THE LIMITS AND THE SOCIAL LEGACY OF GUARDIANSHIP IN AUSTRALIA

TERRY CARNEY*

1 INTRODUCTION

A The policy background

Guardianship laws either for intellectually disadvantaged people alone, or for anyone with diminished functional capacity (such as victims of brain trauma), are now popular in Australia (other than in Western Australia and the Australian Capital Territory)[1] and New Zealand.[2] These laws are based on North American experience, particularly that of the Dependent Adults Act 1976 (Alberta).[3] The common thread is that it permits a guardian to be appointed to manage the property or the personal affairs of the disadvantaged person, or to make one or more of the multitude of decisions lying within these two broad areas of human living.

Contemporary legislation is notable for three things. First, partial orders are permitted (in place of only plenary orders[4]). Indeed they are positively encouraged where any intervention at all is called for (the normalisation principle). Secondly, personal guardianships have been revived (having existed all along under cumbersome equity jurisdictions of — or associated with — superior courts[5]). Thirdly, administrative boards, with multi-disciplinary

---

* LL B (Hons), Dip Crim (Melb), Ph D (Mon), Associate Professor of Law, Monash University. Mr K Akers B A (Mon) has worked as Senior Researcher on this project. The research reported in this paper has been supported by funds from the Australian Research Council.

[1] The dominant reform model is the Guardianship and Administration Board Act 1986 (Vic) [cited subsequently as Vic Act]. The other legislation to be dealt with in this article is: Intellectually Handicapped Citizens Act 1985 (Qld) [cited subsequently as Qld Act]; Protected Estates Act 1983 (NSW); [cited subsequently as NSW (PE) Act 1983]; Disability Services and Guardianship Act 1987 (NSW) [cited subsequently as NSW (DS) Act 1987]; Mental Health Act 1963 (Tas) [cited subsequently as Tas Act]; Mental Health Act 1977 (SA) [cited subsequently as SA Act]; Mental Health Act 1962 (WA) [cited subsequently as WA Act]; Adult Guardianship Act 1988 (NT) [cited subsequently as NT Act]; Dependent Adults Act 1976 (Alberta) [cited subsequently as Alberta Act]; and Protection of Personal and Property Rights Act 1988 (NZ) [cited subsequently as NZ Act]. In relation to Western Australia, it is also necessary to refer to the Supreme Court Act 1935 (WA), for the Mental Health Act 1962 (WA) provides only for property management, leaving personal management to the power of the Supreme Court to appoint a committee. In the ACT the Lunacy Act 1898 (NSW) remains the main source of redress.

[2] Protection of Personal and Property Rights Act 1988 (NZ). The New Zealand legislation is analysed in W Atkin, "The Courts, Family Control and Disability — Aspects of New Zealand's Protection of Personal and Property Rights Act 1988" (1988) 18 Vic Univ Wellington L Rev 345-365.

[3] T Carney and P Singer, *Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People* (1986, Canberra AGPS). Limited guardianship is provided in 34 of the states of the USA: B Galt, "A Critique and Revision of the Utah Guardianship Statute for Incapacitated Persons" [1986] Utah L Rev 629, 630 nn 9, 12.

[4] Alberta removed the distinction (and plenary orders) in 1985 (Dependant Adults Amendment Act 1985 esp ss 2, 11(1)), leaving plenary power to be built up by the court enumerating all of the listed possible powers (against a backdrop that only necessary powers be granted: s 10(1) (2)).

[5] T Carney, "Civil and Social Guardianship for Intellectually Handicapped People" (1982) 8 Monash L Rev 199, 205-207.

composition, frequently (but not inevitably[6]) have been charged with the task of applying the new laws.[7] In Australia, Western Australia and the Australian Capital Territory are exceptions (providing only for plenary property management, and personal guardianships only under cumbersome inherent powers of the Supreme Court to appoint a committee of the person), while in Tasmania personal guardianships are but an adjunct of medical management under the Mental Health Act 1963 (Tas).

The object of the new legislation is facilitatory (to enable people to (re)gain greater independence and capacity to live in the community) and benevolent (it aims to enhance rather than to restrict individual freedoms, and to promote the welfare of disadvantaged people). Once appointed, therefore, guardians commonly have two responsibilities. There is first the 'autonomy-enhancing' (but approximate and proxy) task of exercising rights on behalf of the represented person where this proves necessary.[8] The second has a paternal flavour: it is to protect the interests of the represented person.[9] That dual responsibility conceals a tension between philosophically incompatible values: the autonomy value is uncomfortably counterpoised against that of paternalism. The design of the legislation naturally seeks to place these countervailing positions into balance.

One way in which that balance may be sought to be struck is through the composition of the administering court or board, the specification of eligibility criteria to be satisfied before applications may be entertained or granted,[10] and the selection of procedural rules which apply to the reaching of a decision. Under what may be termed a 'legal process' model, autonomy is given greatest weight. This is achieved by such means as tight and narrowly defined statements of the population eligible for an order, and through insistence on compliance with standards of proof, and hearing procedures,

---

6 Alberta, New Zealand, NSW and the Northern Territory, for example, retain the judicial mode in whole, or part: Alberta Act s 1(c) [the Surrogate Court of Alberta]; NZ Act s 2 [the Family Courts Division of the District Court]; NSW (DS) Act 1987 ss 8,14,31; NSW (PE) Act 1983 s 68 [the Protective Division of the Supreme Court exercises certain parallel and overriding powers to those of the Board]; NT Act ss 9(1), 11(2)(b) [the Local Court on advice from a Guardianship Panel].

7 *Eg* Vic Act s 19 [Guardianship and Administration Board]; SA Act s 20 [Guardianship Board]; Qld Act s 16(a)(i) [Intellectually Handicapped Citizens Council of Queensland].

8 T Carney and P Singer, *supra* n 3, 48-49.

9 The Alberta legislation, for example, enables the guardian to be granted control over "normal day to day decisions . . . including the diet and dress . . .": Alberta Act s 10(2)(h).

