

HUMAN RIGHTS COMMISSION

Discussion Paper No. 4

ETHICAL AND LEGAL ISSUES IN
GUARDIANSHIP OPTIONS FOR
INTELLECTUALLY DISADVANTAGED
PEOPLE

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This is the fourth of the Human Rights Commission's discussion series. It does not represent the views of the Commission, but is a summary of the research report prepared by the Commission's consultants.

It is being circulated to inform interested persons of the issues which have been put before the Commission for consideration in moving towards proposals for guardianship legislation in the A.C.T. For those who are interested in seeing the full three hundred page report, copies are available for consultation in the Commission's Resource Centre on the 6th Floor, AMP Building, Hobart Place, Canberra City.

Whilst this discussion paper focuses upon the needs of the intellectually disadvantaged, the Commission is aware of the related issues concerning the mentally ill and the confused elderly, and is about to issue a companion -discussion paper on the rights of the confused elderly.

Anyone is welcome to make a submission to the Commission on the issues raised in this paper. It is envisaged that early in 1984 a meeting of interested groups will be convened in Canberra to discuss proposals for guardianship legislation in the A.C.T.

Human Rights Commission,

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ETHICAL AND LEGAL ISSUES IN GUARDIANSHIP OPTIONS
FOR INTELLECTUALLY DISADVANTAGED PEOPLE

I. INTRODUCTION

1. THE HUMAN RIGHTS CONTEXT

. The Human Rights Commission Act 1981 incorporates as Schedule 3 the principles laid down in the 1971 United Nations Declaration on the Rights of Mentally Retarded Persons (the Declaration). As part of its charter, the Australian Human Rights Commission is required to have regard, in areas of Commonwealth responsibility, to the rights of the mentally retarded as recognised in the Declaration. In addition, under the Act, Commonwealth legislation concerning intellectually disadvantaged people, including legislation for the Australian Capital Territory, should pay particular regard to the standards set in the Declaration.

It follows that the Declaration may be used as a 'check-list' for evaluating legislation. For ease of reference during the balance of the discussion in this Report, the text of the Declaration is set out as Appendix 1.

It is, however, important to note particularly Article 5, which 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.

2. GOALS AND PHILOSOPHIES

There are two broad competing goals in caring for and assisting intellectually disadvantaged people: maximisation of their freedom as individuals and adequate protection of their welfare.

A. MAXIMISING THE FREEDOM OF THE INDIVIDUAL

A.1 Underlying Philosophies

A.1.1. Total Freedom

An extreme version of the goal of maximising individual freedom is the argument that the mere fact that a person is intellectually disadvantaged, and as a consequence may make decisions not in his or her best interests, is no

justification for placing limits upon that person's freedom beyond those limits which are imposed on the freedom of other people. The Declaration, however, does not state flatly that intellectually disadvantaged people have the same rights as others; it says that they have those rights to the maximum degree of feasibility.

The use in the Declaration of the words 'to the maximum degree of feasibility' thus recognises that some people may suffer from a degree of intellectual disadvantage which renders them incapable of enjoying one or more of these rights. For example an intellectually disadvantaged person may have difficulty in making use of the right to self-government. However, if he or she is capable of self-development, albeit with the assistance of others, then he or she has a right to 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.

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 other people.

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 or her development by paternalistic overprotection outweighs the risk that such a person may come to harm if given too much liberty.

B. 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 (Paragraph 6 of the Declaration).

B.1 Underlying Philosophy

Some protection is necessary to ensure the physical safety and welfare of many intellectually disadvantaged persons. An appropriate level of protection should also facilitate an intellectually disadvantaged person's enjoyment of those rights and liberties which he or she is 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 for each individual. There has been a tendency to regard intellectually disadvantaged people as 'eternal children'.

The great majority of intellectually disadvantaged persons are only mildly disadvantaged. 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 disadvantage, are able to lead independent lives. A few fall into the moderately disadvantaged 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 disadvantaged. Individuals functioning at these levels are much more dependent, need more intensive programming, and frequently have physical problems in addition to intellectual disadvantage.

Functional capacity is thus not wholly dependent upon the level of intellectual disadvantage which the individual has. This makes nonsense of any automatic assumption of total incapacity.

The welfare of intellectually disadvantaged adults would be better safeguarded if the 'eternal child' notion were replaced by a flexible approach which would adapt to their changing capabilities (and cater to their needs) at all levels of functional impairment.

3. CHANGING ATTITUDES

There was once a time when intellectually disadvantaged people were allowed to remain and to live as members of their local communities. 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 - 'out of sight, out of mind'. 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. Some of the difficulties which still hand over from the last century are the continued use of institutional care and a tendency to' continue to lump disparate groups of people together.

The Declaration 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 the individual to pursue his or her interests. It has been argued that to this end the

State should provide appropriate generic legislation system of guardianship that can be individually tailored 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.

This paper will discuss the modern options for intellectually disadvantaged people which might replace the historical legacy of the traditional model or its successor the 'welfare/medical' approach. The focus of the paper will, however, be on the ethical (or other more pragmatic) benchmarks against which these options should be measured.

