DIANA MURPHY

ADULTS WITH INTELLECTUAL DISABILITIES AND WELFARE GUARDIANS: GROUNDS FOR A COMMISSION FOR ADULTS WITH MENTAL INCAPACITIES

LLB(HONS) RESEARCH PAPER FAMILY LAW (LAWS 507)

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ABSTRACT

The Protection of Personal and Property Rights Act 1988 aim is to protect and promote the personal and property rights of those who are not fully able to manage their own affairs. One of the powers bestowed by the Act is the ability for the Family Court to appoint welfare guardians for some adults with intellectual disabilities. The Act was a major step towards protecting and promoting the rights of those with mental incapacities, however, the examination of the role of the welfare guardian in this essay shows that the Act did not go far enough in achieving its aim. As a result many adults with intellectual disabilities can be left vulnerable to abuse, neglect and self-neglect. The solution to removing this void in the legislation is to create a Commission for Adults with Mental Incapacities. Such an entity would ensure that the aim of the Act is properly met and ensure that adults with intellectual disabilities and other mental incapacities are able to be treated with the same dignity and respect as that entitled to other members of society.

Word Length

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 17000 words.

I INTRODUCTION

Adults with intellectual disabilities can be some of the most vulnerable members of our community. There is a balancing act between the protection of such people and respecting their individual rights and autonomy along with everybody else in the community. The passing of the Protection of Personal and Property Rights Act 1988¹ aspired to achieve this balancing act. Its aim is to provide for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs². One of the powers bestowed by the Act is the ability for the Family Court to appoint welfare guardians. Welfare guardians are empowered to make decisions for an incapacitated person and such a power was not available until the passing of the Act. This essay will examine the different aspects of the welfare guardian role. Through this examination it will be shown that the 1988 Act went a long way to supporting and protecting adults with intellectual disabilities but it did not go far enough.

The examination of the role of the welfare guardian commences in the second chapter of this essay which will give an overview of the Act's history and principles as well as an overview of why the Act is important for those adults with intellectual disabilities. This will illustrate the context in which welfare guardians are appointed and also show that there should be a legislative change to explicitly state the "best interest" principle in the Act.

The examination will continue with chapters three to five which will specifically examine the role of the welfare guardian. All of these chapters will show that there are serious gaps in the Act. In chapter three, the appointment of a welfare guardian will be explored. It will be shown that the gaps in the Act have resulted in poor evidence being used in the Family Court to prove that someone requires a welfare guardian. Furthermore, it will be shown that

Referred to as the Act or the PPPR Act.

² In the title

there are no mechanisms to provide for the appointment of a welfare guardian if no one volunteers for the role.

In chapter four, the actual functions of the role of the welfare guardian will be explored. The chapter will examine what the Act states the functions of welfare guardians are, the courts' interpretations of these functions and welfare guardians' views of their function. It will be shown that there is uncertainty over the powers of coercion for welfare guardians and that the Act does not give welfare guardians certainty over their functions. The fifth chapter will examine how the role of the welfare guardian is enforced and monitored. It will be shown that there is a problem with very poor enforcement and monitoring provisions in the Act of which there must be legislative change to correct.

By the close of chapter five the examination of the role of the welfare guardian would have established the fact that a body must be created to fill the gaps in the legislation. Chapter six will examine this and will ascertain that a Commission for Adults with Mental Incapacities should be created to fill these gaps. If such a Commission was appointed it would ensure that adults with intellectual disabilities and other mental incapacities are not exposed to abuse, neglect or self-neglect and in doing so ensure that the objectives in the Act are properly met.

II BACKGROUND

Before examining the role of the welfare guardian it is important to look at the role in its surrounding context. This chapter will do this by first, over viewing the Protection of Personal and Property Rights Act 1988³. Second, it will outline the Act's explicit principles. Then this section will examine the Act's implicit principles and recommend a change to the Act to make the implied "best interest" principle explicitly stated. This chapter will then examine who adults with intellectual disabilities are and why some will require the use of the Act for protection.

A Protection of Personal and Property Rights Act 1988

Prior to the passing of the Act there was no legislation that enabled personal welfare decisions to be made on behalf of a person nor was their legislation that provided for the guardianship of adults. This was indeed problematic because many vulnerable adults could not have the best care suited to their needs. The PPPR filled this void. It was the result of over 10 years of planning and submissions and was considered to be a legislative landmark in the area of human rights⁴. Its aim is "to provide for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs"⁵. The Act replaced the Aged and Infirmed Persons Protection Act 1912 and Part VII of the Mental Health Act 1969 which dealt with all of the property matters of the mentally incapacitated.

³ Hereon referred to as the Act or the PPPR.

⁴ A C Hughes-Johnson *The Protection of Property and Personal Rights Act 1988* (New Zealand Law Society Seminar Sept/Oct 1988) 1

⁵ In the title of the Act

The Act is administered through the Family Court. Its basic functions are to provide mechanisms to promote and protect the property and personal rights of those with incapacities. It has various means to do this. First, it provides mechanisms for any person to grant to another person an enduring power of attorney to either look after their property or personal welfare⁶. Second, it provides mechanisms for the Family Court to make orders regarding property⁷ or personal⁸ welfare if a person lacks capacity. Third, the Act provides the means for the Family Court to appoint a property manager⁹ or a welfare guardian¹⁰ for a person with certain incapacities. The Act deals with property and personal welfare orders separately. Welfare Guardian orders are part of the personal orders that are available for the Court to make.

The Act sets out in section 6 the level of incapacity required in order for the Court to make a personal order, a welfare guardian has its own separate test for incapacity which will be discussed in chapter three. Section 6 states that the Court cannot make a personal order unless that person:

- (1) (a) Lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
 - (b) Has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters

This is a fairly rigid test further emphasised by s 6 (3) which states

(3) The fact that the person in respect of whom the application is made for the exercise of the Court's jurisdiction has made or is intending to make any decision that a person exercising ordinary prudence would not have made or would not make given the same circumstances is not in itself sufficient ground for the exercise of that jurisdiction by the Court.

⁶ Part IX

⁷ Part III, Part IV, Part V, Section 10 (J), Section 11

⁸ Section 10

⁹ Section 31

¹⁰ Section 10(k)

From the tests of section 6 it is clear that the Act has the potential to cover a lot of people, this may include the mentally ill, the infirmed elderly, the intellectually disabled, the paralysed and victims of head injuries. The test for incapacity does not rely on a person's diagnosis or condition but rather on the person's actual decision making ability. Thus the Act does not enforce prejudices and stereotypes but looks to intervene only when there is actual need, regardless of its cause.

B Explicitly Stated Principles

There are three principles that are specifically stated in the Act and they underlie all decisions that can be made under the Act, including the decision to grant welfare guardianship. These principles work to try and promote the rights of those with incapacity as much as possible while allowing for their protection if needed. They ensure that encroachment on a person's autonomy is only done when it is completely necessary. These principles are:

- 1. The principle of the presumption of competence; and
- 2. The principle of least restrictive intervention; and
- 3. The principle of encouragement.

1. The principle of the presumption of competence

In order for the Court to make any personal orders there must be proved incapacity. The Act states in section 5:

Presumption of competence---For the purposes of this Part of this Act, every person shall be presumed, until the contrary is proved, to have the capacity

- (a) To understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; and
- (b) To communicate decisions in respect of those matters.

One of the key factors of this principle is that it emphasises that the Act is not about labelling or reinforcing stereotypes and prejudices. Thus a person's label or diagnosis e.g. Down's syndrome will not be determinative of their capacity and therefore it provides that all people are considered competent until proved otherwise.

2. The principle of least restrictive intervention

The second principle of the Act is the principle of least restrictive intervention. The Act states that in section 8 that:

The primary objectives of a Court on an application for the exercise of its jurisdiction under this Part of this Act shall be as follows:

(a) To make the least restrictive intervention possible in the life of the person in respect of whom the application is made, having regard to the degree of that person's incapacity:

As well as being expressly stated, this principle is prevalent in the provision of the various types of personal orders that are available to the Court. The orders follow a spectrum of interference in autonomy¹¹. This variety gives the Court options to make orders to meet the needs of a particular person but not beyond. At the least restrictive end of the interference spectrum is the Court's ability to make orders by consent, where the Court can make an order with respect to an area of that person's decision if that person understands what such an order will mean¹². The Court can also make non-binding recommendations¹³ Further along the spectrum the Court can also make interim orders for a period not longer than six months¹⁴. There are also a number of personal orders that the Court may make such as an

¹¹As stated in Anne Bray and Philip Recordon *Disability and the Law* (New Zealand Law Society Seminar August 2001) 5

¹² Section 15

¹³ Section 13

¹⁴ Section 14

order for living arrangements or medical treatment¹⁵. At the extreme end of the spectrum of interference is the ability of the Court to appoint a welfare guardian. Such an order is thus considered a last resort measure.

This principle is important as it ensures that any intervention is at the minimum to ensure the protection of the individual to meet that person's specific needs. It is not about using one aspect of incapacity as an excuse to interfere in other aspects of that person's life where there is capacity.

3. The principle of encouragement

The third principle is the principle of encouragement. The Act also states in section 8:

The primary objectives of a Court on an application for the exercise of its jurisdiction under this Part of this Act shall be as follows:

(b) To enable or encourage that person to exercise and develop such capacity as he or she has to the greatest extent possible.

This principle is further emphasised by later provisions regarding welfare guardians. It states in s18 (3):

In exercising those powers, the first and paramount consideration of a welfare guardian shall be the promotion and protection of the welfare and best interests of the person for whom the welfare guardian is acting, while seeking at all times to *encourage that person to develop and exercise such capacity as that person has* to understand the nature and foresee the consequences of decisions relating to the personal care and welfare of that person (emphasis added)

It goes on to state in s18 (4):

A welfare guardian shall:

- (a) Encourage the person for whom the welfare guardian is acting to act on his or her own behalf to the greatest extent possible; and
- (b) Seek to facilitate the integration of the person for whom the welfare guardian is acting into the community to the greatest extent possible. (emphasis added)

¹⁵ See Appendix I for orders available.

This is seen as a reinforcement of the principle of least intervention and seeks to encourage those with incapacities to meet what potential they have.

C Implied Principles

There are two principles in the Act that are not expressly stated but have been presumed to be implicit. The first of these is the best interest principle the second is the principle of procedural rights.

I Best interest principle

The first implied principle means that the Family Court, in making decisions under the Act is to make the welfare and best interests of the incapacitated person the paramount consideration. The Courts have read this principle to be implicit in the legislation. This section of the essay will examine whether such a principle can legitimately be read into the Act.

There are only two statutory references to the "best interests" principle in the personal welfare provisions of the Act. These sections however are only in reference to the role of the welfare guardian and not to the court's discretion. Section 12(5)(b) states that "the proposed appointee will act in the best interests of the person in respect of whom the application is made." Section 18 states that "the first and paramount consideration of a welfare guardian shall be the promotion and protection of the welfare and bests interests of the person for whom the welfare guardian is acting".

There are many reasons to contend that the best interest principle can not be implicit in the Act for decisions made by the Family Court. First, it can be argued that it is clearly Parliament's intention not to have the principle used by the Family Court because the principle was expressly stated with regard to welfare guardians so it can be assumed that if it was to be used by the Court it would be also expressly stated. A second argument is that other

principles have been expressly stated but this has not. Clearly, it may be argued, that if this principle was to be used it would be stated like all of the other principles. A third argument is that the Legislature created the Act after years of scrutiny, thought and with full knowledge of the common law yet still did not include this principle, thus it cannot be implied.

