  - courts — delays, costs, listing arrangements, hours of operation and overheads, and
  - Government charges,
- whether the cost of taking legal action is unacceptably high;
- the availability of targeting of legal aid; and
- whether there are any practicable alternatives to the present system.

The Chairman of the Committee Senator Barney Cooney (ALP, Vic) said in the Senate that

> The Committe believes that most lawyers, like other professional groups, are genuinely hard working persons. For this reason, the Committee will be looking at lawyers' fees and charges not in isolation but in the context of the overheads involved in running their practices. In examining the overall cost of legal services, the Committee wants to consider aspects of lawyers' professional practice to gauge whether they have an effect on the cost of legal services and litigation in Australia today. Some such aspects include, for example, the two counsel rule or the split nature of the profession in some States.
>
> Beyond the costs associated directly with lawyers, other factors may contribute to the cost of obtaining justice in Australia. Such factors include the listing arrangements in courts, the monetary jurisdictional limits of the courts, the awarding of costs, and legal representation in small claims jurisdiction or before certain tribunals, for example.

The Committee will ask whether there are ways of streamlining court procedures so as to reduce the costs of those procedures. It will examine, for example, whether measures such as longer sitting hours, grouped proceedings, contingency fees, or increased incentives for people to try alternative, informal, means of resolving disputes may be practical.

The Committee will also look at the factors that affect the cost of non-litigious legal work — for example, should conveyancing, or the incorporation of companies, be the exclusive province of lawyers?

Senator Cooney said:

> One of the concerns the Committee has in undertaking an inquiry such as this is that the community's reasonable expectations of obtaining justice should not be unduly compromised. As far as the Committee is concerned, there is a balance to be achieved between an acceptable level of justice and an acceptable cost to individuals and to the community.

The Committee will also examine the availability and targeting of legal aid.

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dp: guardianship and management of property

outline. The ALRC's Discussion Paper No 39, *Guardianship and Management of Property*, was released in May. The paper examines the inadequate state of the present law in the Australian Capital Territory providing for guardianship of persons unable to manage their personal affairs. These are generally people suffering from a disease or disability such as senility, brain damage, mental illness, or intellectual disability. The Discussion Paper also examines the law relating to the management of property of such persons and makes tentative recommendations for reform of the law.

background. The reference was given to the Commission on 29 August 1988 by the Commonwealth Attorney-General. Prior to this, however, much work had already been done on the topic by the Attorney-General's Department including extensive public consultation and the

preparation of the Draft Guardianship and Management of Property Ordinance 1985 (ACT). The draft legislation was circulated to the Human Rights Commission and to others in the community concerned with guardianship and management of property of disabled people. The views outlined in these submissions were taken into account in the preparation of the Commission's Discussion Paper.

limitations of the present law. At present in the ACT, in cases where it is necessary to appoint either a guardian or manager of property, or both, an application must be made to the Supreme Court under the Lunacy Act 1898 (NSW). Apart from its old-fashioned language, the Act is defective in a number of ways. It is not comprehensive in its coverage so that certain groups of disabled people who may need guardianship or management of property orders cannot obtain them. For example, in relation to guardianship orders, the Act does not cater for people suffering from senile dementia or drug or alcohol related diseases. There is also no periodic review of orders. Whilst it is possible to appeal against an order made by the Supreme Court under the Act, there is no provision for periodic review of orders. An order remains in force, usually for an indeterminate time, and will only cease to operate if an application is made to have the order revoked. Ideally, an order should remain in force only so long as it is needed and should be capable of being modified as necessary. Another limitation is that although the general law imposes standards of accountability on someone who is appointed to manage another's property and money, the Act imposes no standards of this sort. In relation to guardianship, both the Act and the general law are silent. There is also the problem of inaccessibility. Although there are no procedural or substantive bans to anyone making an application to the Supreme Court under the Act, in practice there are serious problems of accessibility not the least of which is expense. It costs between $2 000 to $5 000 to obtain an order from the Supreme Court. The filing fee alone is $240. The high costs, and the fact that many people are intimidated by the need to take formal proceedings, have resulted in very few applications being made since the Supreme Court started its work.

a specialist tribunal. To overcome these problems, the Discussion Paper tentatively suggests that a tribunal be established which would develop necessary expertise. Such a body would be able to ensure that due process is observed while at the same time fostering an atmosphere of informality. It could preside over both adversarial and inquisitorial hearings as the requirements of the case dictate. It would be able to initiate lines of inquiry. This is particularly important when the tribunal must determine the precise functions which the person who is the subject of the enquiry lacks and the people who and services which are available to support the person. It is suggested that a tribunal would be better suited than a court to the task of periodic review of orders and to the role of providing advice and guidance to guardians and managers.

proposed model. Under the tentative proposals a model known as the 'care' model is proposed. Such a model for intervention would require the tribunal to be satisfied that the person in question either:

- needs to make a decision of importance as to his or her welfare or health other than one concerning property or money and lacks legal capacity to make that decision or
- is unable to manage his or her day to day life and his or her needs cannot be met except by the appointment of a guardian.

The tribunal may find that both needs are present. The types of needs which are established will determine the kind and scope of order that is made by the tribunal.

specific incapacity. A key question is whether the tribunal must be satisfied that in addition to need, the person suffers from a defined and specific mental or physical incapacity, such as intellectual impairment, mental illness or brain damage. At present, the Commission is inclined towards recommending this requirement since it ensures that allegations of incompetence or eccentric or anti-social behaviour would not be sufficient justification for making an order. The list would give the tribunal a definite 'gateway' when it is deciding whether or not a person is unable to manage his or her day to day life.

who may apply? In principle, any person who has a legitimate interest in the welfare of the person in respect of whom an order is sought should be able to initiate proceedings. The Commission is at present inclined towards the view that there should be a list of people with an unqualified right to apply which would include the person in respect of whom the order is sought, the spouse of the person, a child, parent or brother or sister of the person and the Public Advocate (if such a position is created). This list should be supplemented by 'any other person' who may apply only with leave of the tribunal.

guardian's powers. At common law, a plenary guardian has the same control over the incapacitated person as a parent has over his or her child. This is usually spelled out in the legislation but the power to chastise should be specifically excluded. In the Commission's view, there are certain decisions which a guardian should not be able to make on behalf of the represented person which include the decision to vote, to marry, to make a will, to adopt a child, or to consent to any treatment under the Mental Health Ordinance 1983.

non-therapeutic treatment. Under the Commission's tentative proposals, consent to certain medical procedures such as sterilisation or abortion would not be able to be given by the guardian. Instead, these cases should go before the tribunal for determination. The tribunal should be guided by statutory criteria in these difficult decisions. This would include the requirement that the tribunal must be satisfied that the proposed procedure is in the incapacitated person's best interests. In deciding this issue, the matters that the tribunal should take into account should include the consequences of not carrying out the proposed procedure as against the consequences of doing so, whether alternative procedures are available, and the good faith of the proponent of the medical procedure in that he or she is concerned for the best interests of the incapacitated person rather than his or her convenience or the public's convenience.

public advocate. The Commission has received virtually unanimous support for the idea that a Public Advocate, modelled on the one in Victoria, should operate in the Australian Capital Territory. A primary function of the Public Advocate would be to act as the guardian of last resort where no individual is ready, able or willing to act as the guardian of a person or where there is no suitable person to act. As is the case with individuals, the Public Advocate would be able to act as a plenary or a limited guardian, according to the nature of the appointment. The Public Advocate would also be able to act as an alternate guardian and as an administrator. The Public Advocate would also provide information to the Guardianship and Administration Tribunal to enable appropriate decision making.