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"ACCESS TO JUSTICE - THE WAY FORWARD"

THE QUEENSLAND GUARDIANSHIP AND ADMINISTRATION REGIME – Balancing the Right to Autonomy with the Right to have Adequate and Appropriate Decision-Making Arrangements.

"One of the most remarkable legal developments of our time is the growth of the international law of human rights. It is one of the three pillars of the United Nations…….At the heart of the principles of universal human rights is a concept of the autonomy, worth and inalienable dignity of the human being.

The Common Law of England, one of the world's great legal systems, which has been adopted in Australia, Canada, the United States and elsewhere also protects fundamental human rights. Indeed all legal systems, to some extent, strive to do so. But there are times in the journey of each human being when the subject is particularly vulnerable and even unable to assert his or her human rights."

The Hon Justice Michael Kirby AC CMG[1]

Introduction

In 1996 the Queensland Law Reform Commission in its final report[2] on assisted and substitute decision making estimated that at that time there were over 100,000 Queensland adults with a condition which affected their decision- making ability. Most of these people suffered from dementia, a mental illness or an intellectual disability. Whilst some of these people have the capacity to appoint an attorney to act on their behalf, many are so severely disabled that they lack the capacity to ever appoint an attorney. The issue for all people in this group is whether they have appropriate and adequate decision making arrangements in place. The essential question is whether their rights and interests are being adequately taken care of and protected.

Improving access to justice for this group of people essentially means that they have the right to the greatest possible degree of autonomy in decision making but that they also have the right to appropriate and adequate decision making arrangements in place whether they be formal or informal arrangements. In particular health care decisions should not be made without appropriate substitute consent being given.

The Position prior to July 2000

[1] P Darzins, W Molloy and D Strang (eds) *Who can decide?* (Memory Press, Adelaide 2000)p.v
[2] Queensland Law Reform Commission (1996) *Assisted and Substitued Decisions: Decision-making by and for people with a decision-making disability,* Report No 49, Brisbane Qld.

Improving access to justice for people with impaired decision making is a continuum. In any discussion an there needs to be an understanding of the way things were, an analysis of how things are now and a discussion of improvements for the future.

A symbol of how things used to be is a Form 69, which issued under **section 55** of the Mental Health Act 1974.

Section 55 of the *Mental Health Act* 1974 provided that a designated medical practitioner must, upon forming the opinion that a person in a facility had a mental illness and was incapable of managing their affairs, notify the Public Trustee (PTQ) who under the fifth schedule of the Act had a general authority to act unless the Supreme Court ordered otherwise.

This process defied the rules of natural justice, there was no notice, no hearing and a plenary order, placing all financial affairs in the hands of the PTQ, covered all matters from the management of a simple pension to running a complex family business. There were no safeguards, no procedural fairness, no standards and no simple way of obtaining a review of the decision.

A Form 69 was regularly used by Qld Health facilities, including hospitals, as a simple administrative process to refer a persons affairs to the PTQ and some 3,300 people were still being managed by the PTQ by virtue of this provision as of June 2000. Matters stayed that way unless a person requested a review and a form 70 would issue advising that a person could now manage their affairs. Some referrals dated back to the 1930's.

Accordingly some adults in this group had their decision-making autonomy taken away from them in relation to all financial matters for a period of time far greater than would have been strictly required.

Prior to July 2000 however there were many adults who needed substitute decision making arrangements put in place, because they were unable to make decisions for themselves, but family members were reluctant to do so because it involved action in the Supreme Court. An application had to be made to the Supreme Court for a declaration that a person was unable to manage their affairs and a committee of the estate was appointed under the *Mental Health Act 1974* or a protection order was made under the *Public Trustee Act 1978.* The Supreme Court, apart from its inherent parens patriae jurisdiction, was also empowered under the *Supreme Court Act 1995* to appoint guardians and committees.

Intellectual disability, dementia and acquired brain injury however were within the jurisdiction of the Intellectually Disabled Citizens Council under the *Intellectually Disabled Citizens Act 1985* whereby the Council could refer a person's financial affairs to the Public Trustee and health care decisions to the Adult Guardian (or previously the Legal Friend).

The disadvantages were that the procedure for the appointment of a substitute decision-maker depended on the type of disability of the adult and was set out in a

variety of different Acts. It also did not allow for the appointment of family members or close friends as guardians or administrators but only allowed the appointment of statutory bodies such as the PTQ or the Adult Guardian.