10 A common pre-requisite is the three-fold 'legal process' test of: (1) that the person falls into a defined category such as having a 'disability' (Vic Act s 22(1)(a); NSW (DS) Act 1987 ss 3(2), 7; Tas Act s 22(1)(a); SA Act s 26(1)); NT Act s 15(1)(a)); (2) is unable by reason of their disability to make reasonable judgements about aspects of their person or circumstances (Vic Act s 22(1)(b); NSW (DS) Act 1987 s 7 [defines "person in need" to be inability to manage]); and (3) is in need of a guardian (Vic Act s22(1)(c); NT Act s 15(1)(b)). Another kind of pre-requisite is illustrated by the more welfare oriented Alberta test of: (1) that the person "would substantially benefit" from an order (Alberta Act s 4(1)(a) [introduced in 1985, replacing "need" in the 1976 Act]); (2) that an order is in the "best interests" of the person (Alberta Act s 4(1)(b), cf Tas Act s 22(1)(b) ["necessary in the interests of the patient"]); and NZ Act s 12(2)(b) [the "only satisfactory way to ensure that appropriate decisions are made"]; and (3) is both repeatedly or continuously "unable to care for", and unable to "make reasonable judgements in respect of" themselves (Alberta Act s 6(1)(b) cf Qld Act ss 4 [definition of "functional competence"], 16(2)(b) ["competent in law"]; SA Act s 26(1); NZ Act s 12(2)(a) [lacks capacity to understand or to communicate an understanding of the nature and consequences of matters related to personal care and welfare]).

which replicate those of a court, or which aim to reach the same results by less formal and less threatening hearing styles. On the other hand a 'welfare' or a 'developmental' model stresses the paternal value of protecting vulnerable people from risk or exploitation. The first seeks to achieve this by approximating the service access and delivery standards of a general welfare service administered by a professional social work agency. Thus eligibility criteria are more diffuse (as would be the case with say identification of a need for counselling services) and procedures parallel those of the helping professions (medicine and social work), with relaxed and generous provision of guardianship services, free of the excesses of legal monitoring or gatekeeping. (The development model is similar except that, by drawing parallels with the flexible powers of a parent over a child, it concentrates on the post—service delivery phase.)[11]

The 'reform' legislation in the mainland States of Australia (apart from Western Australia and the Australian Capital Territory) broadly subscribes to the legal model, at least at a formal level. Tasmania breaks ranks to the extent that their legislation is much more an adjunct to the medical management of mentally ill patients otherwise requiring compulsory detention. Where Victoria (and other jurisdictions in that vein) break new ground within the mainstream States is in endeavouring to promote an accessible and informal atmosphere at Board hearings and in monitoring orders to review their suitability, both in meeting individual needs and in maintaining a balance between the values of autonomy and paternalism. The literature suggests that this is not easily achieved. At the intake level the decision-maker (in Victoria the Board) may misjudge the level of competence of individuals.[12] This is accentuated in a 'welfare model', such as that in Tasmania, where admission is essentially a matter for medical certification to a body whose prime task is to ratify that assessment.[13] A lack of someone to speak for the disadvantaged person, or unduly abbreviated hearings, may lead to the making of overly protective orders.[14] Formal guarantees of rights may, in any event however, be contradicted in practice: thus a United States study found that a jurisdiction lacking any legislative guarantees (the District of Columbia) in practice subscribed to the legal model, routinely supplying good legal advocacy, while the reverse was the case in the state of Texas (where mere lip service was paid to comprehensive legislative guarantees).[15] There is also a risk that orders will be made for the wrong reasons, such as to undermine informed consent protections over the provision of medical care[16]

---

[11] T Carney and P Singer *supra* n 3, 56-69, 113-117.

[12] S Shah, "Legal and Mental Health System Interactions" (1981) 4 Int Jo of Law and Psychiatry 219, 255.

[13] Tas Act ss 14(3)(4),23(1) [a guardianship application "forwarded" to the Board and "accepted" by it].

[14] G Morris, "The Use of Guardianships to Achieve — Or to Avoid — the Least Restrictive Alternative" (1980) 3 Int Jo of Law and Psychiatry 97.

[15] R Allen, *Legal Rights of the Disabled and Disadvantaged* (1969, Washington DC, Social and Rehabilitation Service, US Department of Health Education and Welfare) 4-6; (published for the National Citizens Conference on Rehabilitation of the Disabled and Disadvantaged).

[16] R Gordon and S Verdun-Jones, "The Right to Refuse Treatment: Commonwealth Developments and Issues" (1983) 6 Int Jo of Law and Psychiatry 57, 67.

or, as is to some degree the case in Tasmania,[17] to by-pass legal barriers to involuntary institutional care in mental health facilities.[18] And prospective (or actual) participants/users of the law may be ill informed about, or unsympathetic to, the objectives of the legislation or its procedures.[19]

B The structure of the argument

This paper explores these issues at two levels: the formal structure of the legislation and the ethical (and practical) conundrums which it poses in sensitive areas of medical consent and protection from exploitation. The paper opens by working through the main elements of the legal framework in Australia and New Zealand against the backdrop of the comparable provisions of the Alberta legislation which strongly influenced these developments. It will be found that there are significant differences in the approach taken in the Australian States and Territories. These differences stem from a number of possible influences, such as local factors peculiar to that jurisdiction, local crafting of the common stockwood of the 'legal process' model in order to effect an improvement, or departures at the policy level, designed to shift the relative weightings of competing policy considerations, without totally breaking from the legal model.

The paper concludes by examining in more detail the provisions for dealing with medical consents and the arrangements to protect people at risk of exploitation. The tension between policies of enhancing freedom and personal autonomy and the countervailing paternalist concern to protect vulnerable people, will be teased out. The practical level will also be examined with a view to finding a legislative regime which may strike a workable balance between the two ethical poles. It will be argued that this is best achieved by combining three elements. First, guardianship legislation of the type enacted in Victoria. Secondly, an advocacy and watchdog network similar to the Office of Public Advocate and the Community Visitor network established under Victorian law. Finally, it is suggested that the approach taken to medical consent under the South Australian law deserves careful evaluation.

---

[17] Thus the Tasmanian legislation (Tas Act ss 26(1)(b)-(d), (3)(d)) allows for people under a guardianship order to be transferred to the care of another person, to the Board itself, or to a hospital (in which case their status is deemed to be that of a person who was compulsorily admitted under medical certification); though the regulations do insist on satisfaction of similar medical pre-requisites to those for compulsory admission: Mental Health (Hospital and Guardianship) Regulations 1964 reg 10(2)).

[18] Morris, *supra* n 14, *passim*.

[19] American Bar Association, Committee on Legal Incapacity Probate and Trust Division, "Limited Guardianship: Survey of Implementation Considerations" (1980) 15 Real Property Probate and Trust Jo 544-554. The ABA study found that lawyers had only a very limited awareness of guardianship laws in many of the states surveyed (544). There was general support for the foundation concept that competence be presumed unless contradicted, and that only necessary, partial orders be made when limitations were established. However concerns were found on the issues of: cost; 'borderline' cases; stigma; and imposition of orders on a showing of only minimal incapacity: (546). Procedural protections were thought to be a possible impediment (553).