II. THE EXISTING LAW IN THE AUSTRALIAN CAPITAL TERRITORY

The law in the A.C.T. is a mixture of the old, the borrowed and the new. Both the old and the borrowed portions of the law are derived from New South Wales. The 'pre-existing' and the 'borrowed by agreement' segments of A.C.T. law remain in force until they are displaced by fresh Ordinances designed specifically to meet the needs of the Territory. As a result, the law concerning intellectually disadvantaged persons that applies in the A.C.T. has always been, to some extent, that of New South Wales as well as of the A.C.T. itself. In fact, the New South Wales laws relevant to this inquiry that are operative law in the A.C.T. despite their obsolescence and virtual disuse, and despite their repeal in New South Wales, are the Lunacy Act 1898 and the Inebriates Acts of 1900 and 1909.

1. THE FRAMEWORK OF THE PRESENT A.C.T. LAW

1.1 Adults

The first Ordinance that can be regarded as bearing on the intellectually disadvantaged is the Insane Persons and Inebriates Committal and Detention Ordinance of 1936-1937 which approved an Agreement between New South Wales and the A.C.T. By means of this Agreement, New South Wales legislation was made applicable in the A.C.T. to the extent necessary to enable A.C.T. residents to be 'committed to a State institution' for the reception of the insane'. The early Ordinances were followed by the Mental Health Ordinance 1962. In short, where an A.C.T. resident requires admission to a N.S.W. institution, the law as at the time of writing includes the terms of the New South Wales Mental Health Act 1958 as amended.

1.2 Children

There is also the law with regard to intellectually disadvantaged children to be considered.

First, there was enacted the Child Welfare Agreement Ordinance 1941 endorsing an Agreement with New South Wales. 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.' Secondly, the Child Welfare Ordinance 1957 was passed and finally, in 1962, 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 to be dealt with under and subject to the Child Welfare Act 1959 of the State and any (amending) Act'.

The New South Wales Child Welfare Act 1939 has now been repealed and in its place, the Community Welfare Act, 1982 has been enacted but not yet proclaimed.

2. THE DETAILED CONTENT OF THE CURRENT LAW

2.1 Adults - Mental Health

Involuntary Admission: In the A.C.T., the certificate of one independent medical practitioner, who has personally examined a person, to the effect that in his or her opinion that person is mentally ill and a suitable case for admission, is required before an A.C.T. resident can be admitted to a State centre for observation and treatment. Two such certificates are necessary before involuntary admission can be effected with the help of the police.

The doctor must state whether the person is:

- (a) suicidal;
- (b) dangerous to others;
- (c) unable to care for himself; or
- (d) not under proper care and control

and shall include in the certificate any facts and other matters upon which his or her opinion is based. An A.C.T. resident is so admitted pursuant to S.I2(1) of the N.S.W. Mental Health Act 1958 as amended.

Voluntary Admission: An A.C.T. resident can be voluntarily admitted to New South Wales admission centres, mental and authorised hospitals on *his* or her own or someone else's application, under Part VI of the Mental Health Act 1958. Following the passage of new N.S.W. legislation in 1982, this Act now includes special provision for intellectually disadvantaged persons.

2.2 Adults' Supreme Court Protective Jurisdiction: Under the legislation in force prior to the operation of the 1982 reforms in N.S.W., a person incapable through mental infirmity by reason of disease or age of managing his or her 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 his or her 'property'. Such 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 fall within the category of persons who are 'incapable' by reason of disease. As in the more populous States, the machinery associated with this Supreme Court jurisdiction is such that it is a cumbersome and unattractive procedure, ill adapted to meet the needs of intellectually disadvantaged persons. 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 a mentally ill and incapable person a Judge of the Supreme Court can appoint committees of his or her estate and of his or her 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. The distinction between the person and his or her estate 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 or her affairs.

Guardianship: A guardian can be appointed for a mentally ill person, following a report made by a Master at the direction of the Court 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; 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 below.

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.

There is provision for adults to grant irrevocable powers of attorney that would continue to operate in the event of intellectual handicap developing but it is limited. The A.C.T. Powers of Attorney Ordinance 1956 provides for the creation of an irrevocable power of attorney where the power is expressed to be irrevocable and is either given for valuable consideration or for a fixed period not exceeding two years. When a third party deals with the attorney for valuable consideration, such a power is not revoked by the onset of lunacy or unsoundness of mind - Powers of Attorney Ordinance, ss. 6 and 7.

2.3 Children

The A.C.T. Child Welfare Ordinance 1957 has its own definitions of 'neglected children' and 'uncontrollable' children. The Ordinance provides for closed Children's Court proceedings to determine 'charges' laid against a child that they are either 'neglected' or 'uncontrollable'. As in the case of adults who are intellectually disadvantaged, the A.C.T. Ordinance does not contain provision for their requirements. However, the New South Wales Child Welfare Act 1939 did and, until its repeal in 1982, could apply to A.C.T. children whenever the Minister of the Territory as a child's guardian committed the child to a

State institution pursuant to the Supplemental Agreement of 1962. Unless the New South Wales Community Welfare Act 1982 applies to the A.C.T., this option is no longer in existence.

In the A.C.T., the Minister can become the guardian of a child in two ways:

- (i) if the Children's Court commits the child to the care or custody of the Minister to be dealt with as a ward admitted to government control; and
- (ii) if a parent has custody of that child, the parent **may** request or consent to his or her admission to government control and if the Minister is satisfied that it is necessary in the interests of the child (under sixteen years) or young person (sixteen to eighteen years) such order **may** be made.

The Ordinance does not refer specifically to the intellectually disadvantaged child. That part dealing with the establishment of depots, shelters, homes and hostels is sufficiently broad to cover this group of people, but is not directed towards it. By contrast in New South Wales, specific provisions have been enacted to provide for intellectually disadvantaged children.