The best interest principle was used in the case of $Re\ G\ [PPPR\ Hysterectomy]^{16}$, there the Court stated that

"[The Court] is required, first to recognise the principle that there be the least restrictive intervention as possible in the life of the disabled person, having regard to the degree of that person's disability, and secondly, to treat the promotion and protection of the welfare and interests of the disabled person as the first and paramount consideration.¹⁷"

This approach by the Court could raise fears that the Family Court will practice undue paternalism which will lead to the other principles being undermined. This gives further reasons to argue against the use of the best interest principle. As stated, the purpose of this legislation is to protect and promote the rights of person's with incapacities. The stated principles are the presumption of competence, least intervention and principle of encouragement. The paternalistic approach of the best interest principle is arguably largely contradictory to these principles. The best interest principle promotes the ethical principles of beneficence above the principle of autonomy and can be seen by disabled people as unwarranted paternalism. ¹⁹ Its inclusion by the Courts can be seen to be "introducing a different emphasis to the literal objectives outline in the Act" ²⁰, this is arguably contrary to

 $^{^{16}}$ Re G [PPPR: Hysterectomy] (1993) 10 FRNZ 541

¹⁷ Above 14, (1993) 10 FRNZ 541, 543

As was raised in Anne Bray and Philip Recordon *Disability and the Law* (New Zealand Law Society Seminar August 2001) 8

¹⁹ Above 16

²⁰ Above 16

Parliament's intentions. This argument was used by the Plaintiffs in the case of *RE A, B, and C (personal protection)*²¹. There, it was argued to the Court that the legislature has purposely moved away from a protective attitude and "the Family Court is not entitled to put the welfare the best interests of the person the subject of the application at the forefront of its consideration of the appropriate orders…but has to concentrate upon the provisions of s 8"²².

This point was also made in the case of *Re S (Shock treatment*²³) where it was said by the Family Court that:

"The Family Court does not have the parens patriae jurisdiction.... The notion of the 'best interest' of the person the subject of the application does arise in several contexts in the Act...None of these sections is however relevant to the issue now before the Court. Accordingly it is clear that the test to be applied is not a 'welfare' or best interests test. Instead the enquiry must be as follows:

- (a) What is the degree of Mr M's incapacity?
- (b) Having regard to his incapacity, what is the least restrictive intervention possible in Mr M's life,
- (c) what course of action will enable Mr M to exercise such capacity as he has to the greatest extent possible?²⁴"

Despite these arguments against the use of the best interest principle, they can be refuted. This can be done first by arguing that the role of the welfare guardian is the creation of the new Act and principles such as the best interest principle need to be expressly stated for this new role. The Family Court, however already uses the best interest principle in other areas of its functions therefore it does not need for it to be expressly stated. A second refute is that the legislation was created after years of scrutiny and Parliament would have been aware of the common law and Parliament would have

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²¹ RE A, B, and C (personal protection) [1996] NZFLR 359, ²² 1996] NZFLR 359, 370

²³ Re S (Shock treatment) [1992] NZFLR 208 ²⁴ [1992] NZFLR 208, 213

realised that the Court would have read in the "best interest" presumption, since they therefore did not exclude this principle then, it must be read in.

A third argument stems from the fact that the best interest principle is not contradictory to the other expressly stated principles. The High Court has found this to be the case stating "the legislature has seen fit to make provision for the welfare and best interests of certain disadvantaged members of the community to be addressed in a particular fashion. The part of the Act we are concerned with is all about the welfare and best interests of such people."25

It can be argued that the "best interest" principle will not undermine that of the other principles but will actually enhance them. This point can be illustrated by the High Court in RE A, B, and C (personal protection) when it stated that when using its discretion, at some stage there had to be a value judgment in respect of the issues identified which concerned the welfare and best interests of the person concerned however, that value judgment had to be made with the objectives of s 8 and elsewhere of the Act firmly in mind²⁶. In that case the High Court agreed with the amicus curiae who stated that the decision in Re S (shock treatment) is only sustainable if it is read into it in respect of the purported second part of the test which is stated above, "what is the least restrictive intervention possible in the life of the person the subject of the application to ensure that that persons welfare and best interests are catered for"27.

The "best interests" principle will not in practice lessen the effects of the explicit principles but will act as a qualifier for the other principles. This was considered to be so in the case of RE A, B, and C (personal protection) where the Court stated:

"The Act makes clear in s 8 and elsewhere that the Family Court which is responsible... shall have as a primary objective the least restrictive intervention

 $^{^{25}}$ RE A, B, and C (personal protection) [1996] NZFLR 359, 371 26 1996] NZFLR 359, 372

possible in the life of the person in respect of whom the application is made and enable or encourage that person to exercise and develop his or her capabilities to the greatest extent possible. If that is not seen as being in the welfare and best interests of the person who is the subject of the application of the Court, we do not know what is "28".

After analysis it is clear that the best interest principle is used by the Family Court legitimately as there is not argument that can properly refute the use of this practice. Despite this, there is some validity in the argument that the best interest principle can potentially encroach on the other principles of the Act. It is imperative that the best interest principle is not developed too far by the Courts to be overly paternalistic as this could mean that a number of people may have their autonomy unduly trampled on.

Recommendation 1:

To heed to the side of caution to ensure that undue paternalism is not exercised by the Courts, section 8(a) should be amended to state:

SECTION 8: PRIMARY OBJECTIVES OF COURT INEXERCISE OF JURISDICTION UNDER THIS PART - The primary objectives of a Court on an application for the exercise of its jurisdiction under this Part of the Act shall be as follows:

(a) To make the least restrictive intervention possible in the life of the person in respect of whom the application is made to ensure that that persons welfare and best interests are catered for, having regard to the degree of that person's incapacity

This amendment would be in line with the actual practice of the Court and makes the welfare and best interest principle not paramount but adds a qualifying element to the other section 8 principles. This insures that cases do not progress further with the "best interest" principle to be too paternalistic and encroaching too much on the rights of those with incapacity, yet recognises the reality of the 'best interest" principle in the discretion of the Court.

²⁷ 1996] NZFLR 359, 371

2 Principle of procedural rights

The second implied principle underlying the Act is the principle of procedural rights. The Act emphasises that guardianship and management involve a loss of civil liberties and should occur only after due legal process²⁹. As a result of this there are a series of safeguards and procedures that must be adhered to in order for any orders to be made. This is extremely important due to the vulnerable nature of the people subject to this Act who can easily be taken advantaged of or manipulated. The Act thus requires that the person is legally represented³⁰, that they be present during the Court proceedings³¹ and that notice of the proceedings be given to wide range of people including the person subject to an application³². All orders either have built-in termination date or are regularly reviewed. There are only a few informal mechanisms that can be used in the Act. There are mechanisms to allow for pre-hearing conferences³³ and the ability of Trustee Corporations³⁴ to accept property management without a court order. The allowance for pre-hearing conferences have been criticised as such meetings, while effective for those incapacitated, can easily lead to a power imbalance for the incapacitated person, even if such a person has Counsel³⁵.

²⁸ 1996] NZFLR 359, 372

²⁹ As discussed in WR Atkin "The court, family control and disability – aspects of New Zealand's Protection of Personal and Property Rights Act 1988" (1988) 18 VUWLR 345, 356 ³⁰ Section 65

Section 74, unless the Court is satisfied that the person wholly lacks the capacity to understand the nature and purpose of the proceedings, or that attendance or continued attendance is likely to cause that person serious mental, emotional, or physical harm

³² Section 63, unless the Court is satisfied that the person in respect of whom the application is made wholly lacks the capacity to understand the nature and purpose of the proceedings; or exceptional circumstances exist

³³ Section 66

³⁴ Section 32

³⁵ As was argued in New Zealand Institute of Mental Retardation (Incorporated) Working party on Guardianship and Advocacy of Mentally Retarded People Submissions on Proposed legislation for the Administration of Incapacitated Persons' Property (1986), 4

D Intellectual Disabilities

After discussing the Act and its principles it is now important to look at adults with intellectual disabilities and establish why the Act may be of use to some of them.

An intellectual disability can be categorised as:

"a learning difficulty that is characterised by limitations in various skill areas. These may include limitations in

Self care

Daily living

Social interaction

Judgement and self direction

Intellectual Disability usually becomes evident during the developmental years.

The skill limitations due to the disability often exist alongside other abilities.

With appropriate support, people can learn skills to participate in the community. 36"

People with intellectual disabilities are often the subject of prejudice and misunderstanding³⁷. An intellectual disability is not a mental illness or a condition as many mistakenly believe and those with an intellectual disability can no way be labelled as all the same; they are as different from each other as everybody else in society. Intelligence levels are a continuum and vary between everyone in society, over one's lifetime and are subject to changing environmental circumstances. Those with an intellectual disability are just at one end of the spectrum of intelligence

Previously there was a lack of services and support for those with an intellectual disability and as a result families found it extremely difficult to

³⁶ S Gates "Why is it necessary for the expert witness to testify within their own science?" (1999) 3 BFLJ 81, quote from J Cooper, Disability and the Law (London: Kingsley (Jessica) Publishers Ltd, 1996) 9

³⁷ As was discussed in S Gates "Why is it necessary for the expert witness to testify within their own science?" (1999) 3 BFLJ 81, 81

cope with the needs of that person, this lead to a large amount of people being incarcerated into institutions. Over the last thirty years however there has been a growth in the number of community support services, education facilities and family support services for those with intellectual disabilities. This has lead to a decline in the institutionalisation of people and the closure of such facilities as the Templeton Centre in Christchurch and Kimberley in Levin. This is in line with extensive research which supports the benefits of community services for the intellectually disabled rather than institutionalised care, even for the severely disabled ³⁸.

Now that those with an intellectual disability are more involved in the community there is room for more understanding and acceptance, this is reinforced by the social movement of supporters of those with intellectual disabilities to remove social oppression and exclusion³⁹. This new attitude is also illustrated by the Act's removal of labels and principles which emphasise the promotion of rights rather than protection per se.

The closures of the institutions however raised concerns with families over whether they had the legal ability to make decisions concerning the intellectual disabled person's care⁴⁰. Many mistakenly believed that they had the legal power to do this as of right. Deinstitutionalisation also raised fears that the intellectual disabled person would be left exposed to abuse or neglect and thus families wanted the power to ensure that this did not occur⁴¹. The Act was able to provide for these concerns.

³⁸ Bray A "The Protection of Personal and Property Rights Act 1988: Progress for People with Intellectual Disabilities?" (1996) 2 BFLJ 51; 64,

³⁹ As above

⁴⁰ This was illustrated in Anne Bray, John Dawson and Justine van Winden *Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities* (Donald Beasley Institute Incorporated, Dunedin, 2000) 86-89, 115-118

III APPOINTMENT OF A WELFARE GUARDIAN

This chapter will first examine when a welfare guardian is appointed and then examine how such welfare guardians are chosen in. By this examination this chapter will show that there are gaps means that the evidence used in Court to prove a person needs a welfare guardian is not of high quality. The gap also means that if no one volunteers to be a welfare guardian then a person who is in need of a welfare guardian will not have one appointed.

A When a Welfare Guardian is Appointed

Section 12 requires a certain level of incapacity for a person to be eligible to be created a welfare guardian. It is a very stringent test, this section will first examine how the Family Court has interpreted section 12 and second, examine how in practice the criteria for section 12 is proved in the Family Court. It will be shown that in practice the evidence used is of variable quality and not enough care given to ascertaining if the criteria of section 12 have been met.

