

**Submission to the Standing Committee on Social Issues of the
Legislative Council of the Parliament of New South Wales, in relation
to its Inquiry into the *Inebriates Act 1912*.**

By Nick O'Neill, President, Guardianship Tribunal (NSW).

Introduction

As the Guardianship Tribunal is regularly called upon to make guardianship or financial management orders in relation to people with brain damage caused by the overuse of alcohol or drugs, I considered that it would be of assistance to the Standing Committee to understand both the nature and limited extent of the Tribunal's jurisdiction in relation to people with alcohol and drugs related problems.

I would be happy to discuss this submission with the Standing Committee should it wish to take evidence from me. Furthermore, should the Standing Committee receive submissions from other sources making suggestions to it about the role of Guardianship Tribunal in relation to people with alcohol and drug problems, or if the Standing Committee was considering making recommendations involving the Guardianship Tribunal, I would welcome the opportunity to comment on such submissions and proposals and would be happy to assist the Standing Committee in any way which the Standing Committee considers appropriate.

What is the Guardianship Tribunal

The Guardianship Tribunal is a court substitute tribunal established under the *Guardianship Act 1987* (NSW) (the Act). The Guardianship Tribunal began operations in August 1989. While the Tribunal has a number of other small jurisdictions, its primary jurisdiction is to hear and determine applications for guardianship and financial management orders. A guardian is a person appointed by the Guardianship Tribunal or the Supreme Court to make personal or lifestyle decisions for the person under guardianship. A financial manager is a person appointed by the Guardianship Tribunal or the Supreme Court to make financial decisions and handle the financial affairs of the person subject of the order.

When the Guardianship Tribunal is dealing with an application for it to make a guardianship order, it must go through a two stage process during the hearing which it must conduct to consider all the evidence and submission made to it in relation to the application. First, the Tribunal must be satisfied by the evidence that the person the subject of the application is a person for whom a guardianship order could be made. Second, the Tribunal must be satisfied that there is, in fact, a need to appoint a guardian for that person. In order to complete the first stage, the Tribunal must be satisfied, on the evidence before it, that the person subject of the application is a "person with a disability", which is defined in the *Guardianship Act* as a person¹:

- (a) who is intellectually, physically, psychologically or sensorily disabled,
- (b) who is of advanced age,

¹ S 3(2), *Guardianship Act*

(c) who is a mentally ill person within the meaning of Chapter 3 of the Mental Health Act 1990 , or

(d) who is otherwise disabled,

and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.

Further more the Tribunal has to be satisfied that the person with the disability is either totally or impartially incapable of managing their person as a result of their disability².

If the Tribunal is satisfied as to these matters, it may then move to the second stage of the process and consider whether or not it should appoint a guardian for the person with the disability. Before it may do so the Tribunal is required to have regard to the provisions of section 14(2) of the Act which provides:

(2) In considering whether or not to make a guardianship order in respect of a person, the Tribunal shall have regard to:

(a) the views (if any) of:

(i) the person, and

(ii) the person's spouse, if any, if the relationship between the person and the spouse close and continuing, and

(iii) the person, if any, who has care of the person,

(b) the importance of preserving the person's existing family relationships,

(c) the importance of preserving the person's particular cultural and linguistic environments, and

(d) the practicability of services being provided to the person without the need for the making of such an order.

In addition, in considering whether or not to make a guardianship order in relation to person with a disability, the Tribunal is required to consider the general principles in s 4 of the Act. Section 4 provides:

It is the **duty** of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

(a) the welfare and interests of such persons should be given paramount consideration,

(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,

² S 3(1), *Guardianship Act*, definition of a "person in need of guardian".

- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

Having considered all these matters in the light of the facts found by it, the Tribunal determines whether or not to appoint a guardian for the person the subject of the application and what functions of a guardian to give to the guardian it has appointed. It should be noted that less than half the applications made for a guardianship order result in an order being made. Last financial year orders were made in relation to 42% of applications.

What is the role of a guardian?

A guardian is the substitute decision-maker for the person under guardianship. A person's guardian does not have to be their carer.

It is important to appreciate that a guardian is a substitute decision-maker for the person under guardianship. However, decisions made, actions taken or consents given by the guardian within the scope of the functions given them in a guardianship order have the same effect as if the decision had been made, the action had been taken or the consent had been given by the person under guardianship.³ In addition, the guardian or person authorised by guardian is empowered to take such measures or actions as are specified in the order so as to ensure that the person under guardianship complies with any decision of the guardian made in the exercise of the guardian's functions.⁴

While there are some private guardians who are the carers of the person under their guardianship, this is not common. In most cases, somebody else is looking after the person under guardianship. The Public Guardian, who is the guardian of more than half of people under guardianship in New South Wales, does not provide any care. As of 12 November 2003, there were 1754 of adults in New South Wales who were under the guardianship of the Public Guardian.