3. THE DECLARATION

Since there is no firm provision in the Child Welfare Ordinance for the periodic review of orders as required by paragraph 7 of the Declaration, the discharge provisions must be regarded as inadequate in this regard.

. 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 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.

So far as a right to economic security and a decent standard of living are concerned, 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. This allowance shall not be granted or continued after the child has reached school-leaving age unless he or she is an invalid or is otherwise incapacitated. Intellectually disadvantaged adults are included in this provision but only if their condition was present before they reached the school-leaving age and only if they were 'destitute'.

The Child Welfare Ordinance seeks 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. 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.

It might be thought that paragraphs 3 and 6 are complied with, but access to a guardian is neither as of right nor is he or she qualified. And the proposals contained in the draft Mental Health Ordinance 1981 of the A.C.T. indicate 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.

Little if any of the legislation described bears any relation to the 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 merely variations on this theme. The purpose of the 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 Declaration.

III. THE POSITINO IN THE AUSTRALIAN STATES

To date the legislatures of the Australian States have employed a number of basic methods of providing guardianship for intellectually disadvantaged persons, including:

- (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 estate by some third person;
- (v) the establishment of Guardianship Boards, to consider the needs of intellectually disadvantaged, 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.

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

Analysis of the legislation also reveals that often the aspirations expressed in the Declaration 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. The legislation is often outmoded, and uses archaic expressions (e.g. 'Backward Person', 'Lunatic so found'); and in many instances, people who are intellectually disadvantaged and those who are mentally ill 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. These reforms are set out and discussed in Appendix 2.

IV. SERVICES AND FACILITIES FOR INTELLECTUALLY DISADVANTAGED PEOPLE

Other services and facilities which, along with guardianship, might be elements of a broad approach to dealing with the problems of intellectually disadvantaged people are briefly described here, and then the theory behind the broad approach is discussed in more detail.

1. THE POWER OF ATTORNEY

The power of attorney, which is a legal mechanism by which one person transfers to another the legal authority to act on his or her behalf, may be general, or limited to certain transactions.. An intellectually disadvantaged person might decide that he or she needs assistance with respect to certain transactions. When executing a power of attorney over those affairs, the intellectually disadvantaged person, in theory, voluntarily vests some of his or her legal rights in the attorney.

However, there are some limitations on the use of powers of attorney. 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.

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 he Or she can no longer understand the nature and consequences of the powers granted. Although this rule has been overcome in Victoria, 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. However, legislation such as that enacted in Victoria makes 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.

2. 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:

1. it would protect both the person and the property of the intellectually disadvantaged person; and
2. more importantly, it would teach the fundamental skills which intellectually disadvantaged people need to be able to better protect themselves.

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 are used far less effectively on behalf of intellectually disadvantaged people than on behalf of many other segments of society. Those 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.

3. ADVOCACY

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 handicapped persons, with a mandate to the volunteer to act as advocate for the person with whom he 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; and self-advocacy occurs when a person speaks out for himself or for others who share his problems.

Citizen advocacy is the form of advocacy which has received the most attention. Examples of how a citizen advocate might assist an intellectually disadvantaged person are: contacting the Department of Social Security to ensure that he or she is receiving benefits to which he or she is entitled; contacting a lawyer when some legal problem arises; writing to government departments or to other organisations on behalf of the person; providing assistance, where necessary, in budgeting; or simply acting as a friend by providing companionship and emotional reinforcement. Matters which might be discussed are accommodation, personal relationships, clothing, entertainment, health, contraception, employment and domestic matters.

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.

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. 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.

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 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.

Most of the above functions could be carried out by an agency that was actually administering a citizen advocacy program.

The idea of citizen advocacy programs has been slower to catch on in Australia, but it is reported that there has been one 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. 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.

4. 'INSTITUTIONALISATION

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. In Australia, large instit-

utions housing intellectually disadvantaged people along with those with mental illness are located in remote areas, administered by government, 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.

Some of the main disadvantages of large institutions are lack of privacy for residents; 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 resulting from 'efficient' administrative decisions, such as routine administration of sedative drugs for the convenience of nursing staff.

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.

The Effects of Institutionalisation: 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 which cannot be easily (if ever) reversed.

There are also solid economic reasons against institutionalisation. From what studies have been done it clearly emerges that community based facilities are cheaper. Whilst 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, it is much more unlikely for these 'negative aspects' to occur in an open, integrated setting, where the normal legal constraints are likely to apply.

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, 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 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.

5. GUARDIANSHIP

Since the various aspects of and models for guardianship are discussed in detail later, 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 or her tender age or because of some significant degree of mental disability, is considered to lack legal capacity to exercise some or all of the rights pertaining to adults generally.

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. 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.

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 his or her children. 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 an intellectually disadvantaged person in those areas in which he or she needs it, while at the same time allowing him or her to exercise independence in other areas of life.

6. 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 care and protection. 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.

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, and with emphasis on the use of the least restrictive alternative. This emphasis reflects growing recognition of the fact that intellectually disadvantaged people are best served by an environment which is as close as possible to a normal one (the principle of "normalisation").

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. The notion of limited guardianship is able to replace plenary 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, or less restrictive than their level of disability warrants.

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 they are individuals with dignity and certain rights and with potential; the great diversity of intellectual disadvantage; 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 intellectually disadvantaged people.