A further scenario was that many adults did have informal or formal decision-making arrangements in place which were not in the best interests of the adult. Informally a family member may have been managing the pension of a person but very little of the money was actually being used for the benefit of the adult. Or an attorney appointed under an Enduring Power of Attorney may have been using the adult's assets for his own benefit. Any action in relation to the conduct of the attorney was heard in the Supreme Court.

The Establishment of the Queensland Guardianship and Administration Tribunal.

Guardianship regimes have been now established throughout Australia and Queensland's Guardianship and Administration Tribunal was established under the *Guardianship and Administration Act 2000* and commenced operations on 1 July 2000. Essentially the Tribunal appoints administrators to make financial decisions and guardians to make personal decisions, which includes health care, accommodation and lifestyle decisions for adults with impaired decision making, where the current informal arrangements are inappropriate or a duly appointed attorney is acting without regard to the best interest of the adult concerned. In particular the Tribunal reviews the actions of attorneys, guardians and administrators who have been making substitute decisions for adults with impaired decision making. The Tribunal's jurisdiction arises irrespective of the type of disability of the adult and allows for the appointment of close friends and family members. The Tribunal also consents to special health care for these adults, which includes sterilisation, donation of tissue, termination of pregnancy and certain decisions in relation to withholding and withdrawing life-sustaining measures.

The functions of the Tribunal are set out in **section 82,** which provides that the Tribunal has the following functions:

- making declarations about the capacity of an adult, guardian, administrator or attorney for a matter.
- considering applications for the appointment of guardians and administrators.
- appointing guardians and administrators if necessary and reviewing the appointments.
- making declarations, orders or recommendations or giving directions or advice in relation to guardians or administrators, enduring documents and attorneys and related matters.
- ratifying a decision or a proposed decision by an informal decision maker.
- Consenting to special health care.

Factors which have contributed to improved access to justice for people with impaired decision-making ability.

The *Guardianship and Administration Act 2000* was based on the recommendations of the 1996 Queensland Law Reform Commission Report which focussed its attention on the laws relating to decision-making by and for people with impaired capacity for decision making. The Act contains a number of important safeguards, which I believe ensure access to justice for this important group in our society.

The entire philosophy of the Act is contained in **section 6** which states that the Act seeks to strike an appropriate balance between the right of an adult, with impaired capacity, to the greatest possible degree of autonomy in decision-making and the adult's right to adequate and appropriate decision-making.

1. The Act contains important Acknowledgments.

Section 5 of the Act specifically acknowledges that an adult's right to make decisions is fundamental to their inherent dignity and that this right to make decisions includes the right to make decisions, which others may not agree. It also provides that the right of an adult to make decisions should be restricted to the least possible extent.

It also acknowledges that the capacity of an adult with impaired capacity to make decisions may differ according to the nature and extent of a person's impairment, the type and complexity of the decision to be made and the support available from the adult's existing support network.

Section 7 also states that an adult is presumed to have capacity for a matter and this is also clearly articulated in Principle One of the General Principles of the Act. The Tribunal does not have jurisdiction in relation to making appointments of a guardian or administrator unless it is established that a person has **impaired capacity for the matter.** The Tribunal takes a very thorough approach in relation to this threshold issue. Justice Mackenzie in the 1999 Queensland Supreme Court decision of *Caldwell v McClelland* [3] stated that the onus was on the applicants to prove the donor lacked capacity at the time a power of attorney was executed and that the task of doing so was substantial. Justice Ambrose also discussed the presumption of capacity in the case of *Re Bridges*[4], where he indicated that whilst there was a presumption of capacity it was a rebuttal presumption.

The Tribunal's decision in 2000 in the case of *Re M*[5] discussed the issue of capacity for a health matter and decided that in that particular case the adult did indeed have capacity to refuse treatment as the Tribunal was satisfied that he fully understood the nature and consequences of the decision he was

[3] Unreported (Mackenzie J, 6 August 1999)
[4] [2001] 1QdR 574
[5] Unreported Qld Guardianship and Administration Tribunal 24 July 2000

making which was to refuse continued artificial ventilation and did not appoint a substitute decision-maker but made a declaration that he had capacity to make this particular decision.

Section 9 of the Act clearly states that there is not always a need for an appointment of a substitute decision-maker and recognises that in some matters it is appropriate for decisions to be made on an informal basis by the adult's existing support network.

