guidelines<sup>114</sup>, as does the Alberta Dependent Adults Act, although its provision is less exhaustive.<sup>115</sup> The Proposed Legislation of the Saskatchewan Law Reform Commission differs only in that it makes specific mention of the protection of the ward's civil and human rights as one of the duties of a guardian. The Model Statute of the American Bar Association also refers to the 'personal, civil, and human rights' of persons subject to guardianship.<sup>116</sup> Section 17(1)(b) casts a duty on guardians and conservators to encourage their wards to:

- (i) Participate to the maximum extent of their abilities in all decision which affect them;
- (ii) Act on their own behalf in all matters in which they are able to do so; and
- (iii) Develop or regain, to the maximum extent possible, their capacity to meet the essential requirements for their physical health or safety, and, if impaired, their capacity to manage their financial resources.

Some combination of the principles referred to above would be suitable for most models of guardianship. It is not so much in the statement of principles and duties as the interpretation of how to implement principles and discharge duties that the various models differ.

## Review of guardianship orders

There appears to be general agreement that an interested person should be able to apply for a review of a guardianship order at any time. There is also broad support for automatic periodic reviews. Thus McLaughlin recommends that there should be periodic review in all cases. He also recommends that when an application for a review is made, notice should be served upon any person who was required to be served with notice of the original guardianship application!"

Opinions as to the desirable periodicity of automatic reviews differ. The most stringent in this regard are the Proposed Bill of the Victorian Minister's Committee and the Model Statute of the American Bar Association. At the other extreme, the Proposed Legislation of the Saskatchewan Law Reform Commission allows for up to five years to pass between reviews.

<sup>113</sup>Victorian Minister's Committee, Proposed Bill,, 31(1), (2); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 28.

<sup>114</sup>McLaughlin, Draft Statute, s. 8(1).

<sup>115</sup>Dependent Adults Act 1976 (Alberta, Canada), s. 11.

<sup>116</sup>American Bar Association, Model Statute, s. 17.

<sup>117</sup>McLaughlin, op. cit., p. 113.

The Proposed Bill of the Victorian Minister's Committee provides for guardianship orders to be reassessed within six months of the original order<sup>118</sup>, and thereafter for reviews to be held at least every twelve months.<sup>119</sup> Further, the Guardianship Tribunal may conduct a review at any time, either of its own motion or on the application of the ward, a person on behalf of the ward or any other person.<sup>120</sup> The notice provision for reviews<sup>121</sup> is similar to that which applies to the hearing of the original guardianship application.<sup>122</sup> Upon completing its review, the Tribunal may by order amend, vary, continue or replace the order, subject to any conditions or requirements it considers necessary, or it may revoke the order.<sup>123</sup>

Under the Model Statute of the American Bar Association, the initial review following the appointment of a limited guardian or conservator must be held within a year of the dispositional hearing', and subsequent review hearings must be held at intervals of no more than two years until the guardianship or conservatorship is terminated.<sup>124</sup> Following the appointment of a personal guardian or conservator with plenary powers, a review hearing must be held within six months of the dispositional hearing and at least yearly thereafter until the guardianship or conservatorship is terminated.<sup>125</sup> More frequent reviews are required where plenary powers are held because they impose a greater restriction on the legal capacity of the ward, and because it is less likely that the ward will be able to apply for modification or termination of the guardianship or conservatorship.<sup>126</sup>

At a review hearing the court must determine why the appointment should not be terminated and why a no less restrictive alternative will be sufficient.<sup>127</sup> Further, upon a prima facie showing that there has been a significant change in the abilities of the ward, the court may order a re-evaluation of the ward's capabilities.<sup>128</sup> It is also provided that the principles, criteria, form and procedures laid down in ss. 12, 13 and 14 of the Model Statute for the hearing of an original guardianship petition shall govern the conduct of periodical review hearings.<sup>129</sup> At the conclusion of the review hearing, the court may terminate or modify the order, or it may continue the order until the next review hearing.<sup>130</sup>

There is also a procedure through which a ward, or some person who is interested in his welfare, may seek to modify or terminate the order or the restrictions which have been placed on the legal capacity of the ward.<sup>131</sup> Again, the principles, form, criteria and procedures laid down in ss. 12, 13 and 14 must be adhered to.<sup>132</sup> Also, notice provisions apply as for an original guardianship petition.<sup>133</sup>

<sup>118</sup>Victorian Minister's Committee, Proposed Bill, s. 69. In this footnote and footnotes 119-23 below, the citations are identical for the Guardianship and Administration Board Bill 1985 (Vic.).

<sup>119</sup>s. 70.

<sup>120</sup>s. 71.  
<sup>121</sup>s. 72.

<sup>122</sup>See 'Notice' above.

<sup>123</sup>Victorian Minister's Committee, Proposed Bill, s. 73.

<sup>124</sup>American Bar Association, Model Statute, ss. 15(1)(a), 30(1)(1).

<sup>125</sup>ss. 15(1)(b), 30(1)(m).

<sup>126</sup>American Bar Association, op. cit., p. 101.

<sup>127</sup>American Bar Association, Model Statute, s. 15(2)(a).

<sup>128</sup>s. 15(3).

<sup>129</sup>s. 15(4).

<sup>130</sup>s. 16(1).

<sup>131</sup>s. 16(8).

<sup>132</sup>s. 32.

Under McLaughlin's Draft Statute, there must be a review of a guardianship order either within two years of the orders being made, or at any time before that on the application of the ward or any interested person.<sup>134</sup> The notice provisions for review by application are the same as those which apply to the original guardianship hearing.<sup>135</sup>

At the hearing of the review the court is instructed to enquire into any change in the circumstances of the ward and into the performance by guardians of their duties.<sup>136</sup> The court may generally make such enquiries and receive such evidence as it is entitled to do on an original guardianship application.

If the court considers that the ward no longer requires a guardian, it may discharge the guardian from office. The guardian may also be discharged from office if the guardian:

- (a) is unable or unwilling to continue to act as guardian,
- (b) refuses to act or continue to act as guardian,
- (c) has failed to act as guardian or to act in accordance with the guardianship order,
- (d) has acted in an improper manner or in a manner which has or may endanger the interests of the [ward],
- (e) is no longer a suitable person to act as guardian, or
- (f) is no longer a resident of [the relevant jurisdiction].<sup>137</sup>

Before the guardian is discharged, the court must be satisfied, where necessary, that suitable arrangements have been made or will be made with respect to the ward, or that another guardianship application will be made.<sup>138</sup> This provision presumably refers, by the expression 'where necessary', to the situation where the guardian is discharged because of some failing on their own part.

The Dependent Adults Act differs in that it does not provide for automatic periodic reviews. However, the dependent adult or any interested person may apply for a review at any time.<sup>139</sup> The powers and duties of the court on hearing the review, and the range of criteria for discharging the guardianship, are the same as those set out in McLaughlin's Draft Statute.<sup>140</sup>

The Proposed Legislation of the Saskatchewan Law Reform Commission requires the court, when making a guardianship order, to specify the time within which a review of the order must be held. This time must not be more than five years.<sup>141</sup>

The full five years latitude may rarely be taken advantage of, but it nevertheless seems to be an unnecessarily long time. This is especially so with respect to the first review after the original order is made. Experience will often be the best guide to the appropriateness or otherwise of a particular guardianship order. It therefore seems desirable that an initial guardianship order be held within a year, at the most, of the original orders being made. Thereafter, an automatic review every two years would probably be sufficient; yearly reviews might prove expensive. However, there should always be provision for review by application 'at any time'.