The addition of a suitable guardianship program to the points outlined above would give us the essentials of the broad approach. However, if an intellectually disadvantaged person is to be cared for and protected by means of the least restrictive alternative, detailed information is required about his or her capabilities.

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.

V. OPTIONS FOR CARE AND PROTECTION

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 that preference? The first question involves choosing from 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.

1. THE LEGALISTIC OR 'SUBSTITUTED JUDGMENT' MODEL

Guardianship may be seen as 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.

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.

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

There are three broad groups for whom the need for guardianship might arise. The first group includes severely and profoundly intellectually disadvantaged individuals. This group most clearly requires guardianship to enable its members to interact legally with world, and its members frequently require protection as well since they are very dependent upon others for even basic life functions.

The other two groups 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 to unwilling to extricate themselves.

The legalistic model addresses neither of these two 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. 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.

In relation to the latter 'at risk' group, it is argued that guardianship should not be used to deal with issues of neglect, abuse or exploitation, and that society should be more ready to make use of criminal sanctions against those responsible for such situations.

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.

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. The legalistic model seeks to deal with the dangers of overprotection 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.

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.

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. Secondly, 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.

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 mentally competent or mentally incompetent. 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.

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. This deterrence effect appears to conflict with the ideas expressed in paragraph 5 of the Declaration.

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. There is also a cost saving under the legalistic approach due to volunteers being used as guardians.

Another criticism of the substituted judgment approach to guardianship is its limited availability. It is said 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.

2. THE WELFARE MODEL

Another model for guardianship which has a social services or welfare orientation is referred to here as the welfare model. 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.

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 that guardianship provides a vehicle for the delivery of other 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.

Extreme examples of the welfare model are the Protective Service Programs which incorporate guardianship into the delivery of a broad spectrum of State provided services. According to one definition, the program should be based on the principles of the least restrictive alternative and gradualism. 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.

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, to be resorted to whenever consent to proposed treatment or services cannot be obtained.

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.

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 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 mental 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 any individual who demonstrates that he cannot make or communicate reasonable decisions would be a candidate.

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 mental competence. This may result in determinations of legal incapacity varying according- to the relative value of the proposed guardianship.

The Use of Agencies: One feature of welfare guardianship is that it is administered through a social work agency. The rationale of welfare guardianship is based on a desire to fulfil the State's residual responsibility 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 family is no longer able to provide protection

There are three types of agencies which could be responsible for administering guardianship according to the welfare model. The first is an agency with an exclusive mandate to provide guardianship. 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 follow this model. The third possibility is to make use of an agency staffed by guardianship professionals. However, there seems to be no evidence of the emergence of such a class of professionals, either now or in the future.

The major problem with using agencies for guardianship is one of conflict of interest. Even where the agency has an exclusive mandate to administer guardianship, a conflict may arise. 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.

With the agency that is primarily responsible for providing social services but which has the power to seek guardianship if this is thought to be necessary, the problem of conflicting interests is far greater. 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 it thinks is appropriate upon the hapless ward. The potential for abuse here is enormous.

Another problem with agencies relates to delegation of guardianship authority. 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. 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. Finding sufficient numbers of adequately qualified personnel is another problem.

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. Agency guardianship might turn out to be a very expensive way of accomplishing only a small part of the goal of protection. 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.

One commentator has rejected the welfare model because of 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 earlier.

Other commentators assert that some direct effort must be made to meet the problem of the residual responsibility of the State to care for those who have no-one else. 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, there would be no need for 'guardianship of last resort' to generate the huge expenditure which some fear would be required to fund a welfare oriented public guardianship scheme.

3. THE 'PARENT CHILD' OR DEVELOPMENTAL MODEL

Under this model, an analogy is drawn between the functional relationship between a guardian and his or her ward and that between a parent and his or her child. However, the notion of the eternal child is not really reflected in this model, which emphasizes that all intellectually disadvantaged persons have some potential for development. Intervention in their lives is necessary for their interests to be protected, and should not be condoned for any other reason.

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 some cases, 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. The acts of a guardian under the developmental model must be so conservative and so commonplace as to be beyond reproach.

Lack of Procedural Safeguards: Another feature of the developmental model is a distinct lack of concern for procedural safeguards. 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.

Developmental Aspect: In this respect, - the developmental model shows scant regard for the civil rights of intellectually disadvantaged persons. Recently it has

become recognised that, on the 'scale' of mental capacity, there is a grey area in which no judgment about mental capacity is certain. 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.

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 realization that every intellectually disadvantaged individual, no matter how severely disadvantaged, is capable of learning some skill.

This approach is consistent with the 'qualified freedom' version of the goal of maximising the freedom of the individual, discussed earlier.

As it is argued that traditional plenary guardianship is at odds with the goal of maximising the development of the ward, 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 well-being of his or her ward.

A pure developmental model divides 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. This form of guardianship is compared with the authority of a parent gradually relaxing control over a growing child, and envisions a flexible zone of authority and power that contracts, expands, and adapts to the particular developmental status of the ward.

This sounds almost Utopian. 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? 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.

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. This is one of the hurdles facing the implementation of limited guardianship, since mental capacity is situational and varies over time.

As the developmental model's procedural provisions give little attention to the rights of individuals subject to guardianship applications, it is inevitable that individ-

uals 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.

4. LIMITED GUARDIANSHIP

As guardianship has traditionally been an all or nothing affair, the person subject to the guardianship is placed under a blanket of legal disability which hinders the exercise of most civil rights.

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, such as partial or limited guardianship programs.