1 The Family Court's interpretation of section 12

A person subject to a personal order must usually meet the criteria of section 6 but those who are subject to a welfare guardian order must meet the more stringent criteria of section 12. Section 12 states that:

- (2) A Court shall not make an order [to appoint a welfare guardian] unless it is satisfied
 - a) That the person in respect of whom the application is made wholly lacks the capacity to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person; and
 - (b) That the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made relating to that particular aspect or those particular aspects of the personal care and welfare of that person

This is a very strict test. There are three main terms used in this section that make this section so stringent. The first term is the phrase "wholly lacks the capacity". This can be contrasted with section 6 which requires the person

to whom the order is made to only "partially or wholly lacks the capacity". There clearly is a higher threshold of incapacity in this section. The second term to give the section more stringency is the term "the only satisfactory way". This term is in line with the least intervention principle and enforces the view that the appointment of a welfare guardian is to be a last resort option and should not be used when less invasive alternatives can be made. The third aspect that gives the section its stringency is the term "that particular aspect". This shows that the order can be limited to certain areas of a person's life, if the situations permit. This is because the role is considered so invasive that it will only be used on areas where it is needed and not necessarily in every aspect of an incapacitated person's life. This also reinforces the principle of least intervention

Section 12 requires that the appointment of a welfare guardian is the only satisfactory way of ensuring that appropriate decisions were made in respect to the person's personal care and welfare. This emphasises that the notion that the appointed of a welfare guardian should be a last resort option. This issue was examined in the case of *Vukov v McDonald*⁴² where it was held that a welfare guardian should not be appointed because the person was subject to a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1991. The result of this order meant that the person did not need to have a welfare guardian to make decisions as the Hospital in which he was receiving treatment had such a role.

The Courts have looked the meaning of section 12, in doing so they have encountered difficulties when ascertaining the threshold for decision making capacity required from the section. Their main difficulty largely springs from the uncertainty of the term "wholly lacks the capacity to make decisions". If this term is read too literally it could prove to be ineffectual yet

⁴² Vukov v McDonald (1998) 17 FRNZ 545

if read too loosely it will lose its "last resort" quality. This issue was discussed in *Re* "*Joe*" where the Court stated "the fact that his wishes and decisions appear unwise according to commonly accepted standards does not in itself justify the Court's intervention. …where does the subject's freedom of personal choice stop and where does the right to intervene for Joe's own good begin?⁴⁴"

The Courts have tried to find the point where a person's decision making capacities are so poor as to meet the criteria of section 12. There has mostly been agreement from the Court that the term "wholly lacks the capacity" should not be read too literally and thus a person with some decision making capacity maybe still awarded a welfare guardian. As stated in *CMC*⁴⁵ "it cannot be necessary to show that the subject is in a vegetable state, completely lacking any power of cognition or rational thought.⁴⁶"

Despite this agreement, there have been differences of opinion from the Court over how sophisticated these decision making powers must be. In the case of $re\ G^{47}$ Judge Inglis required that a person must meet a very stringent decision making test in order to not be appointed a welfare guardian. He stated:

"it is sufficient to show that the subject's capacity to understand the nature and to foresee the consequences of alternatives or options available for choice is so limited by intellectual disability or mental illness or both, that any choice between such alternatives or options which the subject may make cannot responsibly be recognised

⁴³ Re "Joe" [1990] NZFLR 260

⁴⁴ [1990] NZFLR 260, 262

⁴⁵ Re CMC [1995] NZFLR 538

^{46 [1995]} NZFLR 538, 541

⁴⁷ Re G (1994) NZFLR 445

as effective capacity to foresee and understand the likely consequences of the selection of various options⁴⁸".

The interpretation in $re\ G$ has been criticised as being too strict for the requirements of section 12^{49} . Bray argues that weighing up options often has a lot to do with life experiences and being in an institution or other protective environment as G was limits a person's ability to experience different things⁵⁰. Thus the insistence by Judge Inglis "to foresee the consequences of alternatives or options available" may be unrealistic for many with limited life experience yet who have adequate capacity. As an alternative, Bray has recommended that capacity to make a decision should just mean "to make up ones mind"⁵¹. This is perhaps more in line with a literal interpretation of section 12. It can be argued however that Bray's test goes too far and would make section 12 unworkable and therefore would unlikely be a test that the Courts would apply.

There is perhaps a better balance found *In the Matter of F* T^{52} . In that case the Court identified four factors as being particularly important in determining whether or not a person had an adequate capacity to make decisions with regard to the issue in question. These factors are:

- 1. Their ability to communicate choices
- 2. Their understanding of relevant information
- 3. Their appreciation of the situation and of its consequences
- 4. Their manipulation of information in other words their ability to follow a logical consequence of thought in order to reach a decision

⁴⁸(1994) NZFLR 445, 451

⁴⁹ See for example Anne Bray "The Protection of Personal and Property Rights Act 1988: Progress for People with Intellectual disabilities?" (1996) 2 BFLJ 51; 64, 65

⁵⁰ As above, 65, 66

⁵¹ Bray A "The Protection of Personal and Property Rights Act 1988: Progress for People with Intellectual Disabilities?" (1996) 2 BFLJ 51; 64, 66

 $^{^{52}}$ In the Matter of F T (District Court, Auckland PPPR 68/94, 11 January 1995)

This is clearly a better test than that of $re\ G$ or that of Bray as it does not rely so much on life experience but rather inherent ability to make reasoned decisions. The test of $re\ F\ I$ has been followed by other courts⁵³. If this test is followed consistently by the Family Court it will ensure that those who need the assistance of the Court under this section will have their needs meet and will ensure that those persons capable of making decisions do no have their rights unduly infringed upon.

2 Problems in proving section 12

Section 12 is clearly a rigid test, it is based on ascertaining the decision making capacity of a person. The evidence provided to substantiate claims of incapacity will therefore be vital in determining if a person meets the requirements of section 12. Several criticisms have been raised over the quality of evidence used for section 12 determinations⁵⁴. These criticisms largely stem from the lack of education about intellectual disabilities in the legal profession. This conclusion can be drawn from the performance of counsel for persons subject to welfare guardianship orders and medical evidence used by the Court.

The Family Court Judge is often very reliant on the opinion of Counsel for the subject person in making welfare guardian determinations⁵⁵. Counsel will have to be informed of the subject's decision making capacity and wishes in order to provide the correct information to the Court. Bray raises concerns that many rely on their lay knowledge of intellectual disabilities when representing such a person, such knowledge may be inaccurate and vary

 $^{^{\}rm 53}$ For example in re CMC [1995] NZFLR 538

⁵⁴ See particularly S Gates "Why is it necessary for the expert witness to testify within their own science?" (1999) 3 BFLJ 81

⁵⁵ This was found to be the case in Anne Bray, John Dawson and Justine van Winden Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities (Donald Beasley Institute Incorporated, Dunedin, 2000)

between Counsel⁵⁶. Health professionals have raised concerns about this issue and the lack of contact they had with the Counsel for the subject⁵⁷.

The medical evidence given to the Courts regarding a person's incapacity have been criticised for two main reasons. The first criticism is that such reports often provide only sparse information⁵⁸. This is because there lacks medical guidelines as to what such medical reports should include in order to provide relevant information to the Court.

The second criticism for medical evidence stems from the use of expert witnesses by the Court in this area. Gates has criticised the use of expert witnesses as not being suitable experts in the field of intellectual disability⁵⁹. In *re T (welfare guardianship)*⁶⁰ for example the expert witness was Dr WF Bennet who was the Medical Director of the Kimberly Centre. Gates states that a General Practitioner or a Medical Director is not an expert in intellectual disabilities unlike a developmental specialist or psychologists⁶¹. This lack of expertise can be illustrated by the evidence the Doctor used when describing T's incapacity. He stated that T had an IQ of between 50-65 and had not learnt to read. This sort or analysis has been criticised because IQ testing is not indicative of actual capacity and has little or no validity. T had been in an institution for 33 years so was unlikely to have been given the opportunity to

⁵⁶ Anne Bray, John Dawson and Justine van Winden *Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities* (Donald Beasley Institute Incorporated, Dunedin, 2000) 88, 115

Anne Bray, John Dawson and Justine van Winden Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities (Donald Beasley Institute Incorporated, Dunedin, 2000) 96

⁵⁸ As above, 70-71

⁵⁹ S Gates "Why is it necessary for the expert witness to testify within their own science?" (1999) 3 BFLJ 81,

⁶⁰ re T (welfare guardianship) (Family Court, Levin PPPR 031 209 03, 7 August 1994, Judge Inglis OC)

Gates S "Why is it necessary for the expert witness to testify within their own science?" (1999) 3 BFLJ 81,

read⁶². As a result of this "expert evidence", T was appointed a welfare guardian and was not given permission to leave Kimberly. It has been argued that T would have been proved to have capacity if only the correct expert had been used⁶³. There is further evidence of the lack of expert opinions in the case of *re A and others*⁶⁴. In that case there was no analysis into incapacity but a simple assumption of incapacity on the basis of the persons concerned were residents at Kimberley in Levin. This sort of assumption is exactly what the Act was trying to avoid.

There is a very high threshold placed on the criteria for someone to be appointed a welfare guardian yet there seems to be not enough care given to ensure that appropriate evidence is used by the Courts to ensure that the correct decision is made. The law profession needs to ensure that medical professionals are better informed over what information is required from them in order to be of most use to the Court and it is also certain that the Law profession needs to be better educated over who are actual experts in intellectual disabilities.

Recommendation 2:

In order to solve the problem over the lack of education in the legal profession concerning issues relating to persons with intellectual disabilities which results in poor evidence being used in the Court to prove incapacity it is recommended that a body be created to:

Educate the Law Profession on issues relating to those with intellectual disabilities and what evidence is required from medical professionals to prove or disprove capacity.

⁶² Gates S "Why is it necessary for the expert witness to testify within their own science?" (1999) 3 BFLJ 81,

⁶³ As above

⁶⁴ [1993] 10 FRNZ 537

B Choosing a Welfare Guardian

Once the jurisdictional criterion has been met under section 12 then the Court may appoint a welfare guardian. Section 12 also sets out various criteria for appointing a welfare guardian. This section will examine what this criteria is and then examine how it is used by the Courts in practice. From this examination it is shown that the Courts do have a strong emphasis in examining whether a welfare guardian is appropriate. This is because of the emphasis the Court often puts on the family of the subject person and the gap in the legislation that does not provide for situations for a person to be appointed a welfare guardian if no one volunteers for the position.

1 Criteria for appointing a welfare guardian

Section 12 sets out the criteria for appointing a welfare guardian. It states that:

- 1) No person under the age of 20 years, and no body corporate, shall be appointed a welfare guardian under this section⁶⁵.
- 2) The proposed appointee must be capable of carrying out the duties of a welfare guardian in a satisfactory manner, having regard to the needs of the person in respect of whom the application is made, and the relationship between that person and the proposed appointee⁶⁶;
- 3) There is unlikely to be any conflict between the interests of the proposed appointee and those of the person⁶⁷;
- 4) The Court must be satisfied that the proposed appointee will act in the best interests of the person in respect of whom the application is made⁶⁸; and
- 5) The proposed appointee consents to the appointment.

Section 12 basically sets out that the welfare guardian must be capable of acting in the role (points one to three) and also be willing to do so (points four and five).