2 THE ORIGINS AND PURPOSE OF GUARDIANSHIP

Guardianship laws, in their contemporary form, are a response to inadequacies in the common law[20] (and later partly statutory[21]) power to apply to a superior court for appointment of a guardian (committee) of the property (or the person) of an adult suffering restricted decision-making ability.[22] Those inadequacies — principally cost and inflexibility[23] — were exposed when intellectually disadvantaged people formerly cared for in institutions (or by full-time supervision from relatives or friends in their own home) began to re-enter the wider community.

Policies of deinstitutionalisation decanted some existing residents of institutions into less restrictive, but also less supportive, community settings. Policies of normalisation, and the declining availability of family 'carers' (usually women) consequent on changed economic and social priorities (especially increased workforce participation of women[24]) and erosion in the social status of the caring role[25] boosted the numbers of such people moving directly into independent, or semi-independent[26] community living. Numbers were further boosted by the contribution made by escalating rates of impairment from accident trauma (especially brain damage from motor vehicle collisions) or the health problems associated with ageing (senile dementia especially).

Guardianship laws seek to overcome these weaknesses by providing a cheap, accessible and flexible source of supplementary legal authority to enable a third party guardian/administrator to plug those of the gaps in the person's decision-making and managerial capacity as would otherwise detract from their social functioning. Sometimes the gap is so slight, or the personal resources of the surrounding network of family and friends is so extensive,

---

20 The common law jurisdiction crystallised in the thirteenth century in England when courts of Chancery (equity) accepted responsibility for what previously had been an administrative function of the Crown: one animated both by benevolent motives (caring for citizens unable to look after themselves, such as the young, the mentally ill and the intellectually disadvantaged) and by venal objects (to gain access to an important source of revenue): Carney, *supra* n 5, 205-207, and sources there cited.

21 By the latter part of the nineteenth century the mental health ('lunacy') legislation provided a framework for regulating the personal and property affairs of both the mentally ill (lunatics) and intellectually disadvantaged people (natural fools, mental defectives, mentally retarded etc): Carney, *supra* n 5, 205-207. The statutory office of Public Trustee was commonly established to assume management of the property of such people, who, in the absence of such a service would have relied on the powers of the Supreme Court — specifically the inherent powers of a court with the jurisdiction of the English court of Chancery to appoint a committee (personal guardian/administrator): *H v H* [1984] 1 NSWLR 694, 696, 703-706.

22 Initially the mentally ill and the intellectually disadvantaged: Carney, *supra* n 5, 205-207.

23 Carney, *supra* n 5, 209-210.

24 Thus in the 1930s only around 5% of married women aged under 55 were in the workforce, a figure which had risen to 57% by 1986: P McDonald, "Families in the Pursuit of Personal Autonomy" (1988) 22 Family Matters 40, 44. See also Social Security Review, *Issues Paper No 1: Income Support for Families with Children* (1986, Canberra AGPS), 18-19; *Issues Paper No 5: Towards Enabling Policies: Income Support for People with Disabilities* (1988, Canberra AGPS), 184-188.

25 In purely economic terms the introduction — and later the widening in the scope from spouses to relatives and then to any person — of the Commonwealth Carers Pension (in 1983, 1985 and 1988 respectively) did at least overcome the 'charity barrier' to people assuming the caring role: Social Security Act 1947 (Cth) s 39.

26 The community residential units (small houses for 6 or so residents and/or a carer) operated in Victoria for intellectually disadvantaged people, are an example.

that no legal intervention at all is called for. On other occasions the emerging need has been anticipated and is capable of being supplied by the execution of an enduring power of attorney[27] under recent, but fairly widespread legislation which preserves the validity of these special instruments,[28] provided the signatory had the requisite capacity to execute it in the first place,[29] and subject to restrictions on the scope[30] or durability of the instrument.[31] Of these qualifications, the first is the most critical: the Victorian Board, for example, in a survey of twenty-six enduring powers held over patients at a major geriatric facility, concluded that:

---

[27] At common law a normal power of attorney lapses at the very point where it is needed: it ceases to be valid once the person who executed the document slips below the level of legal capacity required by law to validly execute such an instrument in the first place: *Gibbon v Wright* (1953) 91 CLR 423, 445; *Drew v Nunn* (1879) 4 QB 661, 666.

[28] Conveyancing (Powers of Attorney) Amendment Act 1983 (NSW) adding s 163E to Conveyancing Act 1919 [the power is valid only to the extent to which the donor had the capacity to engage in the particular legal act at the outset, unless the court determines to validate it, acting in the "best interests" of the donor: s 163E(5)]; Instruments (Enduring Powers of Attorney) Act 1981 (Vic) s 114; Powers of Attorney Amendment Act 1987 (Tas) inserting s 11C in the Powers of Attorney Act 1934; Powers of Attorney and Agency Act 1984 (SA) ss 6, 9; Powers of Attorney Act 1980 (NT) ss 6-19; Powers of Attorney Act 1956 (ACT) s 7; [the Act provides for making a power irrevocable for two years from its execution; or for a longer period only where the attorney has given valuable consideration: s 6]. Queensland and Western Australia make no provision for an enduring power of attorney. See also: Protection of Personal and Property Rights Act 1988 (NZ) ss 95-106, Third Schedule; Enduring Powers of Attorney Act 1985 (UK); Australian Law Reform Commission, Community Law Reform for the Australian Capital Territory, Third Report, *Enduring Powers of Attorney* (1988, Canbera AGPS).

[29] The New South Wales and Victorian view appears to be that the person must be of full capacity when the document is signed, that is they must, at that point, be capable of lawfully disposing or dealing with any property or other subject matter to which the power relates: *Ranclaud v Cabban* (1988) NSW Conv R (CCH) 55-385, 57-548 [cited and discussed in *Enduring Powers of Attorney*, *supra* n 28 para 17]; *Re Barnes* [1983] 1 VR 605, 609 (where the central issue however was whether a person who was already a protected person could execute an enduring power; Beach J concluded that they could not). In England a less restrictive view has been taken, based on a reading of the legislation as beneficial. Hoffman J, in the Court of Protection, citing *In re Beaney dec'd* [1978] 1 WLR 770, accepted that an enduring power of attorney is valid within the English legislation if the signatory grasps, with the assistance of an explanation, that they are executing a document which completely transfers to the attorney their own powers of decision over the property up to and beyond their own incapacity, even if they would at the time be incapable at law of validly dealing with the management of the property itself: *In re K (Enduring Powers of Attorney)* [1988] 2 WLR 781, 784-787. Hoffman J was influenced by the way the legislation was drawn, providing the Court of Protection with overall supervision (786).