The appointment of a limited or partial guardian generally requires the court of 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.

The Argument for Limited Guardianship: An inflexible approach to guardianship law may result in some people who need only partial guardianship getting no guardianship at all, or in others with a pressing need for some protection falling short of plenary guardianship being subjected to complete deprivation of rights when a more limited form of supervision or guidance would be sufficient. Proponents of limited guardianship argue that it can help reduce the risk of either of these undesirable results occurring.

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. 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.

Problems: Despite its theoretical attractiveness, the successful operation of limited guardianship cannot be taken for granted. Mental capacity varies over time and our ability to predict future developments is much lower than we thought.

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 for 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. There may be many problems that are described as problems to be solved through limited guardianship which should not be solved through guardianship at all, but through one or more of the other elements of the broad approach to protection already mentioned.

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. One solution 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 him and to any third party with whom he might deal.

VI. FEATURES OF GUARDIANSHIP LEGISLATION

1. 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 mental capacity. Traditional guardianship statutes therefore define incapacity in terms of mental *illness*, assuming that it can be identified and diagnosed like any other physical ailment.

If the medical view were correct, the problem of guardianship would be mainly one of diagnosis; if the diagnosis of mental 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 mental disability resulted in a lack of mental capacity.

An approach based on the requirement of a finding of mental **incapacity** assumes that the mentally disabled can be distinguished from the non-disabled. There is an implication here that a person of full mental capacity may not be a proper subject for guardianship, no matter how stupidly he or she behaves. This is because society only allows individuals who have a free will to act irresponsibly.

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.

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. 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.

2. PROCEDURAL MATTERS: GENERAL

2.1 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 mental capacity provides little information about the needs of intellectually disadvantaged individuals. Categorisation is usually based on the 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 him or her.

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 intellectual disadvantage may be appointed. 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 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.

2.2 Representation

In theory, there are two main possible effects of the presence of adversarial counsel as discussed above in considering due process and evidentiary standards in the legalistic model. First, it might decrease the number of cases in which a guardian was unnecessarily appointed. Second, it might increase the number of cases where no guardian was appointed even though this was necessary for the welfare of the client. 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.

Presumably under a legalistic approach to guardianship, legal representation would be insisted upon. Under a model which combines elements of the legalistic and welfare oriented approaches, non-legal representation might be preferred in many cases.

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.

2.3 Notice

Adequate notice of proceedings is another requirement of a just guardianship law. 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 in which the person subject to the application lives. 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.

Any provision which contemplates that there may be circumstances which would justify a guardianship hearing taking place without the person subject to the application receiving notice of it would conflict with paragraph 7 of the Declaration.

2.4 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 high standard of proof might theoretically result in fewer guardians being appointed in respect of people who do need some form of guardianship.

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. It is suggested that placing the burden of proof on applicants in guardianship hearings would be a powerful force in implementing a legislative policy such as the use of the least restrictive alternative.

2.5 Broad Standing Provisions

It has been suggested that 'broad standing provisions, whereby the categories of persons who are able to

apply for guardianship are broad rather than limited, 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.

3. OTHER PROCEDURAL ISSUES

3.1 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.

A second possibility for the role of guardian is a government agency, either one which is already -providing services to intellectually disadvantaged 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.

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.

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. 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 his or her life. Finally, the guardian should not be in a position where his or her interests might conflict with those of the ward.

Parents, where alive and able, would thus seem to be the natural choice. 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. It concerned a 30 year old moderately intellectually 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 disadvantage 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. 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."

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, intended only as a guide, to assist 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."

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. 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..."

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."

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 in the preparation of how to implement principles and discharge those duties that the various models differ.

3.2 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.

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.

The proposed Bill of the Victorian Minister's Committee provides for guardianship orders to be reassessed within six months of the original order and thereafter for reviews to be held at least every twelve months. 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. The notice provision for reviews is similar to that which applies to the hearing of the original guardianship application. 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.

Review of guardianship orders should play a dual role: it should look into whether the ward still requires a guardian and it should examine the actual 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 performance by the guardian of his or her duties, and should set out criteria for discharging the guardian from office if performance falls short of the required standard.

3.3 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.

VII. MEDICAL, INCOME AND PROPERTY MATTERS

1. 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 their behalf may be liable for battery.

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.

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. When a person is incapable of consenting to medical procedures, either because of extreme youth or because of intellectual disadvantage, that consent may, in certain situations, be given by a third party, e.g. the parent of a minor, or a court-appointed guardian.

It is more complicated when an intellectually disadvantaged person attains the age of eighteen. The law then presumes that the adult may consent for himself or herself, and this presumption is abandoned only when it is clear that he or she cannot.

The first thing to be determined is whether the patient is really incapable of giving a valid consent. If he or she is, and the proposed treatment is not immediately necessary to preserve life, the medical practitioner runs the risk of an action to trespass of the person. This risk may be avoided in those States in which it is possible to have an intellectually disadvantaged person made an involuntary patient under the mental health legislation.

Even where a legal guardian is in place, there are limitations imposed upon his or her authority by the common law. 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.

A problem is posed by non-therapeutic medical treatments and procedures. According to the Victorian Minister's Committee, there is no doubt that this has resulted in a number of intellectually disadvantaged people being exposed unnecessarily to major medical procedures.

The Committee thought 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.

1.1 Sterilisations

This report 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. 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 disadvantaged persons.

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.

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.

The Anti-Discrimination Board expressed concern that 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. The Board considered that non-therapeutic sterilisations are only acceptable when those who have the mental 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.