The review should play a dual role: it should look into whether the ward still requires a guardian and it should examine the performance of the guardian. The latter role is a good means of controlling guardians once they are appointed. In order to emphasise this role, the provision relating to review should direct the court or tribunal to look into the

<sup>134</sup>McLaughlin, Draft Statute, s. 9(1), (2).

<sup>135</sup>s. 9(3), (4), (5), (6).

<sup>136</sup>s. 9(7).

<sup>137</sup>s. 9(12).

<sup>138</sup>s. 9(13).

<sup>139</sup>Dependent Adults Act 1976 (Alberta, Canada), s. 9(1).

<sup>140</sup>, <sup>19(3)</sup>, (4), (5).

<sup>141</sup>Saskatchewan Law Reform Commission, Proposed Legislation, s. 11(1)(a).

performance by guardians of their duties, and should set out criteria for discharging guardians from office if their performance falls short of the required standard. Both the Dependent Adults Act and McLaughlin's Draft Statute are satisfactory in this regard.

## Appeals

Where decision-making power in guardianship matters is vested in the ordinary courts, the rights of appeal against the court's decision are as provided for in the Rules of Court of the particular jurisdiction, subject to any privative clauses in the guardianship legislation.

Where a statutory body (e.g. a Guardianship Board or Tribunal) is set up by legislation to handle guardianship matters, the legislation should provide for appeals to an appropriate court in the jurisdiction. This would usually be the superior court of record. The South Australian statutory Board, and the Tribunal proposed for Victoria, provide examples of what is required.

Under the Mental Health Act 1976-1977 (S.A.), where the Guardianship Board has made a guardianship or administration order or an order placing a person in the custody of another, the ward, a relative, the Director of Mental Health Services or any other person with a proper interest may appeal to the Mental Health Review Tribunal against the order.<sup>142</sup> The Tribunal has the power to amend, vary or revoke the order of the Board.<sup>143</sup>

There is also provision for any person aggrieved by a decision or order of the Tribunal to appeal to the Supreme Court.<sup>144</sup> Further, there is a requirement that the person in respect of whom any appeal is brought be represented by counsel, unless the person does not desire representation and has sufficient command of mental faculties to make a rational judgment in the matter.<sup>145</sup> Under the Proposed Bill of the Victorian Minister's Committee, the Guardianship

Tribunal may reserve a question of law to the Supreme Court in the form of a special case stated.<sup>146</sup> More importantly, at least as far as persons subject to guardianship applications are concerned, a person aggrieved by an order of the Tribunal may appeal to the Supreme Court.<sup>147</sup> The limitation period for making the appeal is generally three months from the making of the order appealed against<sup>148</sup>, but in cases of temporary orders or orders relating to medical procedures, the limitation period is fourteen days.<sup>149</sup>

<sup>142</sup>Mental Health Act 1976-77 (S.A.), s. 37(1).

<sup>143</sup>s. 43

<sup>144</sup>s. 44

<sup>145</sup>s. 39(1), (2).

<sup>146</sup>Victorian Minister's Committee, Proposed Bill, s. 65(1); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 64.

<sup>147</sup>s. 66(1); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 65(1).

<sup>148</sup>s. 66(2); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 65(2).

## Chapter Seven

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# Medical, income and property matters

This chapter takes up some of the other important issues associated with disadvantaged persons. Questions relating to the capacity of a person to enter into enforceable bargains or to make a valid will, and liability for damages caused to the person or property, will be addressed. But first we must consider the position in relation to medical treatment (particularly irreversible medical procedures) and property matters.

### MEDICAL TREATMENT

In general, a medical practitioner who administers medical treatment to a patient without the consent of the patient or the person qualified to consent on that person's behalf may be liable for battery.<sup>1</sup>

According to the World Health Organization, informed consent:

. . . means that the patient, or the responsible person, has been told the pros and cons of the proposed treatment, including any probable adverse consequences, and has been able to consider them before making a decision to accept the treatment.<sup>2</sup>

In some situations, however, medical treatment without consent is justifiable. For example, if medical treatment is administered to unconscious or incompetent individuals in order to preserve their lives, there is no battery, provided the individuals concerned have expressed no contrary view when competent.<sup>3</sup>

The right to consent to medical treatment is not totally dependent upon achieving the age of eighteen. The important factor is the capacity of the patient to give a valid consent. A medical practitioner who is considering administering treatment to a patient must be satisfied that the patient has the capacity to give an informed consent to the treatment. That is, he/she must be satisfied that the patient understands the nature and effect of the procedure.

When a person is incapable of consenting to medical procedures, either because of extreme youth or because of intellectual disability, that consent may, in certain situations, be given by a third party. The third party might be the parent of a minor, or a court-appointed guardian.<sup>4</sup>

It is more complicated when an intellectually disadvantaged person attains the age of eighteen. Then the guardianship of the person's parents, and along with it the right to consent to medical procedures on the person's behalf, ceases.<sup>5</sup> The law then presumes that the adult may consent, and this presumption is abandoned only when it is clear that the person cannot.<sup>6</sup>

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<sup>1</sup>Susan Hayes & Robert Hayes, *Mental retardation—law, policy and administration*, Law Book Co., Sydney, 1982, p. 52.

<sup>2</sup>World Health Organization, *Introductory Guidelines to Mental Health Legislation (Draft)*, quoted in Hayes & Hayes, *op. cit.*, p. 52.

<sup>3</sup>Hayes & Hayes, *op. cit.*, p. 53.

<sup>4</sup>*ibid.*, p. 56.

<sup>5</sup>*ibid.*

<sup>6</sup>H. Rutherford Turnbull (ed.), *Consent handbook*, American Association on Mental Deficiency Inc. (Washington, Special Publication No. 3, 1977), p. 16, cited in Hayes & Hayes, *op. cit.*, p. 56.

The first thing to be determined is whether the patient is really incapable of giving a valid consent. If so, and the proposed treatment is not immediately necessary to preserve life, the medical practitioner runs the risk of an action of trespass to the person.<sup>7</sup> This risk may be avoided in those States in which it is possible to have a disadvantaged person made an involuntary patient under the mental health legislation.<sup>8</sup> In South Australia, when an intellectually disabled person requires medical treatment but lacks the capacity to consent to it, third party consent may be given through the Guardianship Board. The Board may place the person in protective custody, or order specific treatment by placing the person in the custody of the superintendent of a hospital, or require that the person receive medical or psychiatric treatment.<sup>9</sup>

Even where a legal guardian is in place, there are limitations imposed upon his/her authority by the common law.<sup>10</sup> The authority of a guardian to consent to medical care on behalf of the ward does not extend to procedures which are clearly not in the ward's interests. For example, there would be no justification for removing a limb from a perfectly healthy patient, even with the guardian's consent. On the other hand, the same procedure, if intended to remove a gangrenous limb which endangered the health of the patient, could be the subject of a valid consent by the guardian."

A problem is posed by non-therapeutic medical treatments and procedures. Such procedures may include sterilisation, the removal of the teeth of a patient who bites staff, medical experimentation and research from which the patient derives no direct benefit<sup>12</sup>, and even the routine administration of sedatives to inmates of mental hospitals for the convenience of staff.