2. The General Principles and the Health Care Principle of the Act clearly articulate a set of rights for all adults with a decision-making disability.

THE GENERAL PRINCIPLES

Presumption of Capacity

1. *An adult is presumed to have capacity for a matter.*

Same human rights

2.(1) *The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.*

(2) *The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.*

Individual value

3. *An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.*

Valued role as member of society

4.(1) *An adult's right to be a valued member of society must be recognised and taken into account.*

(2) *Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.*

Participation in community life

5. *The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.*

Encouragement of self-reliance

6. *The importance of encouraging and supporting and adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.*

Maximum participation, minimal limitations and substituted judgement

7.(1) *An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.*

(2) *Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.*

(3) *So, for example-*

(a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and

(b) to the greatest extent practicable, for exercising power for a matter
for the adult, the adult's views and wishes are sought and taken into account; and

(c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.

(4) *Also, the principle of substituted judgement must be used so that if, from the adult's previous actions, it is reasonable practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.*

(5) *However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.*

(6) *Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.*

Maintenance of existing supportive relationships

8. *The importance of maintaining an adult's existing supportive relationships must be taken into account.*

Maintenance of environment and values

9.(1) *The importance of maintaining an adult's cultural and linguistic environment, and set of values (including and religious beliefs), must be taken into account.*

(2) *For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal and Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.*

Appropriate to circumstances

10. *Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.*

Confidentiality

11. *An adult's right to confidentiality of information about the adult must be recognised and taken into account.*

THE HEALTH CARE PRINCIPLE

12.(1) *The* ***"health care principle"*** *means power for a health matter for an adult should be exercised by a guardian, the adult guardian, the tribunal or, for prescribed special health care, another entity-*

(a) in the way least restrictive of the adult's rights; and

(b) only if the exercise of the power is appropriate to promote and maintain the adult's health and well being.

Example of exercising power in the way least restrictive of the adult's rights-

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

(2) *In deciding whether the exercise of a power is appropriate, the guardian, the adult guardian, tribunal or other entity must, to the greatest extent practicable-*

(a) seek the adult's views and wishes and take them into account; and

(b) take the information given by the adult's health provider into account.

(3) *The adult's views and wishes may be expressed-*

(a) orally; or

(b) in writing, for example, by conduct.

(c) in another way, including, for example, by conduct.

(4) *The health care principle does not affect any right an adult has to refuse health care.*

(5) *In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account-*

(a) a guardian appointed by the tribunal for the adult;

(b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;

(c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.

3. The Act in section 11 requires the Tribunal, in reaching a decision, and all substitute decision makers appointed under the Act to apply these Principles.

It is also important to note that these same Principles are required to be applied by Attorneys who are appointed under the *Power of Attorney Act 1998* and the *Mental Health Act 2000* also requires an application of these principles under that Act.

The Tribunal takes the application of these principles very seriously and in every decision reached it turns its mind to these principles. In some of the most difficult special health applications, involving the withholding and withdrawing of life sustaining measures, it has been these application of these principles which has guided the ultimate decision which has been made.

A great deal of time at any hearing is taken up with a discussion of these Principles and the duties of the guardian or administrator to apply these Principles. Incrementally, we believe that we are advancing the rights of people with impaired decision making capacity by insisting on an application of these Principles. When we review the appointments of guardians and administrators we specifically ask them to address how they have applied these principles in their decision-making. They are asked "How have they encouraged and supported the adult to perform social roles valued in society?" "Have they consulted with the adult and sought their views and wishes prior to making a decision?" "Have they exercised their powers as decision-maker in a way which is least restrictive of the adult' rights?" Any substitute decision-maker, who has acted in a way which is inconsistent with these principles is generally removed at a Review Hearing in accordance with **section 31** of the Act.

Attorneys have been required to abide by these Principles since the *Powers of Attorney Act 1998* came into effect but I am sure most are not aware of this fact. There must be a far greater insistence on this standard of decision making by all substitute decision makers.

4. The Tribunal may only appoint a Guardian or Administrator if a clear need for an appointment is established.

Section 12 of the Act provides that not only must the Tribunal be satisfied that the adult has impaired capacity for the matter but it must also be satisfied that there is a clear need for a decision in relation to the matter and that the adult's needs will not be adequately met or protected without an appointment.