Guardianship orders are time limited

While initial guardianship orders can, in special circumstances, be made up to

³ S 21C, *Guardianship Act*.

⁴ S 21A, *Guardianship Act*.

three years, most orders can only be made for one year. It is the practice of the Tribunal to make its initial guardianship order for one year or less. All guardianship orders except those ordered to lapse without review are reviewed. Reviewed orders may be renewed for up to five years in special circumstances; however the normal renewal period is up to three years. However, it is quite normal for guardianship orders to be renewed for periods less than three years.

What the Tribunal has to be satisfied about making financial management orders

Before the Tribunal may make a financial management order, it must; consider the person's capability to manage his or her own affairs, and be satisfied that.⁵

- (a) the person is not capable of managing those affairs, and
- (b) there is a need for another person to manage those affairs on the person's behalf, and
- (c) it is in the person's best interests that the order be made.

The regularly used test for determining incapability is that developed by Justice Powell in *PY v RJS* [1982] 2 NSWLR 700, 702. He stated:

It is my view that a person is not show to be incapable of managing his or her own affairs unless, at least, it appears that:

- (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and
- (b) that, by reason of that lack of competence there is show to be a real risk that either:
 - (i). he or she may be disadvantaged in the conduct of such affairs; or
 - (ii). that such moneys or property which he or she may possess may be dissipated or lost. It is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner.

If satisfied as to these matters, the Tribunal may make a financial management order in relation to the person the subject of the application who then becomes the "protected person". The protected person is unable to deal with their property or financial affairs while they are the subject of a financial manager.⁶ It should be noted that just over half of all applications made for financial management orders result in an order being made. Last financial year orders were made in relation to 55 % of applications.

Is an intoxicated person within the jurisdiction of the Guardianship Tribunal?

Section s 15(4) of the Act provides that the Tribunal must not make a plenary guardianship order, that is an order giving the guardian all the powers of the guardian in relation to the person with a disability in circumstances in which a limited

⁵ S 25G, *Guardianship Act*.

⁶ S 23A, *Protected Estates Act* 1983 (NSW). *David By Her Tutor The Protective Commissioner v David* (1993) 30 NSWLR 417.

guardianship order would suffice. A limited guardianship order is one where only those functions that the guardian needs to have are given to them. The common functions given to a guardian are, determining where the person under guardianship should live, what health care and services they should receive and acting as the person's substitute decision maker for medical and dental treatment proposed for them by their treating doctor or dentist. It is extremely rare for the Tribunal to make a plenary guardianship order.

As can be seen from above, the jurisdiction of the Guardianship Tribunal is quite limited. As set out above, it has a statutory obligation to be satisfied as to a number of matters before it can make a guardianship or financial management order.

Before considering the technical legal reasons why those persons who are simply intoxicated, albeit regularly and seriously, are not within the jurisdiction of the Guardianship Tribunal, it is necessary to consider the societal context in which this issue arises and the guardianship legislation was enacted. We live under the Anglo-Australian legal system, which is part of the parliamentary democracy that we have inherited and developed. In our parliamentary democracy, the political power lies with the people. They delegate it to their parliamentarians who make their laws. They also accept a system in which there are both judicial and executive arms of government. Nevertheless, it is, and needs to be, regularly restated that within such a system, citizens may do anything except for those things that have been rendered illegal either by legislation or by common law.⁷

It is also accepted within this system that adults make either own decisions subject to the limits of the established law and their ability to fund or give effect to their decisions. Adults lose their decision making power only after interventions allowable by law. Such interventions include imprisonment after conviction of a criminal offence or placement in a psychiatric hospital under a schedule of the *Mental Health Act* validated by Magistrate and regularly reviewed by the Mental Health Review Tribunal. What the Guardianship Tribunal does when it makes a guardianship order is to remove the person with a disability decision making rights and gives those decisions making rights to the guardian. Hence the requirement that the Tribunal conducts a hearing and determines that certain statutory criteria have been met as a result of written and oral evidence given to the Tribunal before the Tribunal may make an order.

It is necessary now to recall what has to be proved before the Guardianship Tribunal may place a person under guardianship. Remember that the first thing the Tribunal has to be satisfied about is that the person the application is about has one of the disabilities set out in section 3(2) of the Act.