The issue in relation to such procedures is whether the consent of a guardian can be valid. The law in this area is far from certain at present, and according to the Victorian Minister's Committee, there is no doubt that this has resulted in a number of developmentally disabled people being exposed unnecessarily to major medical procedures, such as sterilisations and abortions.<sup>13</sup> The Committee thought that these questions were of such significance that a guardian should not have authority to consent to a sterilisation operation, a procedure for the termination of a pregnancy or a procedure for the donation of non-regenerative tissue, and listed three important common characteristics of such procedures:

1. potentially grave implications for the person concerned;
2. they are irreversible or often irreversible;
3. they are open to abuse.<sup>14</sup>

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<sup>7</sup>Hayes & Hayes, *op. cit.*, p. 57.

<sup>8</sup>See, for example, Mental Health Act 1958 (N.S.W.), s. 12.

<sup>9</sup>Mental Health Act 1976-77 (S.A.), s. 27(1)(a), (b), (d). See also South Australia, Committee on the Rights of Persons with Handicaps (C.H. Bright, Chairman), *The law and persons with handicaps, vol. 2, Intellectual handicaps*, Adelaide, 1981 pp. 218-19, hereinafter cited as 'Bright Committee Report'; see also Intellectually Handicapped Citizens Act 1985 (Qld), s. 26(3)(a).

<sup>10</sup>Victoria, Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, *Report*, Victorian Government Printer, Melbourne, 1982, hereinafter cited as 'Victorian Minister's Committee Report'. This report also contains proposed legislation cited hereinafter as 'Victorian Minister's Committee, Proposed Bill', to distinguish it from the report. See also *S. v. McC.; W. v. W.* [1972] AC 24,45.

<sup>11</sup>Victorian Minister's Committee Report, p. 61.

<sup>12</sup>Hayes & Hayes, *op. cit.*, p. 60.

<sup>13</sup>Victorian Minister's Committee Report, p. 61.

<sup>14</sup>*ibid.*

## Sterilisations

Sterilisation can be achieved through the surgical procedures of vasectomy for males and tubal ligation or hysterectomy for females. All three procedures are generally irreversible at present.<sup>15</sup>

This monograph is more concerned with non-therapeutic sterilisations, that is, sterilisations performed not for health reasons but for the purpose of rendering an individual incapable of reproducing, or for facilitating the management of menstruation.<sup>16</sup> The Victorian Minister's Committee, the Bright Committee and the N.S.W. Anti-Discrimination Board all claim to have received a number of reports and submissions testifying to the performance of non-therapeutic sterilisations upon intellectually disabled persons.<sup>17</sup>

It seems that non-therapeutic sterilisations are performed more on women than men. Tubal ligation is most commonly used, although hysterectomies are sometimes preferred because they obviate the need to train intellectually disadvantaged women in the management of menstruation. The Anti-Discrimination Board referred to evidence which suggested that sterilisations have been carried out as a precautionary measure prior to the person ever becoming sexually active and regardless of whether she is fertile.<sup>18</sup> The Victorian Minister's Committee noted generally that in Victoria and other States sterilisation had been used as an easy alternative to sex education and independence training.<sup>19</sup>

The alleged benefits of sterilisation for intellectually disadvantaged persons do not stand critical examination.

One frequently promulgated argument is that intellectually disadvantaged persons are sexually at risk. But sexual activities are unaffected by sterilisation.<sup>20</sup> According to Hayes & Hayes:

. . . sterilisation does not effect the real, feared or imagined sexual promiscuity, or seduction of the retarded person — only sex education, training in social skills, or strict supervision would be helpful.<sup>21</sup>

Another argument is that intellectually disadvantaged persons make bad parents. However, parenting does not depend primarily upon intelligence, but rather upon such things as love and affection, performance of household tasks, and attending to the physical needs of the child. Intellectually disadvantaged citizens have been shown not only to be capable of adequate parenting, but to be capable of good parenting.<sup>22</sup>

It might be said that while intellectually disadvantaged people can be good parents, they cannot control their reproductive capacity. They are prone to have children despite the fact that they are living under conditions totally unsuitable for child-rearing. This point has some substance to it; but sterilisation is too drastic a response. If it is conceded that circumstances could change so that the intellectually disadvantaged person would be in a position to rear a child, it is clearly wrong to perform an operation which would make this impossible. Some other, less permanent method of contraception should be used. Hygiene arguments in favour of performing hysterectomies upon intellectually

<sup>15</sup>Bright Committee Report, p. 122.

<sup>16</sup>N.S.W. Anti-Discrimination Board, *Discrimination and intellectual handicap*, N.S.W. Govt Pr., 1981, p. 297.

<sup>17</sup>Victorian Minister's Committee Report, p. 62; N.S.W. Anti-Discrimination Board, p. 297; Bright Committee Report, p. 122.

<sup>18</sup>N.S.W. Anti-Discrimination Board, *op. cit.*, p. 297.

<sup>19</sup>Victorian Minister's Committee Report, p. 62.

<sup>20</sup>Hayes & Hayes, *op. cit.*, p. 74.

<sup>21</sup>*ibid.*



disadvantaged women appear to reflect the medical profession's inadequate knowledge of training in social and self-help skills for disadvantaged people, as well as general coyness about menstruation."

Arguments based on eugenics are also commonly propounded, even today. The largest group of intellectually disadvantaged persons are only mildly disadvantaged, and this group contains disproportionate numbers of children from lower class families, particularly families evidencing some handicap or disruption. This shows that low standards of living and environmental deprivation are major contributing factors to mild intellectual disadvantage. Short of preventing all such families from reproducing, eugenics would seem to offer little.<sup>24</sup> Eighty-three per cent of intellectually disadvantaged children in any generation have parents of normal intelligence.<sup>25</sup>

The Anti-Discrimination Board expressed concern that non-therapeutic sterilisations were being performed upon intellectually disadvantaged people without their informed consent or even their knowledge. Such action, noted the Board, constitutes a serious denial of the civil rights of the individuals concerned, and appears to be carried out with total disregard for the serious psychological stress that may be caused.<sup>26</sup> The Victorian Minister's Committee agreed with the statement of the Board to the effect that non-therapeutic sterilisations are not necessarily unacceptable.<sup>21</sup> The Board considered that they are only acceptable when those who have the intellectual capacity to give consent, make the choice themselves on the basis of consideration of alternative methods of birth control, and the consequences of sterilisation have been explained.<sup>28</sup>

What happens when intellectually disadvantaged adults are incapable of giving a valid consent? The Bright Committee felt that parents, care-providers and doctors should not have the right to consent on their behalf, because this would involve a usurpation of control over another's body and ability to procreate. The Bright Committee recommended that the decision be made by an independent body, having regard to clear criteria<sup>29</sup>:

- (i) The individual can be presumed to be physiologically capable of procreation.
- (ii) The individual is or is likely to be sexually active.
- (iii) Pregnancy would not usually be intended by a competent person in a similar situation.
- (iv) Appropriate training methods or alternative contraceptive methods have proved unworkable or are inapplicable.
- (v) The next-of-kin (if available) of the person agrees that sterilisation is a desirable course of action for the person on the basis of full information.
- (vi) The Guardianship Board has received evaluations and recommendations based on comprehensive medical, psychological and social evaluation of the individual.
- (vii) It is unlikely that the person will be competent to consent in the foreseeable future.
- (viii) Wherever possible, the person is represented by an independent advocate, competent to deal with the medical, legal, social and ethical issues involved in sterilisation.
- (ix) The person has been granted a full opportunity to express to the Board his or her view which must be taken into account.<sup>30</sup>

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<sup>24</sup>ibid., p. 80.

p. 73.