66 Section 12(5)(a)

⁶⁵ Section 12(4)

⁶⁷ Section 12(5)(c)

⁶⁸ Section 12 (5) (b)

Section 12 also states that:

1. The Court shall not appoint more than 1 welfare guardian for any person unless, in the exceptional circumstances of the case, the Court is satisfied that it would be in the interests of that person to do so⁶⁹.

A question must be raised over whether it is necessary to limit the number of welfare guardians appointed to one person. The Courts have examined when it is appropriate to appoint two welfare guardians. In the case of *re L M (A Protected Person*⁷⁰) for example, the two daughters of a "multi-infarct demented person" were appointed welfare guardian's as the subject person's son had stolen money and was violent to his mother. In the case of *Re A and others (PPPR)*⁷¹ the Court appointed two welfare guardians for the subjects because the subjects had extreme intellectual disability and required long-term institutional care from an early age. In both of these cases the Courts found that the circumstances were "extraordinary" under the Act, this is considered to be a far lower threshold than the "extraordinary circumstances" provisions of the Property (Relationships) Act 1976.

From these cases it can be deduced that the Court does not have a very high threshold to be met in order to have "extraordinary circumstances". Though the Act doesn't seem to allow such flexibility this does seem like the correct approach. There may be many situations where it may be easiest for the welfare guardian involved to share the responsibility, especially where they have always shared the role such as was the case for the parents in *Re A and others*. If it is better for the welfare guardians it will then be better for the subject. This does raise questions over the purpose of the statute limiting the application to only one person. Surely if the Court is satisfied that two persons would do the role better than one then the two applicants should be appointed welfare guardians. Other jurisdictions such as Queensland⁷² allow more than one welfare guardian to be appointed without requiring "extraordinary

⁶⁹ Section 6

 $^{^{70}}$ Re L M (A protected Person) (1992) 9 FRNZ 555

 $^{^{71}}$ Re A and Others [PPPR] (1993) 10 FRNZ 537

⁷² Section 14, Guardianship and Administration Act 2000.

circumstances", there does not seem to be any policy reasons why New Zealand shouldn't also.

2 The criteria used in practice

It appears that the issue of suitability is not addressed very deeply by the Courts. This is for two reasons, first because of the preference that is often placed by the Family Court on the family of the subject person and second because of the gap in the legislation that does not provide for situations where no one volunteers to be a welfare guardian.

The first concern is the preference that the Court places on family. This problem can be illustrated by the Courts use of avoiding "conflicts of interests" as required in section 12(5)(b). The Courts are unlikely to look past conflicts of interests for non-family members, as was illustrated in the case of re "Joe", which concerned the application by a social worker. There, the Court stated that it was not appropriate for a social worker to become a welfare guardian "for her duty as a social worker may conflict with her duty as a welfare guardian, in particular as to the degree of intervention in Joe's personal decisions"⁷³.

This can be contrasted with the Courts practice towards family applicants. Many parents and other relatives have a conflict of interest in becoming a welfare guardian to their relative because of the care they have for that person which means they may intervene too much in the subject's life⁷⁴. Welfare guardianship orders are often sought to empower families of people with intellectual disabilities rather than to "protect and promote the rights" of such persons. As a judge stated in his interview in the Bray (2000) study "I get the distinct impression from people that are using the Act that they don't see

⁷³ Re "Joe" [1990] NZFLR 260, 264

⁷⁴ This can be illustrated in interviews in Anne Bray, John Dawson and Justine van Winden *Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities* (Donald Beasley Institute Incorporated, Dunedin, 2000) 98-99

it like that {as a last resort]......they are probably trying to get more control under the order than was probably within the objects of the Act"⁷⁵. Such conflicts are however overlooked by the Courts as was particularly the case with those applicant parents who opposed deinstitutionalisation which was considered by professionals to be the best interests of the subjects. This can be illustrated in the case of *re G* where the applicant mother was "not enthusiastic about *G* having a future in a smaller community because she believes that she is safer in the Kimberley setting"⁷⁶, a smaller community would have been in *G*'s best interests⁷⁷ yet the Court granted the mother welfare guardianship.

It is not only the Courts that tend to give preference to families, Counsel for the subject person also have a tendency to do the same. Bray (2000) study showed that such Counsel were often more concerned about ensuring family agreement about the welfare guardian than ensuring suitability⁷⁸.

This matter raises the issue over the conflict between family rights and the principle of least intervention. As Atkin states, families my often play a significant role in helping an incapacitated person adjust and grow yet they may also be oppressive⁷⁹. The Courts generally practice less caution towards family members as potential welfare guardians. This is an incorrect practice considering the Act was created to try and prevent undue interference in

⁷⁵ Anne Bray, John Dawson and Justine van Winden *Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities* (Donald Beasley Institute Incorporated, Dunedin, 2000), 75

⁷⁶ Re G [PPPR: Jurisdiction] (1994) 11 FRNZ 643, 645

As stated in Anne Bray "The Protection of Personal and Property Rights Act 1988: Progress for People with Intellectual disabilities?" (1996) 2 BFLJ 51; 64, 65

⁷⁸ Anne Bray, John Dawson and Justine van Winden *Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities* (Donald Beasley Institute Incorporated, Dunedin, 2000), 97

WR Atkin "The court, family control and disability – aspects of New Zealand's Protection of Personal and Property Rights Act 1988" (1988) 18 VUWLR 345, 360

people's lives. Just because a family member is an applicant does not mean that there should be less caution to ensure that a person is appropriate in the role.

Despite this argument, perhaps the Court and Counsel are just trying to be pragmatic in its practice. They maybe merely recognising the role that families play in an incapacitated person's life. As stated by a Judge in the Bray (2000) study "Lets have a bit of reality in this. Would you do that if you were a judge? Would you say "Oh Mum, you've gone out to Templeton every second day, you've been the only one that's looked after this – you've lived with it all your life, but I'm sorry you're not going to be made a welfare guardian" Since the majority of applications are from family members perhaps Counsel and the Court are also weighing up between having an unsuitable guardian, and no guardian at all. It seems the former might be preferred in many circumstances.

This leads on to the next issue in choosing a welfare guardian; the lack of options available to the Court if no one volunteers to play the role. The legislation does not provide for situations where no one volunteers to be a welfare guardian nor does it provide for situations where no one will make an application on behalf of a person to have a welfare guardian appointed. The reality is that under this legislation the incapacitated person is reliant on benevolence of their families or friends to make applications to the Court and then volunteer to be decision makers on their behalf; these are factors beyond the control of the incapacitated person. Due to this gap if there is no one concerned enough to make such efforts than a person may be left to suffer and their incapacity means they have no mechanisms for self-help.

Currently those without welfare guardian use advocacy services, yet such services while being temporarily effective will not meet long term needs and they require some sort of initiative on behalf of the incapacitated person to get. If a person is so incapacitated to require a welfare guardian it is unlikely they will have the capacity to do this.

As a solution to this problem it may be argued that the Act provides for the use of professional welfare guardians. The Bray (2000) study actually found that in a small number of cases professional welfare guardians were used with success⁸¹. Two questions must be asked however, the first is whether the Act actually permits such a role and second whether this role solves the problem of the gap in legalisation.

Section 21 provides for the payment of the welfare guardian's expenses. It states that:

- 1) Subject to any order of a Court made under subsection (2) of this section, all expenses reasonably incurred by a welfare guardian in the exercise of the powers and duties conferred by or under this Act shall be charged against, and payable out of, the property of the person for whom the welfare guardian is acting.
- (2) A Court may order that any expenses incurred or to be incurred by a welfare guardian in the exercise of the powers and duties conferred by or under this Act shall be met, in whole or in part, out of the Consolidated Account from money appropriated for the purpose by Parliament; and every such order shall have effect according to its tenor.

On first account it seems that "expenses" should not be interpreted to include wages only direct reasonable expenses. Despite this, professional welfare guardians are not explicitly excluded from the Act like body corporates are. So arguably professional welfare guardians could be

⁸⁰ Anne Bray, John Dawson and Justine van Winden *Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities* (Donald Beasley Institute Incorporated, Dunedin, 2000), 98

⁸¹ As above, 103

permitted under the Act and perhaps for pragmatic reasons the Courts should consider such an option as a measure of last resort.

Even if they are permitted it is not clear if the Courts will pay welfare guardians remuneration from the Consolidated Account if a person has no assets. To date such funds have not been used⁸². The Courts may take a different attitude towards using tax payer's money rather than the incapacitated person's assets and it seems unlikely that they would permit such an expense.

The use of professional guardians may arguably remove the gap in the scheme of the Act over appointing someone a welfare guardian when they have no one to freely volunteer for them. This does not however remove the gap when no one volunteers to make an application to the Court in the first place if they see some one in need of intervention. It also does not fill the gap for those who have no assets to afford to pay a professional welfare guardian. There needs to be another solution to remove the gap in the legislation.

Recommendation

3:

It is recommended that a body is created to:

- (a) Act as a welfare guardian of last resort if no one volunteers for the role
- (b) Act as body to make application on behalf of a person for the appointment of a welfare guardian when no one else volunteers to make such an application and there is a clear need for one.

This would solve the problem that is currently prevalent due to the gap in the legislation. This solution would also mean that the Court has the liberty to look deeper into a person's suitability as a welfare guardian because they know that there are alternatives available if an applicant is found unsuitable under the Act.

⁸² Anne Bray, John Dawson and Justine van Winden Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities (Donald Beasley Institute Incorporated, Dunedin, 2000), 105

IV FUNCTIONS OF THE WELFARE GUARDIAN

Once a person is appointed as a welfare guardian they are empowered to act in that role. The chapter will examine what exactly that role entails. It will first examine the style of guardianship that welfare guardianship is and look at what the legislation states the role of the welfare guardian is. Second, this section will examine how the Courts have interpreted the breadth of a welfare guardian's powers specifically looking at the Courts interpretation of the welfare guardian's powers for medical treatment consent, delegation, acting in the best interests and powers of coercion. It will be shown that there needs to be legislative change with regard to the coercive powers of the Court and welfare guardians. This section will finally look at how welfare guardians apply their role in practice. It will be shown that they lack guidance and support which makes many welfare guardians uncertain as to the breadth of their powers.

A Legislation

Singer and Carney identify three distinct models of guardianship legislation in which different state goals predominate:⁸³

- 1. A legalistic model which aims to facilitate only a person's legal functioning in the community
- 2. A welfare oriented or therapeutic model which strives to bring a wider range of benefits to the person
- 3. A 'parent-child' or developmental model which aims to promote the development of the individual's functioning in a range of areas.

The welfare guardian incorporates all three of these models, for instance guardians can be appointed to make specific legal decisions (model one), to protect people from abuse and neglect who cannot adequately assist themselves (model two) or to assist the development of the person's abilities and capabilities where the ultimate goal is to eliminate or minimise the need for guardianship (model three).

⁸³ T Carney and P Singer, Legal and Ethical issues in Guardianship Option for Intellectually disabled people (AGPS, Canberra, 1986)

The positive element of the Act in that in accordance with the least intervention principle the role of each welfare guardian may be different to fit the needs of each subject person. This is because section 12 states that a welfare guardian may be appointed in relation to such aspect or aspects personal care and welfare of that person as the Court specifies. They can thus be granted plenary or limited guardianship albeit without the labelling to meet to the needs of the person. Welfare guardians can also receive specific orders regarding the care of the subject person such as orders regarding medical treatment or living arrangements.