A party who applies for an appointment as a guardian or administrator "just in case" without establishing a clear and present need for an appointment will be unsuccessful. The Tribunal has had many applications by parents to be appointed as guardians for their adult children with impaired capacity. However, if they cannot establish why such an order is needed it will be dismissed as the informal arrangements together with the statutory health attorney regime established under the *Power of Attorney Act 1998* are usually sufficient to meet the needs of most people in relation to personal matters. Personal matters covers decisions in relation to accommodation, health care and lifestyle decisions as well as legal matters not relating to finance or property.

5. The application is considered by a multi –disciplinary Tribunal who have specific expertise in relation to people with impaired decision-making ability.

The Act provides in **section 101** that generally, the Tribunal is constituted by 3 members and that it should include a legal member, a professional member and a personal experience member. Qualification for appointment as a non legal member is on the basis that a member has extensive professional knowledge or extensive experience of persons with impaired capacity.

The make-up of the Tribunal therefore ensures that there is an appropriate understanding of the adult's point of view as well as the issues surrounding the decision-making. It also ensures that there is a critical analysis of evidence in relation to the question of capacity.

6. The Tribunal must follow the least restrictive alternative and only make the actual appointments that are required.

The Tribunal can appoint a substitute decision maker for specific things only and it can also appoint successive decision-makers. As stated previously the Act recognises informal networks, and that there may not necessarily be a need for a formal appointment if the decision making is appropriate. The Act does not aim to set up a regime of Guardianship - in fact the Act ensures that an appointment is only made where necessary. The Act recognises that many adults with impaired capacity are capable of making most decisions which affect their lives and that an appointment of a substitute decision-maker is a serious restriction on a person's right to self determination

7. The Tribunal is easily accessed and hearings are conducted simply and quickly with as little formality as the circumstances allow.

The Leggatt Report in the UK stated

"*tribunals should do all they can to render themselves understandable, unthreatening and useful to users…".*[6] The Act provides at section 115 that the adult or anyone who has a sufficient and continuing interest in the adult may make an application to the Tribunal for a declaration, order, direction, recommendation or advice in relation to the adult about something in or related to the *Guardianship and Administration Act 2000,* or the *Power of Attorney Act 1998.* Since the Tribunal commenced there have been several hundred application where an adult has successfully obtained a declaration of capacity on their own application. They have been able to complete all the required documentation, obtain the relevant medical information and present their own case in proceedings before the Tribunal.

There is no filing fee and the proceedings are non-adversarial and lawyers need to seek leave to appear. Whilst leave to appear will generally be given if the circumstances warrant it, parties are advised that because of the non adversarial and informal nature of the proceedings is not necessary for a lawyer to be engaged and that they will be given every opportunity to present their own case. In the approximately two and a half thousand applications heard by the Tribunal in 2001-2002 there were only about 70 applications which involved legal representatives being present. Further more the Tribunal makes no orders as to costs in accordance with **section 127**.

Section 107(1) of the Act requires that the proceeding before the Tribunal be conducted as simply and quickly as the requirements of the Act and an appropriate consideration of the matters allows. The leading case in relation to procedures before Tribunals is *The Queen-v-The Mental Health Review Tribunal ex parte Brian Gillespie* (Supreme Court 1985) which referred to the remarks of Russell LJ in Herring-v- Templeman (1973)[7]

[6] Sir A Leggatt *Tribunals for Users, One System, One Service: Report of the Review of Tribunals(2001)* overview, para 6.
[7] (1973) 3 All ER 569 at 587.

> *Its members are not judges in a law court, nor are they legal arbitors. They are entitled to such flexibility in their procedure as they think the particular case under consideration requires.*

Section 107(2) provides that the Tribunal is not bound by the rules of evidence and may inform itself in a way it considers appropriate. In practice however given the significant infringement on the rights of the adult if a substitute decision maker is appointed, the Tribunal would only attach weight to evidence which is strictly relevant and has been substantiated or tested in some way as the Tribunal is very conscious that the major criticism of Guardianship Tribunals has been that "decisions are frequently made on scanty evidence with little or no cross-examination."[8].

In *Mahon-v-Air New Zealand* (1984)[9] Lord Diplock referred to two rules of natural justice that were germane to that appeal. The rule that the person making a finding in the exercise of an investigative jurisdiction must base his decision upon evidence that has some probative value, and secondly

> *that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.*
>
> *The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self contradictory.*
>
> *The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of the opportunity to adduce additional material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.*

GAAT is an inquisitorial or investigative Tribunal with **section 130** providing that before it can hear and decide a matter the Tribunal must ensure that it has all the relevant material.