[30] The Australian Law Reform Commission has proposed for the ACT that a power of attorney extend to personal guardianship matters: *Enduring Powers of Attorney*, *supra* n 28 para 48. In New Zealand specific provision is now made for such private arrangements to be built into an enduring power, but it is subject to the restrictions which govern a personal guardianship order: NZ Act s 98(4).

[31] Acting on the policy that a decision of the person should not lightly be set aside, the proposal for the ACT would allow the enduring power to continue, subject only to review by a court (not the Guardianship Tribunal) and to safeguards (including separate execution of this component) and limitations on powers of medical decision: *Enduring Powers of Attorney*, *supra* n 28 paras 49-52. In New Zealand, however, any personal guardianship order prevails over the enduring power where inconsistent: NZ Act s 100. Victoria preserves the validity of an enduring power after a guardianship, subject to giving full effect to any decisions taken by a personal guardian or administrator prior to becoming aware of the power, and to a power to terminate it, in the interests of the represented person, on application to the Board (by the Public Advocate, the attorney or other interested persons): Instruments Act 1958 (Vic) ss 117(3)(4) and 118.

> In 25 cases the Board found either that the document was invalid because it had been signed after the person lost competence or it was not being administered in the interests of the person. In only one case was the power both valid and being appropriately used.[32]

Thus, people who lack decision-making capacity from the outset, people who failed to anticipate the need for an enduring power (such as young brain trauma victims and less well advised older people), and people who possess a dubiously executed, poorly drawn or no longer relevant instrument, are the target population for the new guardianship legislation.[33] It is legislation with multiple objectives, some of which set up a policy tension between the enhancement of personal dignity and freedom of action on the one hand, and paternal protection of people from exploitation and abuse on the other. Or which counterpoise reliance on voluntary arrangements against schemes of management/oversight by a statutory official body. Or reactive and formal judicial decision-making styles with informal outreach or conciliation modes. That policy mix (or setting) is shaped by the statements of objects and by the basic elements of the legislation applying in each of the main jurisdictions surveyed here.

3 THE ROLE OF OBJECTS AND PRINCIPLES CLAUSES

Autonomy or paternalism?

(1) Autonomy

An influential school of jurisprudence conceives the legitimate role (and limits) of law to be that of protecting people against unwarranted interference with their freedom of choice/action and in providing the resources (or the 'level playing field') to enable people to enjoy and obtain personal fulfilment from the exercise of those rights.[34] Private law, therefore, should maximise (and guarantee the integrity from interference) of a 'zone of autonomy', while public law provides the 'opportunity field' in which to realise those rights. Tay goes further. She argues that the common law is a superior guarantor of the zone of autonomy than is legislation. Accordingly legislation, which inevitably carries the threat of denial of autonomy, must be pared down to a minimum; legislation, she contends, has no role to play in conferring rights to welfare (or distributional entitlements).[35] But, contrary to Tay, the protection of autonomy[36] and the provision of the opportunity field is generally accepted to be compatible with this liberal, 'Millian' analysis.[37]

Guardianship legislation commonly contains a cluster of objects and principles which reflect these 'autonomy' values. The zone of autonomy itself

---

[32] Victoria, *Annual Report 1987-1988: Guardianship and Administration Board*, 35. This disturbing pattern may not be replicated in jurisdictions which impose more stringent formalities for execution, but it would be wise to assume that it is a widespread problem.

[33] *Supra* n 1.

[34] P Fennell, "Law and Psychiatry: The Legal Constitution of the Psychiatric System" (1986) 13 Jo of Law and Soc 35, 40-43.

[35] A Tay, "Law, the Citizen and the State",in E Kamenka, R Brown, and A Tay, (eds) *Law and Society: The Crisis in Legal Ideals* (1978), 1-4; also J Gray, *Hayek on Liberty*, (1984) 69-75; T Burke, "Can there Be Positive Human Rights?" (1983) 28 ASLP Bulletin 44, 51-54.

[36] Or what MacKay terms "positive freedom": A MacKay, "Judging and Equality: For whom Does the Charter Toll?" (1986) 10 Dalhousie Law Jo 35, 65.

[37] C Ten, *Mill on Liberty* (1980) 3, 110-115.

is recognised in the endorsement of the proposition that the legislation, and all concerned with it, should encourage the development and exercise of intellectual/independent capacities to the maximum extent possible,[38] or a provision along these lines.[39] Maximisation of the size of the zone is conveyed by the principle of the 'least restrictive alternative'.[40] This also conveys something of the boundary riding function: it establishes a climate of opinion unsympathetic to over-zealous interferences with the freedom of decision of the represented person (a negative right); a sentiment strengthened by the inclusion of a statement to provide support and assistance to facilitate the exercise of the maximum degree of control by the represented person over their life.[41]

(2) Paternal welfare

The welfare of the individual, as a positive foundation of state responsibilities to secure or advance the interests of the individual in the face of their inaction/resistance, is recognised by other schools of jurisprudential analysis. Paternalism provides a justification for interference with a person's own conception of their interests in order to secure their welfare. It comes in a strong or a weak version: 'strong' if it lays claim to override the objections of a fully competent person,[42] 'weak' if it rests on the flawed capacity of the individual to judge their own best interests.[43] This latter is the foundation for major aspects of guardianship laws. Philosophically it advances substitutes for the informed consent of the individual to the action/intervention taken. Those substitutes include presumed retrospective consent (subsequent validation of the earlier action[44]), substituted judgement (an assumption of how the person themselves *would* decide if presently competent[45]) and 'hypothetical consent' (here it is conceded that it is an artificial exercise[46]).[47] Either way, state action is defended as both promoting the welfare of the individual and/or on the basis that the interference with or denial of autonomy

---

[38] Qld Act s 16(2)(j); NSW (DS) Act 1987 s 4(f); Vic Act s 28(2)(c) [responsibility of guardian]; NT Act s 20(2)(c) [responsibilities of a guardian]; NZ Act s 8(a); Alberta Act s 11(b). Neither Tasmania, the ACT nor Western Australia subscribe to this principle.

[39] Such as the principle of normalisation (encouragement to live, as far as possible, a normal life in the community: NSW (DS) Act 1987 s 4(c)); Vic Act s 28(2)(b); NT Act s 20(2)(b); NZ Act s 18(4)(b). *Cf* Qld Act s 16(2)(j) ["support . . . [the person] exercising as much control as possible over [their] own life"]; SA Act s 25c(b) ["minimising interference with the rights and independence . . . so far as is consistent with . . . proper protection and care"]. The principle is not at present adopted in Tasmania, WA, or the ACT.

[40] Qld Act ss 5, 16(2)(i); NSW (DS) Act 1987 ss 4(b), 14(d); Vic Act ss 4(2)(a), 22(2)(5); SA Act s 25c(b); NT Act s 4(a); NZ Act s 8(a); Alberta Act s 11(c). Once again the legislation in Tasmania, WA, and the ACT is silent in this area.