What happens when an intellectually disadvantaged adult is incapable of giving a valid consent? The Bright Committee, in considering that parents, care providers and doctors should not have the right to consent of their behalf, recommended that the decision be made by an independent body, having regard to clear criteria -

- "(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 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 evaluation 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."

1.2 Abortions

The laws relating to abortion in the various States of Australia appear to 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.

Difficulties arise 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 in assessing the effect upon the patient's mental health which a continued pregnancy might have.

1.3 Donation of Non-Regenerative Tissues

This issue has never been litigated in Australia, but there have been cases in the U.S.A.

The Australian Law Reform Commission has been concerned that consent as a defence to battery may have no application in the case of a donor of tissue because, in spite of consent, it can hardly be said that the procedure is for the person's benefit. The Law Reform Commission was therefore of the opinion that 'it should not be lawful to take tissue from the mentally incompetent'. In the U.S. case of Strunk v. Strunk, 'K.Y. 445 S.W. 2D 145 (1969), the

court approved of parental consent to a kidney transplant from a 27 year old intellectually disadvantaged man to his twin brother, but only on the basis that the death from kidney disease of the other twin would have had a damaging emotional and psychological effect upon the intellectually disadvantaged twin.

1.4 Legislative Example

Under section 39 of the Victorian Minister's Committee's proposed bill, 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 Tribunal has also been obtained."

Under section 40, a guardian may not consent to these procedures unless the consent of the Tribunal has first been obtained. Section 41 provides that a guardian or ward may apply to the Tribunal for its consent to one of the procedures referred to in section 39. Section 42 provides for notice to be given to a range of persons at least seven days before the hearing of the application. Under section the Tribunal must hear an application within fourteen days of its being lodged. Finally, section 45(1) provides that if the Tribunal is satisfied that it would be in the best interest of the ward, it may consent to any of the procedures referred to in section 39 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.

1.5 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 proposed bill of the Victorian Minister's Committee 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 Minister's Committee proposed bill has ample procedural safeguards, its vague criteria ('in 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.

2. ESTATE ADMINISTRATION

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.

The Minister's 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 intellectually 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 their 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 disability.

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 application -

- ' (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.'

The 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. 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, \$300 or \$1,000), but be at risk of exploitation if he came into a larger sum or inherited valuable property or a major shareholding in a company. Administration orders should be tailor-made to reflect the abilities of the person, yet protect him or her from financial exploitation.

3. LEGAL CAPACITY OF INTELLECTUALLY DISADVANTAGED PERSONS

3.1 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 or she is doing. There is no need for the person to understand all the legal terminology in the contract, but he or she must be aware of the immediate and broad effect of their actions.

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. In determining that capacity courts are strongly influenced by the value of the asset, and also by the 'reasonableness' of the transaction.

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 competence. A contract for the supply of 'necessaries' is binding. Necessaries are articles or services which a person needs in order to maintain himself or herself. They are not confined to what is required to support life, but include those articles and services required to maintain the person in a reasonable lifestyle.

The Bright Committee expressed the opinion that the mere fact that a personal guardian has been appointed in respect of an intellectually disadvantaged adult does not mean that he or she cannot validly enter into a contract.

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.

Under the South Australian Administration and Probate Act, 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 or she could not reasonably have known that the person could not understand the nature of the contract.

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.

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 \$1,000, but required an administrator to deal with larger investments, it would seem sensible to allow him or her to buy a stereo or television without the administrator having the right to intervene.

3.2 Liability for Torts

No person may be held liable for the negligence of another, unless he or she is under a duty to control the conduct of that other. An intellectually disadvantaged adult is solely responsible for his or her own actions, unless he or she has been declared incapable and a guardian has been appointed to act in his or her interests.

Liability for intentional torts depends upon the state of mind of the person sought to be made liable and his or her capacity to form an intent to cause damage or injury. An intellectually disadvantaged person may be liable for any intentional tortious damage he causes.

If an intellectually disadvantaged adult is declared incompetent, and a guardian appointed, the guardian comes under a duty to control the actions of the ward. Thus the guardian would be liable for the tortious actions of the ward.

However, a limited guardianship order should relieve the guardian of his or her duty of care in those areas in which he or she 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.

3.3 Testamentary Capacity

An intellectually disadvantaged person is able to make a valid will if it can be shown that at the time of executing the will, he or she 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. A patient in an institution who satisfies the above requirements is not precluded from executing a will.

3.4 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.

VIII. CONCLUSIONS

1. THE MODELS

. The many options in guardianship law for intellectually disadvantaged people may, for the purpose of drawing this report together, be culled to three main types.

1.1 A 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 device, guardianship in its purely legalistic form would be restricted in its availability to persons who are legally incompetent, or unable to give legally binding consents and form legally binding relationships.

Another important aspect of the legalistic model of guardianship is its emphasis on procedural safeguards, thus extending the benefit of the doubt to those people who fall within the grey area where judgments about mental incapacity are uncertain.

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. Further, in estate administration there may be a good case for making use of a suitably qualified officer (such as the Public Trustee).

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.

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.

1.2 A Welfare Model

Under this model, guardianship is seen as a service which should be available to social workers in their care of intellectually disadvantaged people. 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 himself' or 'unable to make reasonable judgments' are vague and leave the target population for welfare-oriented guardianship uncertain. Thus there would be a great risk of persons being subjected to guardianship unnecessarily.