<sup>25</sup>A. Craft & M. Craft, *Handicapped married couples*, Routledge & Kegan Paul, London, 1979, pp. 30 ff., cited in Hayes & Hayes, op. cit., p. 73.

<sup>26</sup>N.S.W. Anti-Discrimination Board, op. cit., p. 299.

<sup>27</sup>ibid. See also Victorian Minister's Committee Report, p. 73.

<sup>28</sup>N.S.W. Anti-Discrimination Board, op. cit., p.299.

<sup>29</sup>Bright Committee Report, p. 126.

<sup>30</sup>ibid., pp. 128-9.

The Victorian Minister's Committee recommended that consent for all sterilisation operations upon persons subject to guardianship, whether therapeutic or not, should be sought from the Guardianship Tribunal.<sup>31</sup> This was based on their perception that the line between therapeutic and non-therapeutic procedures is very hard to draw. As a consequence of the fact that it is largely a matter in the medical province, it was felt that protections confined solely to the 'therapeutic' category, would readily be circumvented.

The Bright Committee thought that only non-therapeutic sterilisations need be considered by the Guardianship Board.<sup>32</sup> Arguably this would not be adequate as a protection of the interests of the intellectually disadvantaged. Because of the irreversible nature of sterilisation, the Bright Committee also advocated a thirty day delay between the date of the informed consent and the actual operation.<sup>33</sup> Provided there are avenues for accommodating the (presumably quite rare) cases of medical urgency, this 'cooling off' requirement is a valuable inclusion.

## Abortions

According to Hayes & Hayes, the laws relating to abortion in the various States of Australia reflect the belief that abortion should only be allowed under extreme circumstances, for example, if pregnancy poses a threat to the life or health of the mother.<sup>34</sup>

In *R. v. Wald and Others* it was held that if the accused (in that case a medical practitioner) had an honest belief based on reasonable grounds that termination was necessary to protect the woman involved from serious danger to her mental health, there was a defence to a charge of unlawfully procuring an abortion under s. 83 of the New South Wales Crimes Act 1900. In determining whether there is a danger to the woman's mental health, the court may consider not only mental disease, but also the unsettling effect of economic or social stress.<sup>36</sup>

In Victoria it is a felony unlawfully to procure or attempt to produce an abortion. In *R. v. Davidson*<sup>37</sup> it was held that it is not unlawful for a doctor to procure an abortion for the purposes of preserving the life of a woman, or protecting her physical or mental health.

Queensland<sup>38</sup>, Tasmania<sup>39</sup> and Western Australia<sup>40</sup> all provide a statutory defence to the offence of procuring an abortion where the procedure is necessary for the preservation of the mother's life or if the performance of the procedure is reasonable.

The Victorian Minister's Committee expressed the belief that the application of these principles is much more difficult where the patient is unable to consent herself to an abortion and where the medical practitioner must rely upon information from a person other than the patient for an assessment of the effect upon the patient's mental health which a continued pregnancy might have. The Committee therefore recommended that questions relating to abortions be determined by the Guardianship Tribunal.'

<sup>31</sup>Victorian Minister's Committee Report, p. 63; see also Guardianship and Administration Board Bill 1985 (Vic.), ss. 3,7(a), 43(a).

<sup>32</sup>Bright Committee Report, p. 127.

<sup>33</sup>ibid.

<sup>34</sup>Hayes & Hayes, op. cit., p. 38.

<sup>35</sup>*R. v. Wald and Others* (1972) 3 DCR 25.

<sup>36</sup>Hayes & Hayes, op. cit., p. 39. <sup>37</sup>*R.*

*v. Davidson* [1969] VR 667. <sup>38</sup>Criminal Code, 1899 (Qld), s. 282.

<sup>39</sup>Criminal Code Act, 1924 (Tas.), is. 55(1), 165.

<sup>40</sup>Criminal Code, 1959 (W.A.), s. 259.

<sup>41</sup>Victorian Minister's Committee Report, pp. 64-5.

## Donation of non-regenerative tissues

This issue has never been litigated in Australia, but there have been cases in the U.S.A.<sup>42</sup> In a recent case in Texas, the judge drew attention to the need for this problem to be addressed by the legislature, in order to yield a:

... system of rules to adequately protect minors and other incompetents from exploitation without denying them such benefits as competent adults may derive from the organ donating experience.<sup>43</sup>

By contrast, the Australian Law Reform Commission was concerned that consent as a defence to battery may have no application in the case of a donor of tissue because, in spite of the consent, it can hardly be said that the procedure is for the donor's benefit.<sup>44</sup> The Law Reform Commission was therefore of the opinion that 'it should not be lawful to take tissue from the intellectually incompetent'.<sup>45</sup>

In the U.S. case of *S trunk v. S trunk*<sup>46</sup>, the court approved of parental consent to a kidney transplant from a 27 year old intellectually disadvantaged man to his non-disadvantaged twin brother, but only on the basis that the death from kidney disease of the non-disadvantaged twin would have had a damaging emotional and psychological effect upon the disadvantaged twin.<sup>47</sup>

The Victorian Minister's Committee agreed that in certain circumstances tissue donation by persons subject to guardianship could be in their own best interests. However, since there is potential for abuse of the rights of such people, the Committee recommended that where questions of non-regenerative tissue donation arise, the circumstances of the case should be examined by an appropriate judicial body. The Committee felt that the Guardianship Tribunal should take on this task.<sup>48</sup> It also noted that its proposals in this area would not affect the common law position regarding emergency treatment, which is that consent is not required for the treatment of a patient whose life or health is in immediate danger if it would be impractical at the time to obtain the consent.'

## Legislative examples

Under s. 37 of the Victorian Guardianship and Administration Board Bill 1985 a person shall not carry out any procedure:

- (a) for the sterilisation of a represented person;
- (b) for the termination of the pregnancy of a represented person;
- or
- (c) for the removal of non-regenerative tissue from the body of a represented person for the purpose of the transplantation of the tissue to the body of another living person — with the consent of the guardian unless the consent of the Board has also been obtained.

Under s. 38, a guardian may not consent to those procedures unless the consent of the Board has first been obtained. Section 39 provides that a guardian or ward may apply to the Board for its consent to one of the procedures referred to in s. 37. Section 40 provides for notice to be given to a range of persons at least seven days before the hearing

<sup>42</sup>ibid., p. 65.

<sup>43</sup>*Little v. Little* 576 SW 2d 493 (1979).

"Australian Law Reform Commission, *Human tissue transplants*, (Report No. 7), AGPS, Canberra, 1977 (cited in Hayes & Hayes, op. cit., p. 61.

"ibid., pp. 50-1.

<sup>46</sup>*Smink v. Strunk* KY 445 SW 2d 145 (1969).

<sup>47</sup>ibid.

"Victorian Minister's Committee Report, pp. 65-6.

p. 67, citing J. G. Fleming, *The law of torts*, 5th edn, Law Book Co., Toronto, 1977, p. 81.

of the application. Under s. 42 the Board must hear an application within fourteen days of its being lodged. Finally, s. 43 provides that if the Board is satisfied that it would be in the best interest of the ward, it may consent to any of the procedures referred to in s. 37 being carried out upon the ward.