[41] Qld Act ss 5, 16(2)(j); NSW (DS) Act 1987 s 5(b) [to ensure that such services are provided as to promote normalisation]; Vic Act s 28(2)(c).

[42] C Ten, *supra* n 37, 114.

[43] *Ibid* 110.

[44] Plainly this justification is not valid in the case of permanent conditions.

[45] In the nature of it no one can accurately judge how a person will react: past behaviour is only a partial guide (people change course without warning) and, in any event many intellectually disadvantaged people have never exercised the power in issue in the past.

[46] The (unavoidable) consequence is that the values of the decision-maker are imposed on the person for whom they are acting.

[47] C Lowy, "The Doctrine of Substituted Judgement: Deciding for the Incompetent" (1981) 21 ASLP Bulletin 55-71; R Young, "Autonomy and Paternalism" (1981) 21 ASPL Bulletin 32-54.

is justified because the interests of third parties are affected — the actions are not 'self-regarding'.[48]

McClosky argues that the welfare/paternal rights of people with a disability stem from the same source as those of the non-disabled (the interests of the human condition in preserving life, liberty and self expression) and that they are "rights of recipience, and not simply negative rights, not to be killed [etc]".[49] Paternalism, then, seeks to guarantee to the individual that they are the bearers of a right to equality with non-disabled citizens in these central spheres of human activity.[50] This right to equality mirrors the right to freedom championed under the autonomy value. If the judgement of the substitute decision-maker is soundly based, then guardianship predicated on this rationale may of course advance the equality objective. But if the judgement is flawed then the guardianship must miscarry, however well intentioned. To minimise this risk of miscarriage, legislation frequently links the welfare/paternal strand with requirements to respect/consult the wishes of the disadvantaged person and commonly (but not universally) elevates the autonomy goal above the paternal.[51]

The Australian legislation carries prominent enunciations of paternal welfare objectives. Common expressions are that "persons . . . be protected from neglect, abuse and exploitation"[52] and/or that their 'welfare/best interests' be protected or advanced.[53] Queensland provides less by way of objects and principles than some, but, with the exception of the clause permitting regard to be had to "such special circumstances concerning the citizen as the [decision-making Council] thinks fit",[54] it is slanted towards the maintenance of the dignity, self respect and control by the citizen over their own life, and paying regard to their expressed wishes and culture.[55] New South Wales, in addition to the guidelines already mentioned, also requires that the views of the person affected, and their family cultural or linguistic backgrounds be respected.[56] Similar comprehensive guidelines apply in Victoria.[57]

Elsewhere the pickings become thinner. Thus South Australia spells out three main guiding principles: consideration of the wishes of the person;

---

48 E Vallance, "Introduction: Some Problems Stated" in E Vallance (ed) *The State, Society and Self-Destruction* (1975) 16.

49 H McClosky,"Handicapped Persons and the Rights They Possess" in R Laura (ed) *Problems of Handicap* (1980) 86.

50 A MacKay, *supra* n 36, 38.

51 This is less true in jurisdictions such as South Australia or the Northern Territory, for example. Here the policy is skewed more towards the welfare than the autonomy goals.

52 NSW (DS) Act 1987 s 4(g). See also Vic Act s 28(2)(d); SA Act s 25c(b) [to minimise interferences with rights "so far as is consistent with . . . proper protection and care . . ."]; NZ Act s 8(a) [least restriction "having regard to the degree of the person's incapacity"]. The legislation in Tasmania, WA, and the ACT is silent on this score.

53 NZ Act s 18(3) [the "first and paramount" consideration for a welfare guardian]. See also NSW (DS) Act 1987 s 4(a) [a duty of every person exercising functions under the Act to see that the "welfare and interests of such persons should be given paramount consideration"]; Vic Act ss 4(2)(b), 22(3) [best interests a necessary consideration]; Tas Act s 22(1)(b) [an order rests on showing that it is "in the interests of the patient or for the *protection* of other persons" (emphasis added) that an order come into effect]; SA Act s 25c(c) [welfare of the person the "paramount consideration"]; NT Act s 4(b) [best interests to be promoted]; Alberta Act ss 4(1)(bb), 6(2)(a). WA and the ACT make no provision.

54 Qld Act s 16(2)(l).

55 Qld Act s 16(2)(i)(j) and (k).

56 NSW (DS) Act 1987 s 4(d) and (e) respectively.

57 Vic Act ss 4(2), 22(2)(3)(4)(5), 28(1)(2).

minimum interference consistent with care; and the paramountcy of the person's welfare.[58] The Northern Territory has a similar trilogy, except that the welfare principle is not elevated to paramount place and minimum intervention is not subject to the 'care caveat'.[59] New Zealand, for its part, expresses two main objects: minimum intervention (bearing in mind the incapacity) and maximising self-development.[60] While the structure of the decision-making court or board, and the nature of its procedural requirements (to be dealt with below), can both serve as a counterweight to any over abundance of paternal welfare objectives, States such as South Australia (and the Alberta model)[61] certainly lean more towards the welfare end of the policy spectrum.

4 THE POPULATION ELIGIBLE FOR GUARDIANSHIP

The breadth of the group intended to be served by guardianship legislation is a major determinant of the balance between the autonomy and the paternal goals. That is not to say that jurisdictions which restrict eligibility to functionally disadvantaged people whose social dysfunction is due to some narrow or arbitrary cause — such as retardation or mental illness[62] — are less paternally oriented than are those, such as Victoria, which accept applications based on social dysfunction alone, irrespective of its cause.[63] Rather it focuses on the readiness to entertain, and grant, large numbers of orders in more marginal cases.

The willingness to make a guardianship order at the behest of over-anxious parents or relatives, who wish to play safe by providing for some remote or unlikely future need, is ultimately a question of practice. But practice might be responsive to the establishment of definitional gates (subject to serious doubts about the efficacy of such provisions in this context). And

---

[58] SA Act s 25c(a)-(c).

[59] NT Act s 4(a)-(c).

[60] NZ Act s 8.

[61] Alberta adopts the 'best interests' and the 'substantial benefit' policies to guide whether or not to make an order: Alberta Act s 6(2).

[62] See for example Tas Act s 4(1) ["mentally disordered" (mental illness, intellectual handicap and 'sub-normality')]; WA Act s 5(1) ['mentally disordered' ("any illness or intellectual defect that substantially impairs mental health")].