The nature and role of an inquisitorial Tribunal was addressed by the *Queensland Law Reform Commission Report 49 on Assisted and Substituted Decisions,* Volume 1 at page 218.

[8] Carney and Tait, Federation Press1997
[9] (1984)AC 808 at 820

when a matter is heard by a court the judge generally assumes the role of neutral umpire presiding over an adversarial dispute. Each side decides what information is to be presented to the judge. This is done by calling witnesses who are asked questions and then tested by cross examination according to the rules of the law of evidence. The complexity of these rules usually requires the participation of lawyers.

With a tribunal on the other hand, procedures can be simplified and the rules about giving evidence and presenting arguments relaxed. The use of lawyers can be minimised and public accessibility can be increased by the removal of some of the procedural and financial barriers imposed by a formal legalistic system. The tribunal can ensure that the information necessary to achieve the most appropriate solution is available.

Creation of a tribunal would also allow for the appointment to the tribunal of people who have experience or special expertise in particular areas of decision making disability and their associated problems.

9. The Adult is aware of the material upon which the Tribunal makes its decision.

A major criticism of Mental Health Tribunals all over Australia has been the fact that they made decisions without the nature of the evidence upon which they made that decision being made known to the person involved.

Section 108 provides that the Tribunal must observe the rules of procedural fairness and **section 108(2)** expressly provides that each active party must be given a reasonable opportunity to present an active parties case and in particular to inspect a document to which the Tribunal proposes to have regard in reaching a decision and to make submissions about the document. This right to inspect may be displaced by a confidentiality order however. Whilst the Tribunal may make a confidentiality order in accordance with **section 109(2)** these orders have been made only rarely and in the many hundreds of case I have been involved with over the last 2 years I can only recall making two confidentiality orders.

In *Heatley –v-Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 516 also referred to by Ryan J in Gillespie Aickin J stated;

> *that while it was for the Commission itself to devise its own procedures in the light of the obligation to act fairly it should not act on information the general nature of which was not revealed to the person affected.*

You will also note that there is no right to be given a copy of the documents on the Tribunal file but only a right to inspect, the only exception to this is where the Tribunal is to rely on a report from a Tribunal staff member. In that regard a right to a copy exists.

This approach is based on the fact that the adult's right to confidentiality of information is expressly provided for in the Act in **section 112** and **section 11 of schedule 2**

There are strict confidentiality provisions and **section 112(3**) provides that a person must not publish information about a proceeding or disclose the identity of a person involved in a proceeding.

All applications must be accompanied by a health professional's report which specifically addresses questions in relation to the adults capacity for making decisions in relation to personal and financial matters.

In addition the Regulations provide that certain applications must contain specific information. Applications for the appointment of a guardian or an administrator must contain the information set out in **regulation 3** including a copy of any existing enduring documents, a proposed financial management plan as well as evidence addressing the need for the appointment. Applications for a declaration about capacity must contain the information set out in **regulation 4** and **regulation 5** sets out the information needed for an application to register a registrable order and **regulation 6** sets out the information which must accompany an application for consent to special health care.

8. The Views of the adult must be taken into account.

Gordon Renouf in his paper presented to the *Access to Justice Conference in 2001*[10] commented that one thing that was commonly missing in all discussions about access to justice for disadvantaged persons was insufficient concern for the client's point of view.

Section 118 ensures that the adult is given notice of a hearing and **principle 7(3)** of the General Principles provides that to the greatest extent possible the Tribunal and *all* decision-makers must take the views and wishes of the adult into account.

Every attempt is made to have the adult attend the hearing with the only exceptions being if the adult is too ill or infirm and they cannot contribute to the hearing in any meaningful way. In some instances the evidence of the adult may be taken in the absence of the other parties in accordance with **section 109**. The general approach of the Tribunal is that if this occurs then the substance of the conversation will be outlined to all parties at the resumption of the hearing when all parties are present. This approach has been endorsed by the NSW Supreme Court in the case of *Re* "*SU*"[11].

9. The Act provides for the Appointment of a Separate Representative to Represent the Adult's views wishes and interests.