The Tribunal has taken the view that intoxication by drugs or alcohol is not a disability as such. However, the Tribunal does recognise that the overuse of alcohol can cause permanent brain injury which restricts a person in one or more major life activities to such an extent that they require supervision or social rehabilitation. Also, tragically, the Tribunal has seen cases where people, sometime young people, have

⁷ For a recent restatement of this view, see the judgment of the unanimous High Court in *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 110.

been rendered permanently incapable of managing their person after the use of drugs on only one or two occasions. The Tribunal has made appropriate guardianship orders in those cases.

Nevertheless, the Tribunal treats intoxication as one of the usually reversible effects of the overuse of alcohol or drugs. Reversibility is achieved by removing the cause of intoxication. Intoxication is not caught within the definition of disability. When a person is drunk or under the influence of drugs they are seen as incapacitated rather than as disabled. That distinction in language describes two completely different situations. Disability carries with it a notion of an inability to change the nature of the disability even if the person wished to do so. Disability also carries with it a sense of permanence best exemplified by a person born with an intellectual disability which remains with them all of their lives. It is also exemplified by dementia, which causes disabilities that will increase over time. Mental illness is seen as a disability, although people may have periods of acute illness and periods of wellness as with bipolar disorder. Also with that and other psychiatric conditions sufferers can have acute stages requiring treatment in psychiatric hospital and chronic stages where the person can live in the community but be permanently affected by their condition.

Similarly with serious brain injury whether caused by trauma, stroke, alcohol, drug or other causes, people are often disabled in terms of their mental and physical capacities. Fortunately, with both trauma and stroke related brain damage, there is some recovery in many cases and substantial recovery in some cases. Nevertheless, there is permanency in the residual injury after the recovery period has ended.

In contrast, the concept of incapacity can include short, medium and long term incapacity. An example of short-term incapacity is when a person becomes incapacitated through illness, for example, by being overcome by an infection which renders them delirious but from which they recover quickly as a result of being treated with a course of antibiotics. A person is incapacitated when they are unconscious; however they may soon recover consciousness. The Tribunal sees alcohol and drug related incapacity this way. It is induced by the person, but the person ceases to be incapacitated when the effect of the alcohol and drug wears off.

Summary of the Tribunal's jurisdiction in relation to people with drug and alcohol problems

Because of the considerations set out above, the Guardianship Tribunal's jurisdiction extends only to those people whose alcohol or drug related intoxication has left them with disabilities caused by the damage done to the physical structure of the brain and, often, to other parts of their body.

The Tribunal does not have jurisdiction in relation to people who are simply drunk with alcohol overuse or "high" with on drugs.

Some comments on the *Inebriates Act 1912*


As we all know the New South Wales parliament enacted the *Inebriates Act* in 1912, before the commencement of World War I and early in the reign of King George V. Since then our understanding of alcoholism and how alcoholics deal with their condition has increased greatly. In particular, we now appreciate that people succeed in overcoming alcoholism only when they have the desire to do so and have access to

the necessary support services. This now well established understanding of the circumstances which must obtain before people will allow themselves to be assisted to overcome their alcoholism or other drug addiction means that the *Inebriates Act* is based on the false premise that confinement in a place where alcohol or drugs are not available, of itself, will help those seriously affected.

Despite the longevity of the legislation, the Tribunal is not aware of any evidence demonstrating its success in overcoming alcohol or drug addiction. Consequently, it can be argued that since the Act has not been successful it should be repealed.

How to assist some of their members out of their alcoholism or addictions to other drugs has confounded communities over the millennia. Not every problem facing our society is solvable by the intervention of others in the lives of individuals, no matter how benign or well-intentioned that intervention is. Nevertheless there are things that have been or can be done. Those who are intoxicated need protection when in that state. Leaving them on the streets makes them vulnerable, and they can become a danger to themselves and others when they are there is. Legislation providing them with overnight accommodation was introduced some time ago and put into operation. Providing such shelter and protection is not a cure, but a necessary support. Places where people can go to "dry out" and places where people can be supported and encouraged in their efforts to give up the cause of their inebriation are also necessary in dealing with the problem, effectively for some.

Funding of these services and funding services to assist and support those attempting to overcome their addictions are likely to bring about positive results, as they have already done so. These programs should be continued where they exist and either revived or introduced where they are needed. The evidence since 1912 provides little support for the proposition that the *Inebriates Act* is an effective instrument of social policy.



Nick O'Neill

President, Guardianship Tribunal

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