[63] Vic Act s 3 ["disability" (intellectual impairment, mental illness, brain damage, physical disability or senility]; Qld Act ss 4, 27 ["intellectually handicapped" (functional reduction in competence due to "intellectual impairment" of congenital or early childhood or "the result of illness, injury or organic deterioration")]; NSW (DS) Act 1987 ss 3(1), 7, 9 [a person with a "disability" (which includes a person "intellectually, physically psychologically or sensorily disabled"; advanced age; mental illness and people "otherwise disabled" and "restricted in one or more major life activities to such a degree as to require supervision or social habilitation") who is "by virtue of that fact totally or partially incapable of managing his or her person"]; SA Act ss 5, 26(2)(a) ["mental illness" (any illness or disorder of the mind) or "mental handicap" ("imperfect or retarded development or deterioration of mental faculties from whatever cause")]; NT Act ss 3(1), 8 [persons under a "disability" (which means "an intellectual disability", in turn defined as disabilities "resulting from an illness, injury, congenital disorder or organic deterioration or of unknown origin . . ."]; NZ Act s 6(1) [a person who lacks, or lacks the ability to communicate, "wholly or partly, the capacity to understand the nature, and to foresee the consequences of, decisions in respect of . . . personal care or welfare"]; Alberta Act s 6(1)(b) [repeated or continuous inability to care for or make reasonable judgements relating to the person].

it is (or should be) moulded by the legislative expressions of policy,[64] such as the policy of the least restrictive alternative,[65] which might desirably be reinforced (and be made more specific) at the point where the Board (or other decision-maker) entertains the prospect of an order.

Definitional gateways are of course a common method of limiting the reach of the law. To be effective however, at least two conditions should be met. First, the definitional boundaries should be sharp and easy to recognise: definitions which incorporate woolly concepts, subjective elements, or causal chains of reasoning, are less likely to be reliably applied in practice. This is an obvious weakness in the definitions just surveyed.[66] Secondly, the legal climate should be receptive to taking fine jurisdictional points: this calls for a body which attaches heavy weight to jurisdictional niceties (such as because the liberty of the subject is centrally in issue) or that legal representatives of the parties will keep the body on track either during the hearing itself or through judicial reviews sought on the ground of jurisdictional error. Such an environment is less likely to be associated with a tribunal charged with operating in an informal fashion, within an overall system which provides for review to be addressed to reconsideration of the substantive merits of the application. Policy statements, rather than jurisdictional gateways, would appear to be better suited to this setting.

Definitional gateways, then, are not located in congenial territory. In any event, as we have seen, they are widely framed: few people are intentionally barred from entry — there is little by way of a gate. Finally, perhaps, the few remaining barriers are weakened by the complexity of the concepts — the gateposts which might bar entry are rotten. In the absence of strong controls at the point of entry, attention turns to policy directives addressed to the Board (and people thinking of turning to it for assistance). Well enunciated policies of reserving the law to the acute and severe cases of need, where other avenues have been tried or are not appropriate, may educate the Board and potential customers sufficiently about the intended target group.

New South Wales, for example, requires the Board, when deliberating on a possible order, to have regard to "the practicability of services being provided to the person without the need for the making of such an order",[67] while Victoria insists on consideration of "whether the needs of the person . . . could be met by other means less restrictive of the person's freedom of decision and action".[68] Otherwise, however, Victoria controls entry only by two rather general requirements. First that the person is unable to "make reasonable judgments [on] matters relating to her or his person or circumstances", and secondly that the person "is in need of a guardian".[69] New South Wales runs these two together, defining 'need' for guardianship

---

[64] At the time of writing New South Wales policy was thought to be unsettled on this point; opinion was divided in informed professional circles as to whether the Victorian policy would be followed of not making orders on speculative grounds, or in order to reassure applicants worried about the future: Ms J Woodruff, Disability Council of NSW, personal communication 30 January 1989.

[65] Qld Act s 16(2)(i); NSW (DS) Act 1987 s 4(b); Vic Act s 4(2)(a); SA Act s 25c(b); NT Act s 4(a); NZ Act s 8(a). Tasmania, WA, and the ACT are the exceptions here.

[66] *Supra* n 63.

[67] NSW (DS) Act 1987 s 14(2)(d).

[68] Vic Act s 22(2).

[69] Vic Act s 22(1)(b) and (c) respectively.

as total or partial "inability to manage his or her person".[70] This is tightened by the definition of disability to also require a showing of a restriction "in one or more major life activities *to such an extent that he or she requires supervision or social habilitation*" (emphasis added).[71]

The Victorian legislation might be criticised for adopting guidelines which are too diffuse to adequately serve to educate the Board. The concept of 'reasonableness' is notoriously imprecise and 'need' is equally subjective. New South Wales can point to more meaningful guides, but these are contained in a definition rather than the policy statement itself; and that definition suffers from overspill. This is because its prime purpose is to specify the group of people eligible to receive general welfare services — a defect consequent on the decision to incorporate guardianship provisions in legislation regulating disability services, rather than introduce free standing, special purpose guardianship legislation.

The position elsewhere is not demonstrably better. Thus New Zealand and South Australia refer decision-makers to the least restrictive principle but qualify it by reference also to "the degree of that person's incapacity" and remaining "consistent with the proper protection and care of the person".[72] This provides greater encouragement for orders to be made in cases of doubt, though it does at least spell the policy out with some clarity. The Northern Territory, by contrast, is less precise: the Guardianship Panel (which tenders advice to the court making the decision) must canvass "the nature and extent of any support system which is available to maintain the . . . person in the community".[73] This is a slight advance on Queensland,[74] but leaves the policy mix more in the hands of the court than might be desired.

Provided the policy strikes the appropriate tone, the intake gate can arguably be made very broad, in the interests of not arbitrarily denying assistance to applicants whose functional (or social) needs are otherwise identical. In any event, regulation of the width of the intake gate by way of narrowly drawn definitions of the eligible population has inherent limitations.[75] Restrictions on the categories of people who may initiate the application, the other main way in which the composition of the population to be served may be influenced, suffers from being a very indirect (and therefore crude) way of achieving the desired end. It assumes that say only close relatives know the person well enough to be good preliminary judges of need for services (a 'screening by reliable relatives' model).[76] As we have seen,[77] the definitional gateways, though occasionally convoluted, are all encompassing in most jurisdictions.

---

[70] NSW (DS) Act 1987 ss 7 [definition], 14(1) [building need in as a precondition to an order].

[71] Sections 3(2) [definition of person with a "disability"], 7 [person in "need" of guardian must have a disability], 14(1) [guardianship only if in need].

[72] NZ Act s 8(a); SA Act s 25c(b).

[73] NT Act s 9(3)(b).

[74] Queensland goes no further than to direct the Council to apply the least restrictive principle: Qld Act s 16(2)(i).