Despite this option to limit guardianship it can be deduced from the Bray (2000) study that the majority of orders are for "all aspects of personal care and welfare". This appears to be for pragmatic reasons as a judge interviewed in the study stated:

"We usually make the appointment for the global aspects because unless they have some capacity, which they normally don't, or are able to communicate, which they normally can't, its easier and more sensible to give the welfare guardian that power unless they want it narrowed down to something less. And it also means that they don't have to come back to Court for another application to get a further specific power⁸⁴".

The Court is highly dependent on the advice of appointed counsel as to decisions made for the level of welfare guardianship that is to be ordered⁸⁵. This seems highly dependent on how that counsel perceives welfare guardianship and thus advises the Court. This is further reason to ensure that the legal profession is adequately education in the area of intellectual disabilities.

The legislation sets out various restraints and obligations on the role of the welfare guardian. Generally a welfare guardian has *all such powers as may*

⁸⁴ Anne Bray, John Dawson and Justine van Winden *Who Benefits from Welfare* guardianship? A study of New Zealand Law and People with Intellectual Disabilities (Donald Beasley Institute Incorporated, Dunedin, 2000) 76

be reasonably required to enable him or her to make and implement decisions for the person concerned in respect of each aspect specified by the Court order⁸⁶. The legislation states that when exercising these decisions the welfare guardian must:

- 1. Promote and protect the welfare and best interests of the person concerned⁸⁷
- 2. Encourage the person concerned to develop and exercise any capacity they have⁸⁸
- 3. Encourage the person to act in their own interest where possible⁸⁹
- 4. Assist the person to be a part of the community⁹⁰
- Consult the person and others that the welfare guardian considers are interested in and competent to advise on personal care and welfare of that person, including any voluntary welfare agency⁹¹
- 6. Consult with the property manager if the person is subject to a property order ⁹²

If a welfare guardian needs guidance in exercising these powers he or she may apply to the Court for direction⁹³. A decision of a welfare guardian has the same effect as if it had been made or done by the person for whom the welfare guardian is acting and that person had had full capacity to make or do it⁹⁴.

The legislation sets out a number of restrictions over what a welfare guardian can do⁹⁵. A welfare guardian must not:

1. Make any decision relating to that persons marriage or entering into a marriage; or

⁸⁵ As above, 77

⁸⁶ Section 18(2)

⁸⁷ Section 18(3)

⁸⁸ Section 18 (3)

⁸⁹ Section 18(4) (a)

⁹⁰ Section 18 (4)(b)

⁹¹ Section 18 (4)(c)

⁹² Section 18 (5)

⁹³ Section 18 (6)

⁹⁴ Section 19, they can only be personally liable for actions if it can be shown that the welfare guardian acted in bad faith or without reasonable care or did not disclose that the welfare guardian role was being exercised. (section 20)

⁹⁵ Section 18 (1)

- 2. Make any decision relating to the adoption of any child of that person; or
- 3. Refuse consent to the administering to that person of any standard medical treatment or procedure intended to save that person's life or to prevent serious damage to that person's health; or
- 4. Consent to the administering to that person of electro-convulsive treatment; or
- 5. Consent to the performance on that person of any surgery or other treatment designed to destroy any part of the brain or any brain function for the purpose of changing that person's behaviour; or
- 6. Consent to that person's taking part in any medical experiment other than one to be conducted for the purpose of saving that person's life or of preventing serious damage to that person's health.

The legislation can be quite specific however; it is not an entirely comprehensive piece of legislation that specifies every aspect of a welfare guardian's role.

B Cases

1 Medical treatment

As the legislation is not entirely comprehensive, the Courts have stepped in at times to make clarifications over specific powers of welfare guardians. As stated above there are a number of medical treatments specifically excluded from the welfare guardian's powers and which need specific court rulings, but it is not an extensive list. The courts have examined this issue. In the case of *re NH* the Court stated that the welfare guardian had "the flexibility to decide where the patient lives from time to time and all general powers to determine the placement, caring and day to day routine medical arrangements⁹⁶".

⁹⁶ Re N H [Welfare Guardianship] (1997) 16 FRNZ 92, 95

The Family Court in *re H* considered a welfare guardians ability to consent to an abortion and sterilisation⁹⁷. There the Court examined whether the welfare guardian's powers should extend to such issues, or whether the Court's own power under s 10(1)(f) to prescribe the kind of medical treatment H should receive ought to be invoked. It was decided that the Court had the power either to empower or not to empower the welfare guardian with the ability to consent to sterilisation or abortion but such powers were not inherent to the welfare guardian. This was because such procedures were not considered routine and because they had a permanency about them which required the Court's consent. Thus a welfare guardian does not have the power to consent to non-routine medical treatment without the consent of the Court.

2. Delegation of Powers

Another uncertain area is the welfare guardian's ability to delegate powers. There is nothing stated in the Act regarding this. There have however been a number of cases which have dealt with the issue. In the case of $re X^{98}$ for instance the Court stated

"It cannot be right for the Family Court to appoint a welfare guardian with the authority to delegate the whole of his powers to a separate authority which is not accountable to the Court....In each of the present cases the welfare guardian is able to delegate day to day care, medical advise etc but not the right to decide important matters concerning the patient without first consulting the welfare guardian or consent to the administration of the patient of any standard irreversible treatment without first obtaining the direction of the Family Court." (emphasis added)

⁹⁷ Re H [1993] NZFLR 225

⁹⁸ Re X [PPPR] (1993) 10 FRNZ 104

⁹⁹ (1993) 10 FRNZ 104, 107

Thus the welfare guardian does not have the power to delegate decisionmaking powers on important aspects of the subject's life

3. Best interests

Uncertainty has stemmed from the phrase "promote and protect the welfare and best interests of the person concerned". It raises the issue as to how far a welfare guardian is to rely on their own opinion of what is best for the subject and to what degree outside advice is to be followed.

The case of $re M H (PPPR)^{100}$ illustrates this issue. In that case the welfare guardian was removed because her view of the best interests of the subject clearly contradicted that of medical expert opinion. In that case the mother of MH was created welfare guardian. She continued to administer lithium to her son despite the insistence from his doctors that he should not receive this. This was against a specific order in her appointment of her welfare guardianship. The Court stated that "there is no doubt in my mind that Mrs H is sincere in her wish to look after her son as best she can" but the result of Mrs H's approach to care was that she was "relentlessly trying to get MH on more and more medication in the hope of controlling his behaviours, with limited appreciation or understanding of the limitations of medication and the possible side effects"101. The doctors determined that Mrs H "expectations approach a style of care where MH is kept in a medical straight jacket...I consider that Mrs H's care and concern for MH, though well intended, has an obsessional and pathological quality to it, which in the long term may not be in the best interests of M H's welfare" 102. The mother obviously considered that her actions were in the best interests of the son, yet they clearly were not. How much should a welfare guardian adhere to the opinion of others when deciding what is in the best interests?

¹⁰⁰ Re M H [PPPR] (2001) 21 FRNZ 254

¹⁰¹ (2001) 21 FRNZ 254, 256

¹⁰² (2001) 21 FRNZ 254, 255

The Act states in section 18 (4)(c) that the welfare guardian has the duty to consult, so far as may be practicable,

- 1. The subject person,
- 2. Other persons who, in the opinion of the welfare guardian are interested in the welfare of the person and competent to advise,
- A non-commercial representative group that is engaged in the
 provision of services and facilities for the welfare of persons or is
 interested in the welfare of the person and competent to advise the
 welfare.
- 4. The property manager (if applicable)

There is thus a duty to consult doctors, groups like the IHC, and other family members, yet this duty to consult doesn't place an obligation to accept that advice.

In the case of *re NH*, the Court stated that the welfare guardian, whilst having global authority over the patient's placement and treatment, would accept the Kimberley's management's advice on such matters¹⁰³. So following this decision and that of *re MH*, there does seem to be an obligation to follow expert opinion over the subject's care. It is however unclear how much other person's advice is to be adhered to.

The decision of *MH* also raises the issue as to how far welfare guardians are required to sacrifice their own interests for that of their subject. How far will the Courts insist they go? The Courts ascertained that it was easier for Mrs H to care for MH by keeping him overly medicated; this was not in MH's best interests. This was the correct decision, yet surely there will be situations that are not entirely in the best interests of the subject but will be easiest for the welfare guardian and will be permitted, such as moving the subject closer to the welfare guardian for ease of

¹⁰³ Re N H [Welfare Guardianship] (1997) 16 FRNZ 92, 95

monitoring even though this will mean the subject will have to leave their surroundings.

4. Powers of Coercion

A further issue regarding the powers of the welfare guardian is the ability to restrain the incapacitated person and furthermore to the Court's general powers to authorise the physical restraint of persons subject to the Act. The Act is silent on the matter but the Courts have found that it does have the power to authorise the use of physical restraint. This raises two questions, does the power of coercion need to be available and if so does the Act actually concede this power? These questions were examined by the New Zealand Law Commission¹⁰⁴.

The first question is whether coercion should be available. In the case of *re: B (seclusion)* the Court stated that "restraint and seclusion have to be regarded as appropriate elements of the standard care and treatment of patient's with a serious intellectual deficit¹⁰⁵." This assumption has been criticised as dangerous. Gates states that such procedures have no credence in the support of people with a severe intellectual disability for the past 30 years or more¹⁰⁶. A further criticism of the powers of coercion can be found by Robert Ludbrook in his submission to the Law Commission where he states: "The danger with giving people and institutions greater coercive powers over people who are placed in their care is that the powers intended to deal with unusual situations easily become part of standard practice. Powers intended to protect

¹⁰⁴ New Zealand Law Commission *Protections Some Disadvantaged People May Need*: NZLC R80 (Wellington, 2002)

¹⁰⁵ Re B [Seclusion] (1993) 1 FRNZ 174,

 $^{^{106}}$ S Gates "Why is it necessary for the expert witness to testify within their own science?" (1999) 3 BFLJ 81

vulnerable people end up being used to control, punish and restrict the liberty of such people. 107"

Despite this criticism, the evidence suggests that in some cases coercion is appropriate procedure to make. As Dr Donald Beasley, an expert in intellectual disability stated:

"such measure of physical restraint for some will continue to be required, perhaps less frequent and gentler as experience grows...Any restraint must be minimal, authorised for a specific time, renewable on fresh application and independently monitored"

The issue over the legality of coercion of those with intellectual disabilities arose after the passing of the Mental Health (Compulsory Assessment and Treatment) Act 1992. Under this Act mental disorder is defined and it expressly excludes intellectual handicap in its definition in section four. There had not been any such exclusion prior to this Act. The result of this is that there is no explicit statutory provision for the imposition of restraint on those with intellectual disabilities to avoid self-harm nor are there any provisions for restraining such persons from harming others.

To fill this gap Hon Wyatt Creech introduced the Intellectual disability (Compulsory Care) Bill which made provisions for the coercion of intellectually disabled persons charged with imprisonable offences and found guilty, unfit to stand trial, acquitted on the grounds of insanity, and for intellectual disability persons whose behaviour poses a serious risk to themselves and others. This Bill was consequently been redrafted to exclude non-offenders and has not been enacted, therefore, there is still a gap in the legislation concerning the restraint of non-offending persons with intellectual disabilities to avoid self-harm. This raised concerns from institutions and the like about their legal status in coercing those with intellectual disabilities.