There are ample procedural safeguards here, but the criteria are a bit vague. Fuller criteria, especially in relation to sterilisation and donation of non-regenerative tissue, might better protect the interests and rights of the ward.

Section 17(5)(b) of the Model Statute of the American Bar Association provides that a limited personal guardian or personal guardian shall not have the power to:

. . . consent on behalf of a partially disabled or disabled person to an abortion, sterilisation, psychosurgery, or removal of a bodily organ, except as provided in (citation to the Model Personal and Civil Rights Act) or when necessary to preserve the life or prevent serious impairment of the physical health of that person.

Paragraphs (c) and (d) similarly limit the power of a guardian to consent to the withholding of 'non-heroic' life-saving medical procedures and experimental biomedical or behavioural medical procedures (unless such procedures are intended for the benefit of the ward and have been approved by a court).

Under s. 7(3) of the proposed legislation of the Saskatchewan Law Reform Commission, a personal guardian does not have, except with a specific order of the court, the authority:

- (a) . . .
- (b) to consent on behalf of the ward to an *inter vivos* transplant under the *Human Tissue Gift Act*;
- (c) to consent on behalf of the ward to a sterilization except where it is the treatment for some present or inevitable disease;
- (d) to consent on behalf of the ward to a therapeutic abortion except where the continuation of the pregnancy of the ward would or would be likely to endanger her life or health;
- (e) to consent on behalf of the ward to a termination of the ward's parental rights.

Here there are no procedural safeguards expressly laid down by the legislation. It is not clear who would receive notice, and how much notice would have to be given. It is not even clear if the ward would receive notice of the hearing. It therefore cannot be said that the Saskatchewan legislation goes far enough in protecting the rights of persons subject to guardianship in these matters.

## Conclusion

If the human and civil rights of intellectually disadvantaged persons are to be protected adequately in the sensitive area of medical procedures (especially non-therapeutic medical procedures), there will need to be extensive procedural safeguards laid down for these hearings, and there should also be distinct and clear criteria to guide the court or tribunal. Although the Victorian Government Bill has the procedural safeguards, none of the models referred to above has the clear criteria. Comprehensive criteria, of the kind advocated by the Bright Committee in relation to sterilisation, should be formulated for all sensitive medical procedures.

Any scheme which leaves these questions to be determined by the court is conforming in some degree to the legalistic model for guardianship. The more procedural safeguards and comprehensive criteria provided, the more legalistic the model. For example, although the Victorian Bill has ample procedural safeguards, its vague criteria (the best interests of the represented person) allow a 'welfare' element to come in. A heavily welfare oriented model might leave such decisions to the guardian of the person concerned and the guardian, under a welfare model, might be a government agency.

## ESTATE ADMINISTRATION

According to a former Chairman of the South Australian Guardianship Board:

Mt has been our experience that issues of person and property are quite often inseparable. For instance, the guarantee of regular rental payment by an administrator may be the only means by which a person can be found accommodation outside of an institution.<sup>50</sup>

The Victorian Minister's Committee recorded 'almost unanimous approval' for its proposal that the Guardianship Tribunal be able to appoint administrators of the estate as well as guardians.<sup>51</sup>

The Committee recommended that legislation providing for the appointment of estate administrators should conform to the same six basic principles which guide decision-making in guardianship proceedings. An estate administrator should be appointed to make decisions only in those areas in which the disadvantaged person lacks decision-making ability. There should be a fair hearing, and the common law presumption that every adult is capable of looking after his/her own affairs should be reinforced. The legislation should prohibit the appointment of an estate administrator whose personal or financial interests conflict or are likely to conflict with those of the ward. The legislation should guarantee a service which is visible and highly accessible at all times to those likely to need it, and the benefits of the legislation should be available, as far as possible, on the basis of need rather than on the basis of a finding that the individual has a specified qualifying handicap.<sup>52</sup>

The Committee also felt that there should be no legislative preference for the Tribunal to appoint the Public Trustee as estate administrator over a private individual.<sup>53</sup> However, estate administration presents some problems. Estate administrators, when dealing with a large estate, require a degree of specialist expertise. According to the Public Trustee, in many cases where the physical and personal needs of a person are looked after perfectly well by a family member, the estate administration is far from perfect.<sup>54</sup>

There is also a conflict of interests problem. The Australian Physiotherapy Association gave the example of:

. . . a sibling who might be a very appropriate guardian for the person [but] might be unwilling, in the role of guardian of the estate, to advise major financial outlays which would deplete a fund he might expect to inherit on the death of the entitled person.<sup>55</sup>

The Victorian Minister's Committee was satisfied that, in a number of cases, private individuals have applied for guardianship in order to reap some financial reward.<sup>56</sup> The Public Trustee referred to cases in which the property and income of a ward has been appropriated or otherwise used improperly for the benefit of a family member<sup>57</sup>, and offered the impartiality of the Public Trustee (and a consequent ability to resolve family disputes) as one of the reasons why the Public Trustee should be preferred to a private individual for administration of the estates of intellectually incompetent persons. This view is now reflected in clause 49(4) of the Government Bill.

The Alberta Dependent Adults Act, and the Proposed Bill of the Victorian Minister's Committee, both have separate sections dealing with the estates of intellectually incompetent persons. However, in the American Bar Association's Model Statute, the

<sup>50</sup>Victorian Minister's Committee Report, p. 81.

<sup>51</sup>ibid.

<sup>52</sup>ibid., p. 84.

<sup>53</sup>ibid., p. 88.

<sup>54</sup>ibid., p. 98.

<sup>55</sup>ibid.

p. 87.

p. 98.

appointment of a conservator (guardian of the estate) or limited conservator is one of the 'dispositional alternatives' listed in s. 11, along with the appointment of a personal guardian or limited personal guardian and other less restrictive alternatives. Where a conservator or limited conservator is appointed, the duties and powers, and the particular financial resources to which they apply, must be specified in the dispositional order.<sup>58</sup>

Under the Proposed Bill of the Victorian Minister's Committee, the procedure relating to the appointment of an estate administrator is similar to that relating to the appointment of a personal guardian. The Guardianship Tribunal may appoint an estate administrator where it is satisfied that the person subject to the administration applications:

- (a) is developmentally disabled;
- (b) has attained the age of eighteen years;
- (c) is unable to make reasonable judgments in respect of the matters relating to all or any part of his estate; and
- (d) is in need of an administrator of his estate.<sup>59</sup>

The Victorian Minister's Committee saw the concept of the least restrictive alternative, one of the guiding principles underlying its recommendations on guardianship, as being equally applicable to estate administration. The Tribunal must consider whether the needs of the person subject to the administration application could be met by less restrictive means.<sup>60</sup> Further, if an order appointing an estate administrator is made, it should be the least restrictive order that is possible in the circumstances. A person might have proven ability to handle small sums of money (say \$500 or \$1000) but be at risk of exploitation if he came into a larger sum or inherited valuable property or a major shareholding in a company. Administrative orders should be tailor-made to reflect the abilities of the person, yet protect the person from financial exploitation.<sup>61</sup>

## LEGAL CAPACITY OF INTELLECTUALLY DISADVANTAGED PERSONS

### Contracts

Legal capacity is not directly affected by a diagnostic finding that a person is intellectually disadvantaged or otherwise intellectually disabled. All that the law requires is a capacity in a person to understand the general nature of what he/she is doing. For example, a person has capacity to pass property if he/she understands the nature and effect of the conveyance.<sup>62</sup> There is no need for the person to understand all the legal terminology in the contract, but he/she must be aware of the immediate and broad effect of the actions.<sup>63</sup>

If it can be shown that a person did not understand the nature and effect of a particular contract, and therefore lacked the capacity to execute it, the contract may be set aside.<sup>64</sup> In determining that capacity courts are strongly influenced by the value of the asset<sup>65</sup>, and also by the 'reasonableness' of the transaction. For example, a gift by an

<sup>58</sup>American Bar Association, Model Statute, s. 14(1)(1).