Section 125 provides that the Tribunal may appoint a Separate Representative for the adult to represent their views, wishes and interests. These appointments have been made on numerous occasions where the Tribunal considered it was important to have an independent third party to

[10] Caxton Legal Centre Inc. "Access to Justice" Conference – Brisbane October 2001
[11] Unreported Windeyer J 17 September 2001 P043/01Supreme Court NSW Equity Division.

represent the interests of the adult. These were usually cases where a family member was applying for the Tribunal to consent to special health care – usually termination of pregnancy, sterilisation or an application to withdraw life-sustaining measures.

10. The Importance of the Principle of Substituted Judgement.

This principle is set out in the General Principles and it states that this Principle must be used so that if, from the adults previous actions, it is reasonably practicable to work out what the views and wishes would be, a person or other entity in performing a function or exercising a power under the Act must take these views and wishes into account. The proviso to this is that this view must be consistent with the adult's proper care and protection.

Conclusion

The current *Guardianship and Administration Act 2000* together with the *Power of Attorney Act 1998* contains important safeguards to protect the rights of people with impaired decision-making ability. The Tribunal in its first two years of operation has endeavoured to be faithful to the principles enunciated in the Act. It cannot be ignored however that there are significant challenges in the future. Matters which the Tribunal will need to be vigilant about include the following:-

1. **Maintaining 3 member Tribunals given the increasing workload and managing the workload generally.**

The Act provides in *section 101* that generally the Tribunal must be constituted by 3 members unless the President considers it appropriate for the proceeding to be heard by I member. To date most matters have been heard by a 3 member panel unless there were no issues in dispute in the case and it was a very straightforward matter. The forward projections are that the number of applications to the Tribunal will increase rapidly in the future and that while 2,163 matters were finalised in 2000-2001 this increased by 22% in 2001-2002 to 2,620. The recent Commonwealth projections as to the increasing number of older Australians is also alarming as it will impact on the number of potential applicants to the Tribunal

2. **Maintaining vigilance in relation to the application of the General Principles and the Health Care Principle by both the Tribunal and substitute decision makers.**

This is an essential part of Tribunal decision-making and every decision needs to be constantly referred back to these principles. Vigilance is required to ensure this happens and that increasing workload and familiarity does not hamper the application of these principles by the Tribunal.

3. **Maintaining a specialist structure if a combined Tribunal were to proceed in Queensland.**

Robin Creyke in her paper "Tribunals and Access to Justice"[12] commented on the possibility of a combined Tribunal structure in Queensland and foreshadowed "that at least co–location of is contemplated".[13] Creyke also commented that "The biggest criticism of tribunal systems composed solely of specialist tribunals is that their tribunals have been developed in a haphazard fashion so that there is no consistent pattern of decisions which are reviewable, no common procedures making it difficult for citizens bringing claims and those who appear for them, they duplicate resources, premises and infrastructure and are generally an inefficient way to administer justice."

There is a very strong argument therefore that a combined tribunal would in fact increase access to justice however I do not believe that a general jurisdiction tribunal would serve the interests of people with impaired decision-making ability. Accordingly, if a move were made to a combined tribunal it would be important to retain the specialist nature of the Guardianship Tribunal within this structure so that the current expertise, particularly in relation to the issue of capacity were retained.

4. Maintaining a flexibile, non adversarial and informal approach to increasingly complicated matters.

A frequent criticism of Tribunals is that they turn themselves into Courts within 2 years. This is a particular challenge as with increasing workload and greater complexity of matters coming before the Tribunal there is a temptation to adopt formal processes to deal with both these issues. It is a particular challenge to maintain informal hearings and a flexibility of approach in the face of these issues. Once again the Leggatt Report noted that there was a need for Tribunal decision making processes not to be "*excessively elaborate and heavy handed"*.[14]

5. Maintaining a presence in regional Queensland.

Access to justice means that all Queensland residents with impaired decision-making should be able to easily approach the Tribunal. Distance is a huge challenge and whilst the Tribunal has in its first two years has managed to have over 30% of its hearing days in regional Queensland this is a significant challenge with the increasing cost of regional airfares. The Tribunal has used video-conferencing where it has been appropriate but when you have people with impaired capacity as the participants the medium is problematic. Hopefully the appointment of more members in the regions will alleviate some of this cost.

Ann Lyons

[12] Caxton Legal centre Inc. "Access to Justice" Conference Brisbane October 2001.
[13] Ibid at p1
[14] Op Cit at 40