 $^{^{107}}$ New Zealand Law Commission $Protections\ Some\ Disadvantaged\ People\ May\ Need:$ NZLC R80 (Wellington, 2002) 18

Submissions on the intellectual disability (compulsory care) Bill by Stephanie du Fresne summarises these concerns:

"people employed to work with people with an intellectual disability are often in the position of coercing them or imposing restrictions on them. This involves a wide range of coercive and restrictive practices from insisting that people wear adequate clothing or take medication for epilepsy or other serious medical conditions whether they want to or not, through locking external doors or gates to techniques or personal mechanical restraint and seclusion generally imposed because the disabled person does not understand the need for whatever is being insisted on or has transiently lost self-control rather than because that person refuses to cooperate...[there are concerns] that they were not legally authorised to make such coercive practices¹⁰⁸"

There clearly seems to be some need to enable coercion powers over those with intellectual disabilities. The second question is whether the Act confers the power of coercion. There is nothing stated specifically on this issue in the Act. There is a well-settled rule of interpretation that physical restrictions should not be placed on any person except under clear authority of law, and that statutes should be construed on this basis ¹⁰⁹. The Law Commission states that there is not "a power expressed in such general terms anywhere near furnishing clear authority for physical restraint" In light of this standard rule of statutory interpretation, it argues physical restraint powers cannot be read into the Act. The Law Commission has stated that "coercion may be exercised as part of the robust commonsense of everyday care, in relation to more physical constraints serious doubt exists as to whether the 3PR confers coercive powers¹¹¹".

¹⁰⁸ New Zealand Law Commission *Protections Some Disadvantaged People May Need*: NZLC R80 (Wellington, 2002) 5

This proposition is stated in Reg v Home Secretary ex parte Pierson [1998] AC 539, 587 Lord Steyn
 New Zealand Law Commission Protections Some Disadvantaged People May Need: NZLC R80 (Wellington, 2002), 13

¹¹¹ Above 14

Despite this argument, the Courts have willingly read in the powers of restraint. In the case of *Re A, B and C (Personal Protection)*, for example, the Court held that the delegation by the welfare guardian of the day to day care to the Kimberley Centre "included the use by the Centre of such reasonable restraints on the patient as are necessary in the patient's welfare and interests, and for the safety of others, inside and outside the Kimberley Centre Complex" ¹¹².

Another example is the case of re B (seclusion) where it was stated that: "Restraint and seclusion have to be regarded as appropriate elements of the standard care and treatment which require the specific approval or authorisation of the Court in orders made under the PPPR. There is a clear distinction between these forms of care and treatment and the irreversible medical or surgical procedures discussed in RE H.... Accordingly I rule as a matter of law and principle that seclusion may be authorised in one way or the other under the 1988 Act in cases, as here, where it is needed from time to time to ensure the patient's own safety and welfare and the safety and welfare of others. There is power to make a personal order to that effect in terms of s 10(f), for example. In principle a welfare guardian is empowered to consent to the institution in which the patient is cared for providing seclusion for the patient as and when needed, in which case the welfare guardian's consent becomes in the law the patient's consent

In support of the Court's view, Judge Inglis in his submission to the Law Commission stated that there was "nothing ambiguous in the Act". He states that the ability to put someone in an institution is quite pointless unless it is read with the necessary implication that the patient is bound to enter the institution and the institution is bound to receive and keep him there.

 $^{^{112}}$ Re A and Others [PPPR] (1993) 10 FRNZ 537, 540

¹¹³ Re B [Seclusion] (1993) 1 FRNZ 174, 179

Since there is arguably a need to use coercion for those with intellectual disabilities, the Law Commission concluded that there needed to be amendments to the PPPR in order to remove any uncertainty. The Royal Australian and New Zealand College of Psychiatrists, among many, have supported such a change stating:

"For those who are incompetent to keep themselves safe, because of a lack of comprehension of the common dangers of the world around them, the appropriate response is the use of guardianship legislation. The 3PR Act seems the most appropriate vehicle, though it would appear to require some amendment for this purpose 114".

The Law Commission recommended that the Act be amended to state:

An order made under any of paragraphs (d) to (g) in subsection (1) of section 10 of this Act may direct that the person be subjected to physical restriction if in the view of the Court such restriction are necessary to avoid such person endangering such person's health or safety.

A direction authorised by ss (1)

- (i) Must be expressed with such particularity as the circumstances permit and must record the purpose for which the direction is given; and
- (ii) Notwithstanding its terms may not be construed to justify use of a greater degree of force or more lengthy restraint than is required to achieve the purpose for which the direction is given.
- (iii) further safeguards

¹¹⁴ New Zealand Law Commission *Protections Some Disadvantaged People May Need*: NZLC R80 (Wellington, 2002) 16

The Law Commission also stated that with regard to welfare guardians the Act should be amended to empower a welfare guardian, it states that:

A welfare guardian shall have power to subject the person, for whom the welfare guardian is acting, to physical restriction only to the extent that a direction authorising such restriction has been given.

The Law Commission went on to conclude that there needed to be safeguards in the Legislation if such coercive powers were to be included. Such safeguards were:

- 1. Justifiable force;
- 2. Periodic review by the Family Court;
- 3. The powers and obligation of District Inspectors appointed under the Mental Health (compulsory treatment) Act 1992 be extended to include hospitals and services where persons are made reside or are treated;
- 4. Section 65 amended to make it clear that the obligation of a lawyer appointed under that section in respect of whom such a coercion order is sought is a continuing one that remains in existence as long as the order is in fore or until the lawyer is released, then a new one needs to be appointed; and
- 5. The Family Court in giving a direction may impose conditions.

Recommendation 4:

There should be amendments to the Act following the Law Commission's recommendations. In effect this would really only formalise powers that are already permitted. Yet, such changes would remove uncertainty for the carers of those with intellectual disabilities. The legislative change would also make a difference in the provisions of safeguards for those with intellectual disabilities against abuse as currently there is a power of coercions that does not have special safeguards. Such a change would be the first step to really monitor the role of carers and welfare guardians of those with incapacities.

C. Welfare Guardian Practice

There have been two major studies into the practice of welfare guardians¹¹⁵. These studies have shown that many welfare guardians are unsure as to how far their powers reach and how comprehensive the legislation is to explaining their powers¹¹⁶. It seems that how a welfare guardian views their role varies across the board and may depend on the relationship with the subject. How their role is viewed often affects the certainty they feel towards their powers. In particular it has been found that parents see the role as recognition of their parental status and do not act any differently than they had prior to the appointment¹¹⁷. Many see their role as being to maintain or improve the quality of life of the subject, often through maintaining a 'watching brief' over their care and treatment in an institution or group home. Others feel that their role is exactly what it was before the Act and carry out functions that they were already performing but without any 'grief' as to their authority to do this¹¹⁸.

The majority of welfare guardians show a significant lack of awareness of their responsibilities and of the principles governing their actions. The evidence suggests that most Welfare Guardians do not really know exactly what their role is ¹¹⁹ and they are uncertain as to their authority. An example of such uncertainty is from the fact that

Anne Bray and John Dawson *Implementation of The Protection of Personal and Property Rights Act 1988- The Report of A Pilot Study in Dunedin* (Bioethics Research Centre of the University of Otago, 1994) and Anne Bray, John Dawson and Justine van Winden *Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities* (Donald Beasley Institute Incorporated, Dunedin, 2000) 107

Anne Bray and John Dawson *Implementation of The Protection of Personal and Property Rights Act 1988- The Report of A Pilot Study in Dunedin* (Bioethics Research Centre of the University of Otago, 1994) 53-56

Anne Bray, John Dawson and Justine van Winden Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities (Donald Beasley Institute Incorporated, Dunedin, 2000) 107

Anne Bray and John Dawson *Implementation of The Protection of Personal and Property Rights Act 1988- The Report of A Pilot Study in Dunedin* (Bioethics Research Centre of the University of Otago, 1994) 53-56

Anne Bray, John Dawson and Justine van Winden Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities (Donald Beasley Institute Incorporated, Dunedin, 2000) 107

welfare guardians lose their powers upon the death of their subject. Many welfare guardians are unsure who has the power to make arrangements for the person's burial ¹²⁰. This uncertainty is a problem, if a welfare guardian is not certain of the role, how can they know if they are doing it correctly?

It is entirely appropriate for the legislation is not totally comprehensive as to the welfare guardian's powers. This is because there will be such variation in circumstances among applicants that there needs to be an element of flexibility available to the Courts. Despite this fact, the Act does not provide the mechanisms for any administrative structure to provide on-going training or support for the work of welfare guardians. As a result the problems that were found to occur by the two studies in to welfare guardianship will continue. This can lead to various problems such as many welfare guardians being not aware that their three years have expired and forget to renew their guardianship¹²¹. These guardians continue exercising their power even though such powers have expired.

Recommendation 5:

A body should be appointed that:

Provides support, education and training for welfare guardians.

This would be at an informal level where there is easily accessible information available. This body would also be able to answer queries that a person may have about their role. This is far more cost effective than having to make an application to the Family Court over a query.

¹²⁰ Anne Bray and John Dawson *Implementation of The Protection of Personal and Property Rights Act 1988- The Report of A Pilot Study in Dunedin* (Bioethics Research Centre of the University of Otago, 1994) 53-56

Anne Bray, John Dawson and Justine van Winden Who Benefits from Welfare guardianship? A study of New Zealand Law and People with Intellectual Disabilities (Donald Beasley Institute Incorporated, Dunedin, 2000) 107

V MONITORING

The aim of this section is to examine the monitoring and enforcement provisions of the Act for welfare guardians. This section will first examine the enforcement provisions under the Act. Second, it will examine the monitoring and investigation elements of the Act. It will be shown that the Act is does not provide adequately for these functions.

A Enforcement

A major criticism of the Act is that there are very limited enforcement provisions for personal orders. Section 23 provides for any body to apply to the court to appoint a welfare guardian to ensure that a person carries out a personal order if there has been non-compliance. The Act however, does not provide any mechanisms for the punishment of negligent or abusive welfare guardians, nor does the Act provide mechanisms to ensure that welfare guardians comply with orders. The gap can be illustrated *re BEW (No 1)*¹²². In that case the Court did not see the point in making personal orders with regard to BEW because such orders were sabotaged by the mother of BEW. The Court found that such orders would amount to nothing as there were no enforcement provisions of the Act. The result of this case was the mother of BEW played an instrumental part in BEW's later abuse; such a tragedy could have been avoided if personal orders were able to be enforced.

B Monitoring

Another major criticism of the Act is that there is a lack of monitoring of the role of the welfare guardian. There are a few provisions for monitoring and controlling the role of the welfare guardian, yet arguably this does not go far enough. Under section 86 a person with leave of the Court, the welfare guardian, or the person subject to an order may request a review of any personal order (including the appointment of a welfare guardian)¹²³. This review may re-examine the capacity of

¹²² As quoted in re BEW (No 2) [1995] NZFLR 89, 92

¹²³ Section 86

the subject person or review the appointment of the welfare guardian itself. The objectives of such a review are those of section 8. Upon a review under section 86 the Court may vary, decline to vary, discharge or decline to discharge or add to the personal order.

A further monitoring provision is in section 89 which states that a person with leave of the Court or the person subject to an order may request a review of a welfare guardian's decision¹²⁴. A type of review provision is found in section 22 which specifies when a welfare guardian ceases to hold office. A welfare guardian ceases to hold office if that person dies, becomes bankrupt, becomes a special patient, a committed patient or becomes "otherwise incapable" of action. A welfare guardian also ceases to hold office if the personal order expires. This is usually within three years.