[75] See for example the discussion of the elevation of a helping welfare role over the strict application of legal criteria in the administration of Mental Health Review Tribunals in Britain: J Shapland and T Williams, "Legalism Revived: New Mental Health Legislation in England" (1983) 6 Int Jo of Law and Psychiatry 351 358-359.

[76] T Carney, *Drug Users and the Law in Australia* (1987) 53.

[77] *Supra* n 62 and accompanying text.

So also with standing. The person most closely affected is the person for whom the order is sought: only the Northern Territory (and the non-reform jurisdictions of Tasmania, Western Australia, and the Australian Capital Territory) fail to allow such people to apply in their own right.[78] Close carers are included in all reform jurisdictions (and Tasmania): the narrowest being the South Australian and Queensland reference to 'relatives' without more, or Tasmania's "nearest relative". Elsewhere people (or agencies) who have assumed the caring role are granted standing where they are "responsible" for the person (New South Wales), a person providing "substantial care and attention" (Northern Territory), or a non-commercial agency providing "services or facilities", or the manager of public facilities such as hospitals and homes (New Zealand).[79] New Zealand also takes in medical practitioners and social workers — presumably on the basis that they know the person and owe a social duty of care to that person.[80]

The next band of people granted standing to apply in the more open jurisdictions are those with some public duty or role to perform. Thus South Australia, New Zealand and Alberta (and also Western Australia for property management) include the Public Trustee or a person with property guardianship responsibilities already, and Tasmania mentions certain employees of the Mental Health Services Commission. In those jurisdictions with a Public Advocate/Guardian (New South Wales, Victoria, Northern Territory and Alberta), standing is extended to this office. Queensland entertains applications from "officers of the court", and in that State and South Australia, police officers are included.[81]

Finally there are the provisions which open standing in a functional way — provisions which allow any "interested party" to apply where the Board is satisfied of their interest (as in Queensland, New South Wales, South Australia and Alberta) or to appear by leave (as in New Zealand) or direction (as in the Northern Territory).[82] Consistent with the previous discussion, jurisdictions which include such a category of applicants are to be preferred to those with narrower standing provisions. However the breadth and

---

[78] Qld Act s 27(d)(i); NSW (DS) Act 1987 s 9(1)(a); Vic Act s 19(1) [any person may apply]; SA Act s 26(2)(a); NT Act s 8(1) [there is the ability for the court to direct *any* person to apply, but this is likely to be of little import here]; NZ Act s 7(a). Compare Tas Act s 16(1) ["nearest relative" or "authorised officer" (a designated employee of the Mental Health Services Commission: s 11(2))]; WA Act s 64(1) [Public Trustee, corporate trustee or natural person other than the "patient"].

[79] Qld Act s 27(d)(ii); NSW (DS) Act 1987 s 9(1)(b); Vic Act s 19(1); Tas Act s 16(1); SA Act s 26(2)(b); NT Act s 8(1); NZ Act s 7(b) [an "attorney" is also included with relatives], (e) [non-profit welfare agencies], (f) [managers of residential institutions]. New South Wales defines a "person responsible" to include a spouse, carer, or guardian: s 3(1); but it does not include carers of people who "reside in an institution (such as a hospital, nursing home, boarding house or hostel)": s 3(5).

[80] NZ Act s 7(c)(d).

[81] Qld Act s 27(d)(iii) [police], (iv) [an officer of any court], (v) [an officer of the Intellectually Handicapped Citizens Council]; NSW (DS) Act 1987 s 9(1)(c) [Public Guardian]; Vic Act s 19(1); Tas Act s 16(1) [authorised officer]; SA Act s 26(2)(c) [Public Trustee], (d) [police]; NZ Act ss 7(g) [a manager of property], 26(e) [trustee corporation]; Alberta Act s 1(i) [Public Trustee and Public Guardian].

[82] Qld Act s 27(d)(vi); NSW (DS) Act 1987 s 9(1)(d); SA Act s 26(2)(e); WA Act s 64(1) [in property matters any "natural person" may apply]; NT Act s 8(2); NZ Act s 7(h); Alberta Act ss 2(1),1(i) [definition of "interested party"].

simplicity of Victoria's sole ground — permitting "any person" to apply — is best of all.

5 PROCEDURAL FEATURES OF THE HEARING

The procedural aspects of the operation of guardianship laws stem, both in law and practice, from the choice of decision-making body. Courts, the preferred body in New Zealand and the Northern Territory (on advice from a panel) are less naturally attuned to informality and accessibility, but are inherently quite rigorous in conforming to orthodox guarantees of procedural regularity. Multi-disciplinary 'tribunals' are taken (perhaps unfairly) to be prone to a cavalier disregard of due process,[83] but to be strong on informality and access. Since the latter approach is the one taken in most Australian jurisdictions, it might be anticipated that procedural aspects would be carefully addressed in the legislation. The United Nations Declaration on the Rights of Mentally Retarded Persons (1971) provides an added reason to do so.[84] Article 7 insists that procedures for the denial or restriction of rights "must contain proper legal safeguards against every form of abuse".[85]

Multi-disciplinary evaluation has been termed "one of the most controversial, yet one of the most important, protections that can be extended to a ward".[86] The balance between expertise in assessing levels of functional disability and procedural regularity is, in the majority of jurisdictions, sought to be struck by having a variety of backgrounds represented on the Board, and then giving that body clear procedural directions. Queensland, for example requires that all five members of the Council should have qualifications, or personal or professional experience which gives them appropriate knowledge of disability; New South Wales establishes three groups — lawyers, people skilled in assessment or treatment, and people experienced in the needs of disabled people — and provides for panels of three to five to be drawn; Victoria is similar, except that there are no rigid categories for appointment (beyond that the President be a lawyer and that, in appointing other members, the Minister is to consider the matters within the jurisdiction of the board)[87]; while South Australia opts for categories.[88] Tasmania opts for a five member Board, two of whom are the nominees of the Mental Health and the Social Welfare Departments, while of the remaining three, one must have appropriate medical expertise, and one must be female.[89] The hybrid 'court with a panel

---

[83] Thus the Law Reform Commission of the ACT, in its 1973 report, rejected a tribunal because they felt "there are serious objections to a procedure whereby a person's relatives may obtain control of his property without a proper judicial hearing": *Report on the Management of the Property and Affairs of Mentally Infirm Persons* (1973, Canberra AGPS) 12.

[84] The Declaration has been ratified by Australia and adopted as one of the international instruments to which the Human Rights and Equal Opportunity Commission is to have regard in exercising its largely conciliation and education role in relation to Commonwealth administration; there is no such equivalent role in relation to state or territory law: T Carney and P Singer, *supra* n 3, 1-2.