<sup>59</sup>Victorian Minister's Committee, Proposed Bill, s. 50(1); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 48(1).

<sup>60</sup>s. 50(2); see also Guardianship and Administration Board Bill 1985 (Vic.), s. 48(2).

<sup>61</sup>Victorian Minister's Committee Report, p. 86.

<sup>62</sup>Hayes & Hayes, *op. cit.*, p. 238. p. 240.

<sup>63</sup>Bright Committee Report, pp. 208-9.

<sup>64</sup>Hayes & Hayes, *op. cit.*, p. 240.

intellectually disadvantaged person is more likely to be set aside than a sale. And the courts are more likely to set aside, on the basis of lack of capacity, the sale of a house than the sale of some trivial item.<sup>66</sup>

However, if it can be shown that, at the time the contract was made, the other party could not reasonably have known that the intellectually disadvantaged person did not understand the nature and effect of the contract, then the contract remains valid and cannot be cancelled.'

Further, there is a class of contracts which cannot be set aside because of the lack of capacity of an intellectually incompetent person. A contract for the supply of 'necessaries' to an intellectually incompetent person who lacks the legal capacity to purchase them is binding upon that intellectually incompetent person.<sup>68</sup> Necessaries are articles or services which persons need in order to maintain themselves. They are not confined to what is required to support life, but include those articles and services required to maintain people in a reasonable lifestyle.<sup>69</sup> As the economic standing of a person increases, it is likely that goods and services of a higher cost and quality will come under the heading 'necessaries'.

The doctrines of mistake, fraudulent misrepresentation and undue influence may apply to contracts executed by intellectually disadvantaged persons, just as they may apply to the contracts of non-disadvantaged citizens. However, situations in which these doctrines are relevant may arise more frequently where intellectually disadvantaged people are involved. For example, an intellectually disadvantaged person is more likely to be susceptible to undue influence.

The Bright Committee expressed the opinion that the mere fact that a personal guardian has been appointed in respect of an intellectually disabled adult does not mean at the adult cannot validly enter into a contract:

guardian may be necessary because a person is in general terms incapable of managing final or personal affairs, but in a specific situation, the person may know what he or she is doing perfectly well.<sup>70</sup>

This is probably true of traditional 'all or nothing' guardianship, but the situation with limited guardianship is more complicated. Under schemes which provide for limited personal guardianship, the court or tribunal has to specify the 'significant personal matters' or areas of functioning in which the ward is deemed to be legally incompetent and in respect of which the guardian has authority to make decisions on the ward's behalf. For example, s. 12 of McLaughlin's Draft Statute provides:

A guardianship order does not affect any civil rights of the person subject to the guardianship order that, in the case of a limited guardianship order, are not specifically included in the order or, in the case of a plenary guardianship order, are specifically excluded from the order.

The threshold for admission to guardianship is thus raised from a finding of general incapacity for managing personal or financial affairs, to a finding of legal incompetence in specific areas. This narrowing of the scope and applicability of guardianship may mean that, where it is in place, there is less likelihood of the ward retaining a concurrent capacity to contract in certain matters. Nevertheless, the principle of the least restrictive alternative would seem to demand that a ward be deemed capable of entering into such contracts as he can understand.

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<sup>66</sup>ibid., pp. 240-1.

<sup>68</sup>Bright Committee Report, p. 209.

<sup>69</sup>*Rhodes v. Rhodes* (1890) 44 Ch D 94 (CA); cited in Hayes & Hayes, op. cit., p. 244; N.S.W. Anti-Discrimination Board, op. cit., p. 338.

<sup>70</sup>Hayes & Hayes, op. cit., p. 244.

<sup>71</sup>Bright Committee Report, p. 210.

Under the South Australian Administration and Probate Act 1919, contracts entered into by a person whose estate is subject to administration are prima facie invalid and revocable by the administrator, although the other party to the contract is protected if he/she could not reasonably have known that the person they were dealing with could not understand the nature of the contract.<sup>71</sup>

According to the Bright Committee, this provision does not substantially change the common law, but it does clarify the rights of an administrator to intervene and set aside contracts entered into by persons whose estates are under administration.<sup>72</sup>

Again, the possibility of limited or tailor-made estate administration schemes may alter these rights. If a person was capable of handling small sums of money, such as \$500 or \$1000, but required an administrator to deal with larger investments, it would seem sensible to allow that person to buy a stereo or television without the administrator having the right to intervene.

Section 38(1) of the Model Statute of the American Bar Association (ABA) establishes that if the dispositional order does not expressly transfer the authority to perform a particular act or function to a guardian or conservator, the legal capacity to perform that act or function is retained by the ward. This provision is seen by the ABA as a logical requirement of a scheme which provides for tailor-made guardianship and conservatorship plans, and which emphasises the principle of the least restrictive alternative.<sup>73</sup>

Under the Proposed Bill of the Victorian Minister's Committee, a person whose estate is subject to administration is deemed, to the extent that the estate is under the control of the administrator, to be incapable of dealing with land or property or becoming liable under any contract without the order of the Guardianship Tribunal or the written consent of the administrator.<sup>74</sup> The trusteeship provisions of the Alberta Dependent Adults Act have no such provision, although there is a provision relating to the effect of trusteeship or guardianship on testamentary capacity, which is referred to below.

## Liability for torts

No person may be held liable for the negligence of another, unless they are under a duty to control the conduct of that other.<sup>75</sup> Intellectually disadvantaged adults are solely responsible for their own actions, unless they have been declared incapable and a guardian has been appointed to act in their interests.

Liability for intentional torts depends upon the state of mind of the persons sought to be made liable, and their capacity to form an intent to cause damage or injury. An intellectually disadvantaged person may be liable for any intentional tortious damage caused.<sup>76</sup>

In cases of negligence, it is likely that the court would apply a subjective standard of care for an intellectually disadvantaged adult, in much the same way as a subjective standard is applied for children. The subjective standard of care for an intellectually disadvantaged adult appears to be based on a test of whether the degree of impairment is

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p.211.

"American Bar Association, *op. cit.*, p. 151.

'Victorian Minister's Committee, Proposed Bill, s. 57(1)-, sftlso Guardianship and Administration Board Bill 1985 (Vic.), s. 55(1).

<sup>75</sup>*Dorset Y.C. v. Home Office* [1970] AC 1004.