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.

1.3 Developmental Model

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.

2. CHOOSING THE BEST MODEL

This paper does not seek to decide on one particular approach to guardianship. Rather it seeks to illuminate 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. **This paper** therefore concludes 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. It is, however, too simple to see the issue as a direct conflict between these two values, as 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. However, 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 or 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. 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.

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 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 other 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 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 on him or her? The analogy does not seem sufficiently close to allow this conclusion to be drawn. The imposition of guardianship is 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. 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 difference 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 consider-

ation favours the legalistic model, operating as part of a broad approach to the care of intellectually disadvantaged people.

It is appropriate to conclude by looking once more at the clauses of the Declaration and to ask which model best satisfies its requirements. 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 requirements 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 procedures that would adequately safeguard the basic civil rights would be, in effect, to transform them into a modified legalistic model.

DECLARATION ON THE RIGHTS OF MENTALLY RETARDED PERSONS

The General Assembly,

Mindful of the pledge of the States Members of the United Nations under the Charter to take joint and separate action in co-operation with the Organization to promote higher standards of living, full employment and conditions of economic and social progress and development.,

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,

Recalling the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Declaration of the Rights of the Child and the standards already set for social progress in the constitutions, conventions, recommendations and resolutions of the International Labour Organisation, the United Nations Education, Scientific and Cultural Organization, the World Health Organization, the United Nations Children's Fund and other organizations concerned.

Emphasizing that the Declaration on Social Progress and Development has proclaimed the necessity of protecting the rights and assuring the welfare and rehabilitation of the physically and mentally disadvantaged,

Bearing in mind the necessity of assisting mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life,

Aware that certain countries, at their present stage of development, can devote only limited efforts to this end,

Proclaims this Declaration on the Rights of Mentally Retarded Persons and calls for national and international action to ensure that it will be used as a common basis and frame of reference as the protection of these rights:

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.

DECLARATION ON THE RIGHTS OF DISABLED PERSONS

The General Assembly,

Mindful of the pledge made by Member States, under the Charter of the United Nations; to take joint and separate action in co-operation with the Organization to promote higher standards of living, full employment and conditions of economic and social progress and development,

Reaffirming its 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,

Recalling the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Declaration of the Rights of the Child and the Declaration on the Rights of Mentally Retarded Persons, as

well as the standards already set for social progress in the constitutions, conventions, recommendations and resolutions of the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the United Nations Children's Fund and other organizations concerned,

Recalling also Economic and Social Council 1921 (LVIII) of 6 May 1975 on the prevention of disability and the rehabilitation of disabled persons,

Emphasizing that the Declaration on Social Progress and Development has proclaimed the necessity of protecting the rights and assuring the welfare and rehabilitation of the physically and mentally disadvantaged,

Bearing in mind the necessity of preventing physical and mental disabilities and of assisting disabled persons to develop their abilities in the most varied fields of activities and of promoting their integration as far as possible in normal life,

Aware that certain countries, at their present stage of development, can devote only limited efforts to this end,

Proclaims this Declaration on the Rights of Disabled Persons and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights:

1. The term "disabled person" means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities.

2. Disabled persons shall enjoy all the rights set forth in this Declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family.

3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age which implies first and foremost the right to enjoy a decent life, as normal and full as possible.

4. Disabled persons have the same civil and political rights as other human beings; paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of these rights for mentally disabled persons.

5. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

6. Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration.

7. Disabled persons have, the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.

8. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.

9. Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subject, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom. If the stay of a disabled person in a specialised establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.

10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

11. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

12. Organizations of disabled persons may be usefully consulted in all matters regarding the rights of disabled persons.

13. Disabled persons, their families and communities shall be fully informed, by all appropriate means, of the rights contained in this Declaration.

REFORMS PROPOSED IN THE STATESNew South Wales

In New South Wales a Community Welfare Act was passed into law in 1982. It is to be noted that the new legislation is 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.

Tribunals: The Community Welfare Act 1982, constitutes an Intellectually Handicapped Persons Review Panel from which Intellectually Handicapped Persons Review Tribunals are to be drawn.

Definition: The definition of intellectual disadvantage *is* in the same words as in the Child Welfare Act 1939, as amended, with one change. The three criteria of inadequate social adjustment, a retarded rate of maturation or a significant limitation of learning 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 can be misused because the definition provides that the condition characterised by that particular criterion has to be 'due to arrested or limited development of intellectual functioning'.

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.

Representative: One advance in the new legislation is the inclusion of a provision that each intellectually disadvantaged person is to have a 'representative'. This is to be a person (not a public servant) or non-government representative, and an Intellectually Handicapped Persons' Tribunal is to nominate a representative for any intellectually disadvantaged person who is unable to nominate someone himself.

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. 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 Declaration.

The New South Wales Government has two further reforming pieces of legislation on foot. The Anti-Discrimination (Amendment) Act 1982 (assented to in December 1982) and the Conveyancing (Powers of Attorney) Amendment Bill 1983, which, together with the cognate Mental Health (Powers of Attorney) Amendment Bill 1983 and the Trustee (Powers of Attorney) Amendment Bill 1983, were before the Parliament at the time of writing.

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 this 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.

This is simpler and at the same time more extensive than the definitions in the Acts referred to above.

Power of Attorney: The amendments proposed 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.

,South Australia

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

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.

Regionalization: Decentralised service facilities were recommended.