Section 22 is not entirely comprehensive and the meaning of the term 'otherwise incapable' in not entirely clear. There is uncertainty as to the threshold of incapability that is required in order for a person not to be removed as welfare guardian. Could such a term include instances where the welfare guardian becomes imprisoned or leaves the country? One would assume that these things would be included yet a person may be still able to make decisions on behalf of another if abroad and in prison. Another question that can be raised from section 22 is over who would bring to the attention of the Court if a person becomes incapable or is incapable of fulfilling their welfare guardianship responsibilities?

This last question raises the issue over the lack of monitoring provisions under the Act. There is no body that monitors the performance of the welfare guardian. It is up to a volunteer to bring any instances of poor performance on the part of a welfare guardian to the Court's attention. As a result, incapacitated persons may suffer abuse at the hands of the welfare guardian, and if that person has no one to act on their behalf there are no mechanisms to stop this.

46

¹²⁴ Section 89

.Recommendation 6:

There must be a body created that would:

- (a) Investigate claims of abuse and neglect made on the part of the welfare guardian and then have the power to apply to the Court to have that welfare guardian removed and a new one appointed if the case permitted. This would ensure that if any body suspected the abuse of an incapacitated person by a welfare guardian then there would be steps that person could take to remedy the situation without having to have the expense of applying to the Family Court.
- (b) Enforce orders from the Family Court on behalf of an incapacitated person. It could do this by being temporarily appointed a welfare guardian to either ensure a personal order is carried out or apply to the Court to have a welfare guardian removed if that person was not executing their duties adequately.

VI COMMISSION FOR ADULTS WITH MENTAL INCAPACITIES

Recommendations 2, 3, 5 and 6 all point to the conclusion that in order to fill the gaps in the legislation there needs to be a body created to:

- 1. Educate the law profession on issues with intellectual disabilities (recommendation 2)
- 2. Act as a welfare guardian of last resort (recommendation 3(a))
- 3. Act as a mechanism of last resort to initiate applications to the Court (recommendation 3(b))
- 4. Provides support, education and training for welfare guardians (recommendation 5)
- 5. Investigate claims of abuse and neglect made on the part of the welfare guardian (recommendation 6(a))
- 6. Enforce orders from the Family Court on behalf of an incapacitated person (recommendation 6(b))

It is recommended that a Commission would be the most appropriate body to do these functions. This section will examine the functions of Commissions currently used in New Zealand and ascertain that their core functions correspond with the functions that are required from a body to fill the gaps in the Act. This section will then examine how such a Commission would function. This section will then discuss the issues relating to the provision of the function to provide guardians of last resort with reference to the overseas use of the concept and how this could be used within a commission.

A Commissions in New Zealand

Commissions are Crown entities which are bodies established by statute that operate at arms length from the Government. They are organisations established and generally funded by the Government to perform certain functions. The majority of Commissions arise out of an inherent power imbalance in society of which the Commission aims to

remedy. They are created to protect and promote social and/or political rights of members of society. Often the creation of these Commissions is a response to the unequal status and/or inherent disadvantage that the beneficiaries of the Commission have, for example the Commissioner for Children promotes the rights of children who are perceived as being powerless¹²⁵.

Lea¹²⁶ examined the role and functions of Commissions in New Zealand by specifically looking at the Human Rights Commission, the Privacy Commission, the Commissioner for Children and the Health and Disability Commission. Lea observed that all Commissions are concerned with the protection and promotion of rights and all have a statutory right to act independently of the Government. Lea also set out six common functions of the Commissions observation

1 .Complaints investigation.It was established that:

The Human Rights Commission receive complaints of discrimination on the grounds stated in the Human Rights Act 1993. It has powers to enquire generally into any matter, including any enactment or law, or any practice or procedure, whether governmental or non-governmental, if it appears that human rights may be infringed"¹²⁷. On the conclusion of the investigation the commission has the power to mediate the dispute and if that fails the matter can be referred to the Complaints Review Tribunal.

The Privacy Commissioner receives complaints of interference in personal privacy under the Privacy Act 1993. It has the power to call a compulsory

¹²⁵Pamela Lea "The Independent Commissioner as an Instrument of Government" (A research paper for the degree of Master of Public Policy, Faculty of Commerce and Administration, Victoria University of Wellington, 1997) 18

¹²⁶ Pamela Lea "The Independent Commissioner as an Instrument of Government" (A research paper for the degree of Master of Public Policy, Faculty of Commerce and Administration, Victoria University of Wellington, 1997)

conference of the parties to a complaint and the power to summon and examine on oath any person who is able to give information relevant to an investigation or inquiry¹²⁸.

The Commissioner for Children receives complaints on any matter affecting children. It has implicit powers to "enquire generally into and report on any matter...relating to the welfare of children and young persons"129

The Health and Disability Commissioner receives complaints about breaches of the Code of Health and Disability Services Consumer Rights. can refer a complaint to the Director of Proceedings who is appointed by the commissioner. The Director has the power to initiate disciplinary proceedings in any relevant court, tribunal. The director of Proceedings has the right to call evidence and examine witnesses.

2. Education and promotion

All of the Commissioners have the responsibility to educate and inform members of the public of their cause.

4. Monitoring

The Commissions are independent monitors of the actions of the Executive; the Commissioner of children is also required to monitor actions under the CYPT Act

5. Advisory

All of the Commissioners have advisory roles to Government and nongovernment body.

¹²⁷ Human Rights Act 1993, section 5(g) ¹²⁸ Privacy Act 1993, section 76

6. Advocacy

All of the Commissions except that of the Privacy Commissioner have an advocacy role that is often shared with non-governmental organisations.

In 1997/98 the following amounts were spent on commissions:

Human Rights Commission \$4,771,000

Privacy Commissioner \$1,985,000

Commissioner for children \$852,000

Health and Disability Commissioner \$6,881,000¹³⁰

All of the Commissions observed by *Lea* received public funding and as such are financially accountable to the Government under the Public Finance Act 1989 and the Fiscal Responsibility Act 1994. The Commissions are required to have a statement of service performance and annual financial statement. They also must have a statement of objectives at the beginning of each year which can be match to the statement of performance at the end. Many also have a strategic plan with a vision and a mission statement and identify goals, core competencies, stakeholder expectations, and key strategies.

B A Commissioner for Adults with Mental Incapacities

The functions that are common for Commissions are also functions that are recommended to be provided for Adults with intellectual disabilities under the Act. It is presumed that the problems outlined for adults with

Children, Young Persons and their Families Act 1989, (CYPF Act) section 411(1)
 Pamela Lea "The Independent Commissioner as an Instrument of Government" (A

research paper for the degree of Master of Public Policy, Faculty of Commerce and Administration, Victoria University of Wellington, 1997)

intellectual disabilities under the PPPR would also often affect other adults with mental incapacities under the Act. It therefore seems appropriate that the creation of a body should be viewed in mind of benefiting all adults with mental incapacities. Adults with mental incapacities have an inherent power imbalance and require the sort of protection that commissions provide. If a Commissioner for Adults with Mental Incapacities was created it is envisaged that it would follow similar functions as those observed in other Commissions by Lea.

It is to be noted that the Law Commission examined the lack of monitoring under the PPPR but with reference to enduring power of attorney¹³¹. They recommended that the Commission of the Aged should be created to fill this gap. They recommended that such a commission would be both general and specific. The general powers must be to inquire and report on any matter relating to the welfare of the aged. It would have specific powers in relation to enduring powers of attorney would include making on behalf of the donor application to the Family Court for the exercise of that Court's various supervisory powers under Part IX, and of any other Court for such relief under the general law as may be available to any donor.

The above recommendation of a Commission for Adults with Mental Incapacities would be similar to the Commissioner for the Aged but would cover all persons with incapacities. This is a very important factor as all those with mental incapacities should be accorded the same protection regardless of cause of incapacity. Thus a person suffering from a head injury can have the same protection from the abuse from an enduring power of attorney as an aged person. Commissioners are usually created with their own separate piece of legislation yet this is not always the case such as with the Commissioner for Children which was created under Part IX of the Children, Young Persons and their Families Act, 1989. It is appropriate considering the

¹³¹ New Zealand Law Commission *Misuse of Enduring Powers of Attorney*: NZLC R71 (Wellington, 2001)

people who would use the commission to have the commission created in an amendment to the PPPR Act. This would also mean that the Commission would have to adhere to the principles of the Act to ensure there is not over interference.

C Functions of the Commission for Adults with Mental Incapacities

If the Commission for Adults with Mental Incapacities is created then it is presumed that it would have functions like that of other Commissions. This section will outline what these functions would be.

- 1. Make Complaints investigation
 - The Commission would be a body that people can make complaints to regarding the abuse and neglect of a person with an incapacity. These complaints would be for two things:
 - 1. The Abuse or neglect of a welfare guardian or carer of a person who the Family Court has ascertained has an incapacity
 - 2. The Abuse or self neglect of a person with a suspected incapacity.

In British Columbia abuse, neglect and self-neglect are defined terms¹³². It is appropriate for the terms abuse and neglect to be similarly defined in order for the Commission to know what areas it has the ability to receive complaints from. Once the Commission has conducted an investigation in to the care of a person then it can decide if there is sufficient need for intervention. If a welfare guardian is considered to be negligent or abusive then the Commission can apply to the Court to appoint another welfare guardian. If a person with suspected incapacity is proven to be suffering from abuse or self-neglect the

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 $^{^{\}rm 132}$ Section 1, Adult Guardianship Act 1993, See appendix II for their definitions.

commission could then apply to the Court for an appropriate personal order.

The key to initiate the Commission's investigation is to receive a complaint. This could be from any person such as a concerned neighbour, a doctor, the New Zealand society for the intellectually handicapped (IHC) and so on. It should not be compulsory for such a complaint to be made as there is no such requirement to report the abuse of children under the CYPF Act. A complaint need not be any thing more than the receipt of a phone call or a letter from a worried person. This will make the process quite easy. The person making the complaint should be able to be confidential and be immune from any tort claim that may arise as is the case for complaints under the CYPF Act. Such a person however should be prosecuted if the claims are maliciously false. This function would meet the requirements for recommendation 6 and 3(b).

2 Act as an advocate for people with incapacities.

The Commission could act on the behalf of people with incapacities to make their issues known to people. This advocacy would act along with the various other government and non-government organisations that deal with incapacity such as the Brain Injury Association of New Zealand, Enable 133 and the Assembly of People with Disabilities (DPA).

3. Monitor the performance of welfare guardians or enduring powers of attorneys

Such a body would be able to monitor the performance of those who are given powers to Act as decision makers for those with incapacities.

¹³³ Enable New Zealand manages health funding designated to improve the quality of life of people with disabilities

They could do such things as keeping a record of all welfare guardians so they remind them when they need to get a review from the Family Court. They could require a yearly plan from the welfare guardian on their subjects living and medical arrangements and level of care they require and receive. This would also keep statistical information over how many people are welfare guardians and their relationship with their subject. This would meet the requirements of recommendation 6.

4. Advise and educate welfare guardians and the legal profession.

The Commission would be available to advise welfare guardians on questions they may have on their role. They could provide a 0800 number and website that has a variety of information available for their role as welfare guardian. Such a website could also provide a forum for discussion between different welfare guardians. The Commission could also advise the legal profession over the appropriate evidence that is needed for different types of incapacities. This function would meet the requirements of recommendations 2 and 5.