<sup>76</sup>N.S.W. Anti-Discrimination Board, *op. cit.*, p. 341.



so extreme as to preclude the person from appreciating the duty to take care.<sup>77</sup> It seems that an intellectually disadvantaged person who did appreciate the relevant duty of care would be responsible for the consequences of any negligent actions committed.<sup>78</sup>

If an intellectually disadvantaged adult is declared incompetent, and a guardian is appointed to act in his/her interests, the guardian comes under a duty to control the actions of the ward. Thus the guardian could be liable for the tortious actions of the ward.<sup>79</sup>

However, a limited guardianship order should relieve the guardian of the duty of care in those areas in which the guardian does not have authority over the ward. This accords with the principles of the least restrictive alternative and normalisation. In those areas of functioning in which they are not deemed incapable, intellectually disadvantaged persons should bear sole responsibility for their actions.

### Testamentary capacity

A court is generally more likely to set aside a will executed by an intellectually disadvantaged person because the transaction the nature of which must be appreciated is more complex than most sales and other everyday transactions. An intellectually disadvantaged person is able to make a valid will if it can be shown that at the time of executing the will, the person was capable of appreciating the extent of disposable property in the estate and the effect of any claims which could be made against the estate.<sup>80</sup> This is known as having a 'disposing memory'.<sup>81</sup> A will executed by a person who lacks a disposing memory will be regarded as invalid and of no effect.<sup>82</sup> The capacity of the intellectually disadvantaged person in other areas is irrelevant.<sup>83</sup> A patient in an institution who satisfies the above requirements is not precluded from executing a will."

In addition to being capable of executing a valid will, the testator must have been 'fair' to those who had a claim on the estate. Spouses or children who feel that they have been denied a benefit to which they were entitled may challenge the will on the basis that it makes inadequate provision for their welfare. Testator's family maintenance legislation provides for such actions.<sup>85</sup>

Section 46 of the Alberta Dependent Adults Act provides that a guardianship or trusteeship order is not of itself sufficient to establish that a dependent adult does not have legal capacity to make a testamentary disposition. Under the Model Statute of the ABA, testamentary power is not one of the powers which may be transferred to a conservator.<sup>86</sup> Therefore, under s. 38(1) the ward would retain testamentary power, subject to the requirements of the common law.

<sup>77</sup> *Slattery v. Hayley* (1923) DLR 156,160; *Adamson v. Motor Vehicle Trust* (1957) 58 WALR 56.

<sup>78</sup> N.S.W. Anti-Discrimination Board, op. cit., pp. 341-2.

<sup>79</sup> *ibid.*, p. 341.

<sup>80</sup> *Banks v. Goodfellow* (1870) LRSQB 549.

"Hayes & Hayes, op. cit., p. 239.

p. 241.

"*Banks v. Goodfellow*, op. cit.

<sup>81</sup> N. S.W. Anti-Discrimination Board, op. cit., p. 342.

<sup>82</sup> Hayes & Hayes, op. cit., p. 242. See, for example, Testator's Family Maintenance and Guardianship of Infants Act 1916-54 (N.S.W.).

<sup>86</sup> American Bar Association, Model Statute, s. 18(5)(6).

## **Conclusion**

Legal capacity of intellectually disadvantaged persons is usually covered by the general law. Therefore, there is no need for any legal incapacity to arise by implication from the operation of a guardianship or estate administration order. However, where a specific finding of legal incapacity is part of an order, that would seem to preclude the intellectually disadvantaged person from exercising legal rights in the area of functioning covered by the finding of incapacity.

The rights of intellectually disadvantaged persons would be best served by a guardianship scheme under which power to act on the ward's behalf is transferred to the guardian only in those areas of functioning in which the ward is found to be legally incapable, and the legal capacity of the ward is left intact in those areas of functioning not specifically covered by the order.

## THE MODELS

The many options in guardianship law for the intellectually disadvantaged may, for the purpose of drawing this survey together, be culled down to three main types.

### A legalistic model

The first such option is the pure legalistic model. This model sees guardianship as a legal device by which a citizen volunteer guardian protects the ward's interests and acts as a substitute decision-maker in some critical matters.

Because it is seen as a legal advice, guardianship in its purely legalistic form would only be available to persons who are legally incompetent, or unable to give legally binding consents and form legally binding relationships. This is one way of restricting the size of the group subject to guardianship.

Another important aspect of the legalistic model of guardianship is its emphasis on procedural safeguards. The effect of this emphasis on procedural safeguards is to extend the benefit of the doubt to those people who fall within the 'grey area' where judgments about mental incapacity are uncertain. This prevents a number of people within that 'grey area' who are nevertheless not legally incompetent from being deprived of their civil rights and liberties through being subjected to guardianship.

Moreover, by its use of volunteers as guardians, the legalistic model avoids exposing the ward to the risk of conflicts of interest which are characteristic of government agencies.

However, the legalistic model should not be incompatible with the use of some sort of public guardianship agency as a guardian of last resort, because those who have no one to turn to should not be deprived of the benefits of guardianship, if guardianship is what they need, merely because of the risk of a conflict of interests. Further, in estate administration there may be a good case for making use of a suitably qualified public officer (such as the Public Trustee). The possibilities for conflicts of interest in financial matters where a family member is involved are probably greater than where a public agency is used.

Legalistic guardianship should make use of limited guardianship orders, in order to cater for the needs of intellectually disadvantaged persons at every level of incapacity in human functioning. Where questions relating to controversial medical procedures, such as non-therapeutic abortions, sterilisations and tissue donations, arise, the decision whether to give a consent on behalf of the ward should be made by a judicial body, such as the court or other body in the particular jurisdiction charged with responsibility for making decisions in guardianship matters.

Finally, under legalistic guardianship, the ward would retain legal capacity in those areas in which he or she has not been found to be legally incompetent.

### **A welfare model**

At the opposite end of the scale is the welfare-oriented model for guardianship. Under this model, guardianship is seen as a service which should be available to social workers in their care of the intellectually disadvantaged. Thus guardianship would be administered by social workers employed by government agencies. The conflicts of interest and accountability problems which may arise with agency guardianship have been referred to.

There is also a problem in determining in social work terms who should be subject to guardianship and why. Criteria such as 'unable to care for oneself' or 'unable to make reasonable judgments' are vague and leave the target population for welfare-oriented guardianship uncertain. This could lead to an increase in the numbers subjected to guardianship. Thus there would be a great risk of persons who fall within the 'grey area' where judgments about mental competence are uncertain, being subjected to guardianship unnecessarily under the welfare-oriented model, even if there were exhaustive procedural safeguards.

Welfare-oriented guardianship would also prove expensive, relying on government employed social workers and at the same time trying to reach a far greater population.

A pure welfare-oriented model is unlikely to make provision for limited guardianship, since it views guardianship both as a service and as a means to the provision of other services. The view of guardianship as a means to the provision of other services suggests that there is unlikely to be any requirement that controversial medical procedures be considered by a court or other judicial body before being consented to by the guardian.

### **A developmental model**

There is also a parent—child version of a developmental model for guardianship. This model places emphasis on the development of the ward's abilities and capabilities, and to this end encourages limited guardianship. But an analogy is drawn with parental guardianship over children. Broad powers are conferred on the guardians, who are then expected to do their own tailoring of the order. Because of the view that guardianship must be in the best interests of the ward, this model pays no attention whatsoever to procedural safeguards. It is supposed that the ward has nothing to lose by being subjected to guardianship and that guardians will naturally exercise powers wisely and in the least intrusive fashion; limits therefore need not be laid down in advance, and routine monitoring of guardians would be seen to be an unnecessary and burdensome step.