Normal Lifestyle: The Report recommended the provision of increased homecare assistance and the encouragement of alternative residential homecare and community living in place of institutional care.

Anti-Discrimination: The Bright Report recommended the protection: of intellectually disadvantaged people against discrimination. •

Guardianship: Finally it was recommended that a watchdog agency have the function, inter alia, of acting as advocate for intellectually disadvantaged people.

Victoria

In Victoria, a committee set up in 1980 to report to the Government on the legal position of intellectually disadvantaged people presented its Guardianship Report in December 1982. The Report included proposed legislation.

In the Report, there are 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 (i.e. full) guardians; and limited or plenary estate administrators in addition to or as an alternative to a guardian. There is also a recommendation 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.

Guardian: There is to be provision for limited or partial guardianship tailored to the individual needs of each particular intellectually disadvantaged person. 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.

The Ccmmitttee's proposals will ensure that mental health legislation will no longer apply to intellectually disadvantaged persons in Victoria, and that the Guardianship Tribunal will replace 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 Opnortunity (Discrimination Against Disabled Persons) Act 1982 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.

Rights: A plenary guardian cannot be appointed unless the Tribunal 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 proposed legislation includes clauses that spell out the powers and duties of plenary and of limited guardians.

Queensland

In Queensland, two major bills affecting intellectually disadvantaged persons were introduced into the Parliament in March 1983. The first of these, the Intellectually Handicapped Citizens Bill, will effect a major re-structuring of laws governing the guardianship of intellectually disadvantaged persons, once it becomes law. The major thrust of the Bill is directed towards giving effect to the least restrictive alternative principle, this being specifically expressed in clause 5. Clause 7 establishes a corporate body known as the Intellectually Handicapped Citizens Council of Queensland, whose functions are to include the appointment of guardians or 'friends' of the intellectually disadvantaged person, and fostering a general improvement of the quality of life of intellectually disadvantaged citizens in that State.

Applications for the appointment of a 'friend' are governed by clause 30, which provides that any of a number of authorised persons (including the intellectually disadvantaged person himself) 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:

- (i) the individual circumstances of the intellectually disadvantaged person, and the extent of intervention required in the particular case;
- (ii) the need to maintain the intellectually disadvantaged person's dignity and self-respect; and
- (iii) any special circumstances, such as cultural considerations.

Clause 28 of the Bill defines those persons who are eligible to be appointed as 'friends'. Those who are ineligible include, surprisingly, immediate relatives of the intellectually disadvantaged person, and those who work in a paid capacity providing services to that person.

In general, 'friends' so appointed are required to advance the intellectually disadvantaged person's wishes, and his/her social and personal interests. The Council is further required to review the needs, capabilities and wishes of the intellectually disadvantaged person at least

every two years, and in so doing, may vary or terminate any intervention (including the appointment of A 'friend') as need be.

The Bill also contains specific provisions dealing with the management of the estates of intellectually disadvantaged persons. Clause 33 empowers the Public Trustee, upon notification by the Council, to become the manager of the estate of an intellectually disadvantaged citizen who, in the Council's opinion, requires estate management for the protection of either himself or his dependants. The Public Trustee is authorised to assume management, except where a committee of the estate has already been appointed under other legislation.

The Bill also provides for appeals against any decision made under clause 16, regarding the provision, variation or termination of intervention. The appeal is de novo, and is made to a judge of the Supreme Court, whose decision is final.

The second Bill presented before the Queensland Parliament in relation to these matters, is the Mental Health Act and Criminal Code Amendment Bill. Clause 4 of the Bill amends the title of the Mental Health Act (1974) to the Mental Health Services Act (1974-83). The clause also effects 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'.

COMMENTARY

Since 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 none of the Australian States is there 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 an intellectually disadvantaged person makes it necessary to restrict or deny some or all of his or her rights (c.f. paragraph 1 of the Declaration). Victoria's proposed legislation, and Queensland's Intellectually Handicapped Citizens Bill, both attempt to do this, but neither to date has been brought into force.

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

paragraph 3 of the Declaration. 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 to normal life (paragraph 4 of the Declaration).

To achieve suitable reform in these last two areas, it would be necessary to obtain the co-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 extension of legislation that prohibits discrimination to persons under guardianship is another reform measure that may help to achieve the recognition of the general and special rights set out in the Declaration (c.f. the recent equal opportunity and anti-discrimination legislation of New South Wales, Victoria, and the recommendations of the South Australian Bright report).

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 (c.f. paragraph 7 of the Declaration).

The old-fashioned legislative structures classified all intellectually disadvantaged people, whatever the nature of their disability, together with the mentally ill. 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 Declaration. The welfare/medical model legislation applies in a patchy fashion to people who are senile - that is to say, suffering intellectual disadvantage resulting from age - as well as people such as the intellectually disadvantaged at birth, those whose incapacity does not arise until they are adult, and to 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. It can be argued that such a legislative structure is not in accord with the 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 for respectively those people who are intellectually disadvantaged' and those who are mentally ill. 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 handicapped persons.

The proposed reforms in Victoria, South Australia and New South Wales will, however, at least separate those who are mentally ill from those who are intellectually disadvantaged and the State Mental Health Acts will no longer apply to people who are not suffering from mental illness.

Similarly, although Queensland's Intellectually Handicapped Citizens Bill seeks to effect some useful reforms in that State, the proposed assimilation of the position of intellectually disadvantaged people and those with mental illness under the Mental Health Services Act (1974-83) would, at least in principle, serve to frustrate those objectives.