
PROTECTING THE RIGHTS OF THE INCAPACITATED

by Barry Hunt

Legislation protecting the rights of the incapacitated has been introduced in the Australian Capital Territory. The article provides details of the Guardianship Tribunal and the Community Advocate.

Until recently to appoint a guardian to make decisions for a person in the Australian Capital Territory who is intellectually or mentally incapacitated you had to apply to the ACT Supreme Court under the antiquated 1898 NSW Lunacy Act — a procedure which involved \$2 000 or more in legal costs. The ACT Attorney-General, Terry Connolly pointed out in the Legislative Assembly that this is most unfortunate because too often those who need such an order are in circumstances which place them among the most disadvantaged in our community. Legislation to establish a Guardianship and Management of Property Tribunal has been passed by the ACT Legislative Assembly as recommended by the ALRC. The new system for guardianship will provide what is essentially a free service.

Discussing the Guardianship and Management of Property Bill in the Assembly, the Attorney-General acknowledged the efforts of the ALRC in producing its 1989 report *Guardianship and Management of Property* (ALRC 52) which he said formed the basis for the ACT Bill. He commended former ALRC Commissioner Mr Nicholas Seddon for his work. Mr Seddon was the Commissioner responsible for the report and for a previous report: *Enduring Powers of Attorney* (ALRC 47) which deals with the related matters.

Welfare principle

The new tribunal will conduct informal inquiries and appoint legal guardians and managers. The

paramount principle involved in such appointments and in the way guardians and managers exercise their powers is the welfare and interest of those incapacitated persons.

Restricted powers

There are restrictions on the powers of guardians and managers — they may not vote on a person's behalf, make a will nor consent to their marriage. They may not chastise an incapacitated person nor give consent for an abortion or sterilisation. Only the tribunal can approve such medical procedures provided they are lawful.

In financial matters, a manager appointed by the tribunal to handle the affairs of an incapacitated person must file accounts on an annual basis with the office of community advocate.

A Community Advocate

In *Guardianship and Management of Property*, the ALRC recommended the appointment of a Community Advocate for guardianship matters. The ACT *Community Advocate Act* 1991 establishes such an Advocate. The Community Advocate represents the interests of incapacitated persons before the guardianship tribunal. The advocate will also be an advocate for youth.

The Community Advocate will monitor how the order of the Tribunal is carried out by a guardian or manager. The Community Advocate performs an Ombudsman-type role and, if necessary, may apply to the Tribunal to have an order reviewed, varied or

revoked by the Tribunal. In guardianship matters the Community Advocate operates in much the same way as the Public Advocate in Victoria.

The Community Advocate will work closely with the Guardianship and Management of Property Tribunal and, as a last resort, can be appointed a guardian or manager.

In mental health matters the Community Advocate will be able to protect the interests of a person who has been involuntarily detained or in respect of whom a treatment order is sought under the *Mental Health Act 1983*. He or she must protect the basic rights of persons who are unable to protect themselves.

The existing Office of Youth Advocate (established under the *Children's Services Act 1986*) will combine with the Community Advocate and the current function of youth advocacy will continue to be performed within the Office of Community Advocate by the Deputy Community Advocate (Youth Affairs) and staff.

A limited advocacy function for mental health will be provided by the Community Advocate who has the function of representing forensic patients.

The Community Advocate is also responsible for the recruitment and training of volunteer guardians. This program will be similar to the volunteer program which operates in Victoria.

These Bills were passed by the ACT Legislative Assembly on 17 October 1991 and the system is due to become fully operable in late January 1992.

The Guardianship Tribunal

The Tribunal consists of a President who is either a Magistrate or is a person who has at least 5 years experience as a legal practitioner. The President may sit alone, if the need arises, but the Tribunal will usually comprise a panel together with two expert Members. The Tribunal will convene after giving 7 days notice to applicants and other parties but may convene at shorter notice in urgent cases.

The Tribunal will be empowered to issue orders which appoint a guardian to make personal decisions on behalf of a person who is incapacitated by illness, injury or intellectual disability. In addition, the Tribunal may appoint a person to be a manager of the incapacitated person's financial affairs.

Examples of when a guardianship or management order are necessary include those family situations where a child who has a mental or intellectual disability has reached 18 years of age and one or both parents seek formal appointment as a guardian or manager (or dual appointments). Sometimes a person is incapacitated as a result of a road or other accident and is no longer able to make rational decisions. Likewise, the ageing process may render a spouse, parent or friend incapable of decision-making. In these cases another person has to make decisions and handle property matters.

This decision-making role on behalf of another person is an important responsibility and gives rise to fundamental legal relationships. For this reason, the authorisation for such powers must come from an independent and experienced body such as a statutory Tribunal.

The Tribunal is not a Court. As is the case in other jurisdictions, it will operate with the minimum of formality. It is not necessary to be legally represented but if applicants so desire they may use the services of a lawyer. A public official, the Community Advocate, will be available to represent an applicant if the need arises.

Hearings before the Tribunal will be free of charge. A small filing fee will be applicable which may be waived in cases of hardship. The cost of legal representation, where that is provided by choice of an applicant, will be a matter for that applicant. The Tribunal Registry will be based in the ACT Magistrates Court but the tribunal itself is not located in the court buildings.

Orders made by the Tribunal will be subject to regular review (at least every 3 years). Depending on the particular case, a review may be carried out at earlier intervals.

It is estimated that there is a backlog of 1 500 cases in the Territory of persons who require guardianship or management orders. The Tribunal, as a part-time body, is scheduled to sit for at least 80 days per annum and it will handle at least 4-5 cases per day.

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