## **CHOOSING THE BEST MODEL**

Throughout this monograph we have pointed out advantages and disadvantages of the several possible approaches to guardianship for the intellectually disadvantaged. We do not, however, see our role as deciding on one particular approach. Rather we hope to have illuminated some of the issues that are relevant to such a decision. These issues range from broad views about rights and liberty to the economic feasibility of the proposals. We therefore conclude this survey by drawing together the two main evaluative threads which have run through the preceding pages.

It is tempting to present the underlying philosophical issue as one of the relative priority of freedom as against welfare. Should we prefer the legalistic model, with its procedural safeguards to ensure that no one is unnecessarily deprived of the freedom to run their own affairs? Or should we choose the welfare model, which allows

guardianship to be administered by government social workers, who have considerable expertise in the delivery of welfare services, and are in the best position to judge the welfare needs of people in their care?

It is, however, too simple to see the issue as a direct conflict between the two values of freedom and welfare. For one thing, most of those who value freedom would accept John Stuart Mill's view that it is legitimate to curtail the freedom of people who clearly lack the capacity to exercise a free choice, and for whom freedom would not lead to the realisation of such goods as happiness, knowledge, self-development and moral responsibility. This means, in effect, that the value of freedom is at least partly dependent on the extent to which those granted freedom will be able to use it to improve their welfare. But if the value of freedom is thus partly dependent on welfare considerations, the converse is also true. Any consideration of a person's welfare would be inadequate if it failed to take into account the extent to which that person is able to control his/her life, or at least some areas of it. Freedom, even if only within a limited area, is a vital component of welfare for all those with the capacity to exercise any degree of autonomy, no matter how minimal.

The interrelatedness of freedom and welfare suggests that it would be wrong to select a model of guardianship based too exclusively on one of these values. It could be argued that the 'parent—child' or developmental model suffers from this defect. The aspiration to self-development is praiseworthy, and its achievement would promote both freedom and welfare; but the means used should be appropriate to the end desired. It is questionable if the grant of a broad sweep of potential power under the legally restrictive device of guardianship is the way to encourage the development of an intellectually disadvantaged person's capabilities. Educational and other habilitative services can be provided by the appropriate authorities under a broad approach, either without resorting to guardianship, or by means of limited guardianship.

There is also the question of the rights and liberties of those in the 'grey area' who could be subjected to guardianship unnecessarily. A form of guardianship which lacks proper procedural safeguards will mean that people whose needs could be addressed by means less restrictive of the ward's freedom of decision and action would be subjected to guardianship. It might be claimed that this will not happen as long as those responsible for the use of guardianship act with benevolent concern for the best interests of their wards. In an ideal world, this would be true; but we do not live in an ideal world. In setting up structures to cope with problems in the real world, we must take cognisance of the fact that even the most benevolent and conscientious administrators sometimes work under pressure and make ill-considered decisions. We should also recognise that administrators often find it difficult to reverse such decisions: a reversal may be tantamount to admitting that one has made a serious mistake.

Guardianship entails a serious restriction of the rights and liberties of those subject to it. For anyone who values liberty, therefore, if any model of guardianship makes the unnecessary and unwarranted imposition of guardianship more likely than some viable alternative approach, that must count as a major objection to the model. The same point applies if the model makes it likely that a more restrictive form of guardianship will be applied when a less restrictive form would suffice.

Similar criticisms could be brought against the welfare model of guardianship. Rubbery criteria for admission to guardianship might be expected to lead to guardianship being imposed on people who do not need it. Moreover the use of agency employees and the view of guardianship as a mechanism for providing other services means that guardians under the welfare model may not always be as fearless and objective as they should be when making decisions on behalf of their wards. These guardians would not necessarily be acting as protectors of the rights and interests of their wards.

So far as the minimisation of unnecessary restrictions on freedom is concerned, the legalistic model appears to fare better than the other major alternatives. Its built-in procedural safeguards are designed to ensure, as far as is humanly possible, that guardianship is imposed only when it is truly needed. Moreover it is well suited to the use of limited guardianship, which is an important device for permitting at least some freedom to those who cannot be left as free as non-disadvantaged citizens.

Against the legalistic model, it could be urged that there will be some people who could, in the opinion of those most closely involved, benefit from guardianship; and yet for one reason or another, the court or tribunal may not appoint a guardian. This could result in irreparable harm to the person concerned.

To some extent the question raised by this objection is the same as that raised by the burden of proof requirement in criminal law: should ten guilty parties go free in order to ensure that no innocent parties are convicted? In the case of criminal law, our legal tradition answers this question in the affirmative. Does it follow that we should be prepared to allow ten people in need of guardianship to go without it, in order to ensure that no one who does not need guardianship has it imposed against their will? We do not think the analogy is sufficiently close to allow this conclusion to be drawn. The imposition of guardianship is, as we have said, a serious restriction of liberty. It is not, however, a penal sanction, and it is not to be compared to imprisonment.

This suggests that perhaps the procedural safeguards of the legalistic model need not be as strict as those used in law courts for criminal trials. Similar considerations would lead to a doubt about the appropriateness of adversarial procedures. A balance must still be struck between the relative likelihoods of too much and too little guardianship, but the balance need not be quite so heavily against unnecessary guardianship as it must be against unjust convictions. The legalistic model becomes inappropriate when it sticks too rigidly to the procedures of a court of law operating in a different context.

There is one more reason why the differences between the legalistic and the welfare models should not be seen as a simple distinction between maximising freedom and maximising welfare. For the legalistic model to be regarded as purely the maximisation of freedom for those incapable of exercising freedom for themselves, one would need to regard the guardian as acting in accordance with the intent of the ward — in other words to take seriously the doctrine of 'substituted judgment'. We have seen, however, that this doctrine cannot coherently be applied in cases in which the ward could not grasp the issue that the guardian must decide. In these circumstances, the guardian must decide on the basis of what a reasonable person would do, or on the basis of the best interests of the ward. Either way, welfare considerations will be central.

For the reasons just given, the final choice of a structure for guardianship will depend not on strict ideological preferences for freedom or welfare, but on a judgment about which model best combines the two central values while remaining practical and economically realistic. Here it is relevant to note that an approach with tight criteria for admission to guardianship may result in economic savings, since fewer people will need to have guardians appointed. This could leave more funds available for the development of educational and other habilitative services on a non-custodial basis, and thus assist, in a positive way, a greater number of people. This consideration favours the legalistic model, operating as part of a broad approach to the care of the intellectually disadvantaged.

It is appropriate to conclude by looking once more at the paragraphs of the United Nations *Declaration on the rights of mentally retarded persons*, and to ask which model best satisfies the requirements of that Declaration. Some of the rights there listed are welfare rights: the rights to proper medical care, and to economic security and a decent standard of living. Others are basic civil rights — the right to due process of law and the requirement for proper legal safeguards including a right of appeal, in respect of any restriction or denial of rights. Which model can best satisfy these different

requirements? The flexibility of the legalistic model may give it an edge on its rivals; for while it, or at least some version of it, would seem able to accommodate the welfare requirements of the Declaration, it is difficult to see how either the welfare or the developmental model can satisfy the basic civil rights requirements. To build into the welfare or developmental models procedure that would adequately safeguard the basic civil rights would be, in effect, to transform them into a modified legalistic model.

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