D Possible Issues Regarding the Commission

The Commission would have to adhere to the Principles of the PPPR. Under that Act a person is to be presumed competent until proven otherwise by the Court. The Commission could have a conflict of interest between trying to avoid the abuse and neglect of those with incapacities and trying not to interfere too greatly in the lives of those with incapacities or suspected incapacities. This however, can be avoided if the Commission has set procedures to take action which follow the principles of the Act.

An issue surrounds the funding of such a Commission. The Human Rights and Privacy Commissioner are funded through the Ministry of Justice. The Commissioner for Children is funded through the Department of Social Development and the Health and Disability Commissioner is funded through

the Ministry of Health. It appears that the care of those with mental incapacities is a social issue, much like the protection of children is. Thus it appears that the Department Social Development would be an appropriate government department to fund such a scheme. The issue remains however over the political will to do this. Especially since those with incapacities have such a small voice in the community that it is difficult for their concerns to gain public or political interest and support.

E Guardians of Last Resort

A Commissioner for adults with mental incapacities would go along way in meeting the gaps in the current legislation if it followed the functions specified by Lea. Specifically if would meet recommendations 2, 3(b), 5 and 6, however it would not go far enough. It would not effectively meet recommendation 3(a). This is in fact the most important of recommendations. The appropriate option, in light of this need, would be to expand the role of the Commission for Adults with Mental Incapacities to include a service to provide guardians of last resort.

The NZ society for the Intellectually Handicapped recommended prior to the Act coming in force that there should be the creation of a "public guardian"¹³⁴. Such a body was recommended to act as a guardian of last resort. It would also function to monitor the operation of the legislation, recruit potential guardians and managers, act on behalf of a person, provide information to people on the legislation and promote and co-ordinate programmes to help people with disabilities.

¹³⁴ New Zealand Society for the Intellectually Handicapped Submissions to the Justice and Law Reform Committee on the Protection of Property and Personal Rights Bill 1986 (1987) para 9

Guardians of last resort have been subject to criticism by such people as McLaughlin¹³⁵. First, he criticises the fact that due to the delegation of powers, the person who is accountable to the Court is different from the person carrying out the duties assigned by the Court. Second, he criticises the fact that there will be conflicts of interest for the social-worker/guardian between his or her responsibilities to the court and his or her responsibilities to the agency that employs him or her. There may also be conflicts between the interests of the multiple persons under the guardian's care at the same time. A fourth criticism is that such a policy creates a series of personal guardians so there is no ongoing personal relationship between the subject person and his or her guardian. A fifth criticism is that such a public agency is costly and prone to over-protection.

McLaughlin's arguments can however be rebutted, this is for several reasons. First, government authorities often delegate their powers that have been assigned to them with out any glitches e.g. social workers under the CYPF Act. Second, the Commission that employs welfare guardians could have mechanisms to ensure that the appointed guardian does not have a conflict between the Commission and the subject person such as by stating in the employment contract that the primary obligation of the welfare guardian will be to the incapacitated person. Third, the Act only allows for a welfare guardian to be appointed for 3 year duration, consistency with guardians is not a necessity to ensure the person has consistency in care. The fifth criticism of McLaughlin can be rebutted because while a public agency may be expensive there may be bigger social costs if the gap in the legislation is not addressed, such as the high cost to pay for the degenerating health of an incapacitated person who is suffering from neglect.

It has been recommended that a possible compromise to the public agency model would be to instead recruit volunteer guardians from the

New Zealand Institute of Mental Retardation (Incorporated) Guardianship for Mentally Retarded Adults- Submissions to the Minister of Justice (1982), 30

community¹³⁶. Here people from the community are recruited and trained by some public agency. Then such persons would be appointed by the Court when there is no one else available. The Donald Beasley institute supported such a programme stating that this greatly reduced the possibility of conflicts of interests as the guardian's livelihood and career are not at stake if he or she is loyal to his or her court-assigned duties¹³⁷. It suggests that guardian turnover can be cut down with a proper recruitment programme. This argument must be criticised due to the lack of people who would want to be a welfare guardian for a stranger for free. If there was such a desire in the community surely such persons would have volunteered already.

The criticisms by McLaughlin are not strong enough to outweigh the need to provide guardians of last resort. It is imperative that such a function becomes part of the functions of a Commission for adults with mental incapacities. To support such a notion are two examples of similar bodies used overseas. The first example is in Queensland, Australia where the role of the 'Adult guardian' has been created under the Guardianship and Administration Act 2000 to protect the rights and interests of adults with impaired capacity. The Adult Guardian is an independent statutory officer who acts as a body that offers support and advice to guardians (like welfare guardians), attorneys, administrators (like property managers) and others acting informally, to assist them when making personal, health care or financial decisions for adults with impaired capacity. It also has powers to act as a guardian of last resort. The 'Adult guardian' also has investigatory powers if there is a report of exploitation, abuse or neglect of a person with impaired capacity, or a complaint about the actions of a person who has been given enduring powers of attorney. If a person is found to have behaved

¹³⁶ New Zealand Institute of Mental Retardation (Incorporated) *Guardianship for Mentally Retarded Adults- Submissions to the Minister of Justice* (1982), 30

¹³⁷ As above n 12

irresponsibly the 'Adult guardian' has the authority to suspend a power of the attorney, can conduct an audit, and obtain a warrant to remove an adult who is being abused, exploited or neglected.

A second overseas example is similar in Ontario, Canada with similar investigatory, monitoring, enforcement and support powers. In Ontario the Office of the Public Guardian and Trustee (OPGT) has been created and part of its role is to be appointed as a welfare guardian (called *guardian of the person*) by the Court if a mentally incapable adult needs protection and there is no one else to act¹³⁸. Such a role has similar goals as New Zealand's welfare guardians. The OPGT also has powers to investigate situations in which an adult is alleged to be mentally incapable and suffering, or at risk of suffering such as with severe self-neglect, physical abuse and financial exploitation. If an investigation confirms the need for guardianship, and no alternative solution can be found, the OPGT will apply to the court to be appointed as guardian with legal authority to make the decisions required for the person's protection.

As previously argued there is clearly a need to provide for guardians of last resort to meet recommendation 3(a). It is recommended that such an entity should be a branch of the Commission for Adults with Mental Incapacity. That way for example, if the commission establishes after an investigation that a person needs to be appointed a welfare guardian and there is no one to volunteer for the role then the Commission can appoint the last resort welfare guardian. This would give the Commission functions which go beyond that of other Commissions. Yet it is not a completely foreign concept for a Commission. The Health and Disability Commission for example, has an advocacy service that is a branch of its functions. This Commission would have very similar functions as that of the 'adult guardian' in Queensland and the OPGT in Ontario; it would ensure that the gaps in the

¹³⁸ The Substitute Decisions Act (SDA) 1992 Ontario, Canada

legislation would be filled to ensure that those of the most vulnerable in the community have their rights protected.

Recommendation 7

It is recommended that the most appropriate way to meet the gaps of the current legislation is to create a Commissioner for Adults with Incapacities who would have powers to:

Receive complaints

Investigate complaints

Monitor the performance of welfare guardians

Act as an advocate for issues regarding those with incapacities

Educational role to welfare guardians and the law profession

Provide guardians of last resort.

VII CONCLUSION

The Protection of Personal and Property Rights Act 1988 aim is to protect and promote the personal and property rights of those who are not fully able to manage their own affairs. The Act was a major step towards protecting and promoting the rights of those with mental incapacities, however, the examination of the role of the welfare guardian in this essay has shown that the Act did not go far enough in achieving its aim. The result is that those subject to the Act are vulnerable to abuse, neglect and self-neglect.

Through the examination of the welfare guardian role it has been shown that there are a number of gaps in the Act. In chapter II, it was shown that the Act should be amended in section 8 to explicitly state the best interest principle. In doing so this recognises the actual practice of the Courts but ensures that the principle does not expand to be overly paternalistic and thus contrary to the other principles of the Act. In chapter IV it was shown that there should also be another amendment to the Act to include the powers of coercion. This also recognises the actual practice of the Court but would ensure that the practice has better safeguards.

Chapters III – V also illustrated many gaps in the Act which leave adults with intellectual disabilities exposed to potential abuse, neglect and self-neglect. To solve the problems and meet the recommendations outlined in those chapters, it was recommended in chapter VI that there should be a Commission for Adults with Mental Incapacities to fill the gaps in the legislation. This recommendation makes the presumption that many of the problems in the legislation for adults with intellectual disabilities will also be prevalent for adults with other mental incapacities. It was recommended that such a Commission would have the power to:

Receive complaints

Investigate complaints

Monitor the performance of welfare guardians

Act as an advocate for issues regarding those with incapacities Educational role to welfare guardians and the law profession Provide guardians of last resort.

An important obligation of the law and society in general should be to protect our most vulnerable. Who can be more vulnerable than those with mental incapacities? If the changes recommended in this essay are made, particularly for the creation of a Commission for Adults with Mental Incapacities it would ensure that the aim of the Act is properly met and adults with intellectual disabilities and other mental are able to be treated with the same dignity and respect as that entitled to other members of society.

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APPENDIX I

Section 10 - Personal Orders available to the Court to make:

10. Kinds of order---(1) On an application for the exercise of a Court's jurisdiction under this Part of this Act in respect of any person, the Court may, subject to subsection (2) of this section, make any one or more of the following orders:

- (a) Subject to the Disabled Persons Employment Promotion Act 1960, the Labour Relations Act 1987, and the Minimum Wage Act 1983, an order that the person receive appropriate remuneration for work performed or to be performed by that person:
- (b) An order that any parent of the person make suitable arrangements for the personal care of the person after the parent's death:
- (c) An order that the arrangements made by any parent of the person for the personal care of the person after the parent's death be observed, or be varied in any particular specified in the order:
- (d) An order that the person shall enter, attend at, or leave an institution specified in the order, not being a psychiatric hospital or a licensed institution under the Mental Health Act 1969:
- (e) An order that the person be provided with living arrangements of a kind specified in the order:
- (f) An order that the person be provided with medical advice or treatment of a kind specified in the order:
- (g) An order that the person be provided with educational, rehabilitative, therapeutic, or other services of a kind specified in the order:
- (h) An order that the person shall not leave New Zealand without the permission of the Court, or shall leave New Zealand only on conditions specified in the order:
- (i) An order appointing a person named in the order as next friend or guardian ad litem for the person for the purposes of any proceedings in a District Court:
- (j) An order under section 11 of this Act that a person named in the order administer any item of property specified in the order:
- (k) An order under section 12 of this Act appointing a welfare guardian for the person.

APPENDIX II

Meaning of "abuse", "neglect" and "self-neglect" under section 1, Adult Guardianship Act 1993, British Columbia.

- 1. "Abuse" means the deliberate mistreatment of an adult that causes the adult
 - a) physical, mental or emotional harm, or
 - b) damage to or loss of assets

and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial or access to visitors;

- 2. "neglect" means any failure to provide care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage to or loss of assets, and includes self-neglect;
- 3. "Self-neglect" means any failure of an adult to take care of himself or herself that cases, or is reasonably likely to cause within a short period of time, serious physical or mental harm or substantial damage to or loss of assets and includes
 - (a) living in grossly unsanitary conditions,
 - (b) suffering from an untreated illness, disease or injury,
 - (c) suffering from malnutrition to such an extent that, without intervention, the adult's physical or mental health is likely to be severely impaired,
 - (d) creating a hazardous situation that will likely cause serious physical harm to the adult or others or cause substantial damage to or loss of assets, and
 - (e) suffering from an illness, disease or injury that results in the adult dealing with his or her assets in a manner that is likely to cause substantial damage or loss of the assets.

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