[85] It also requires that decisions be grounded in "an evaluation of . . . social capability . . . by qualified experts".

[86] B Galt *supra* n 3, 645; the UN Declaration also blends procedural regularity with "an evaluation of the social capability . . . by qualified experts": Art 7.

[87] Vic Act s 5, Schedule 1, item 2(2).

[88] Qld Act s 8(2); NSW (DS) ACT 1987 s 49(3); Vic Act s 5(2), Schedule 1 item 2; SA Act s 20(2) [2 lawyers as chair and deputy; 2 psychiatrists and 2 psychologists; and 4 appropriately qualified "ordinary members"].

[89] Tas Act s 8(3), Schedule 3, item 1.

of assessors' approach in the Northern Territory relies on a panel of three: an executive officer (a public service post), a person with expertise in disability, and a member drawn from the community near to the applicant.[90] It can be seen that most jurisdictions, then, understandably lean towards expertise; however there is clear merit in at least ensuring that a lawyer chairs the Board as some guarantee of procedural regularity.

The questions of who may attend the hearing (in particular, whether the represented person and family may), and of who must be notified of pending hearings are of course of great significance. Openness of hearings to public observation (subject to closure for cause) is however most basic of all. Public hearings are provided in New South Wales, Victoria and the Northern Territory, subject to a discretion to close where necessary in a particular case;[91] Queensland, South Australia and New Zealand on the other hand restrict attendance to affected parties, while the clear inference in Tasmania is that the Board make decisions on the papers.[92] Attendance by the represented person is the next most basic guarantee of fairness (and accuracy of result). New Zealand is strongest here: the represented person *must* attend throughout unless excused or excluded by the court.[93] South Australia, Queensland and Alberta go in the same direction: in South Australia an opportunity to attend and be heard is to be extended 'wherever practicable', and a notice and right of attendance in Queensland and Alberta is backed by the power to have the person interviewed where the severity of disability precludes attendance.[94] In the Northern Territory attendance may be in person or by legal representative, as in Alberta and New South Wales (where a guardian ad litem or separate legal representative may be appointed); Victoria makes provision for representatives to be appointed in the event of non-attendance also.[95] Tasmania however denies hearing rights.[96]

The range of people entitled to notice of the hearing is the next indicia of procedural adequacy. Short of advising all and sundry, the object should be to inform everyone likely to have a significant point of view to contribute. This includes the represented person, close relatives, people responsible for providing care or services such as accommodation, people or agencies with existing management functions, and agencies with public watchdog or advocacy roles. Victoria and Alberta embrace the complete set, adding for good measure individuals deemed by the Board to have an interest in proceedings. At the other extreme, South Australia does not have a strict notice requirement, simply speaking of providing an opportunity to appear

---

[90] NT Act s 9(2). The executive officer chairs the panel, which is constituted by the responsible Minister: s 9(1)(2)(a).

[91] NSW (DS) ACT 1987 s 56; Vic Act s 7; NT Act s 25.

[92] Qld Act s 29(3)(7); SA Act s 25b(2); NZ Act s 79. Tasmania allows the Board to determine its own procedure but neither requires hearings nor makes provision for the attendance of affected parties.

[93] NZ Act s 74.

[94] SA Act s 25b(1); Qld Act s 29(1)(i),(2),(4); Alberta Act ss3(2) [notice], 5(a) [attendance], 4(2) [report], respectively.

[95] NT Act s 13(1)(b); NSW (DS) Act 1987 ss 58(1)-(3); Vic Act ss 12(1)(3): Alberta Act s 5.

[96] Note 91 above. For their part WA, and the ACT, in dealing with Supreme Court applications for appointment of committees, rely on the discretion of the court, which will usually wish to see, or be informed about, the person affected by the application.

for the represented person and "any person who the Board is satisfied has a proper interest in the matter".[97]

Tasmania's welfare model is quite silent. Unless the two medical practitioners (whose declaration serves as the foundation of the order) choose to consult with interested parties, there is *no* obligation at all for such people to be advised of the application, much less for them to be offered an opportunity to participate: the only procedural protections are those directed against conflicts of interest on the part of the medical practitioner, or staleness of their examinations.[98] In the Northern Territory, although all the listed groups may make representations and would seem likely to become aware of the situation where the Panel makes its own enquiries (rather than rely on its own knowledge), there is no notice obligation as such.[99] Notice is called for in Queensland, but only for the represented person, their nearest relative and anyone determined by the Council; leaving closest to Victoria New South Wales (the represented person, each person "responsible for the person" who can reasonably be located, and the Public Guardian) and New Zealand (parents, guardians, carers, managers etc).[100]

6 THE EVIDENTIARY AND LEGAL CULTURE OF HEARINGS

The style of hearing envisaged by the legislature is encapsulated in such features as: the statutory provision made for the decision-making Board or body to make its own enquiries and to run the hearing free of technical restraints; in the provision made for legal or other advocacy for the represented person (and the role of the lawyer); and in the standard of satisfaction required to found an order. Legislation conforming most closely to the legal model will track the courts by restricting initiatives in the gathering of evidence beyond that placed before the body, by encouraging legal representation (or providing for the appointment of counsel), and by retaining high levels of proof to sustain orders. Thus Galt argues for generous provision of legal representatives who act in accord with the instructions of the represented person (not as guardian ad litem pursuing their 'best interests'), and for proof to be 'clear and convincing', or beyond reasonable doubt, before rebutting the presumption of full competence.[101]

Welfare or paternal considerations will, by contrast, infuse proceedings with more inquisitorial, less adversarial and less rigorous standards of proof. Unless of course — as in Tasmania — the real object is to cede the power of decision to the medical profession, subject to ratification (and some directions) from the Board. Under such a 'medical model' civil rights rely for their protection on rights of appeal or review by yet another body — a Mental Health Review Tribunal.

---

97 Vic Act ss 20(1), 44, 61; Alberta Act ss 3(2).

98 Tas Act ss 16(4)(5).

99 SA Act s 25b(1)(2); NT Act s 13 [the form for giving notice, however, is dealt with in s7].

100 Qld Act s 29(1)(a)(i)-(iv); NSW (DS) Act 1987 s 10(1); NZ Act s 63.

101 B Galt *supra* n 3, 640-645. Morris agrees, but places even greater emphasis on how conscientiously the lawyer prepares the case: G Morris, "Conservatorship for the "Gravely Disabled": California's Non Declaration of Non Independence" (1978) 1 Int Jo of Law and Psychiatry 395, 425-426.

A Informality

A principle widely applied is that the body should be relieved from the rules and practices governing the reception of evidence; often coupled with an injunction to conduct proceedings with as little formality as possible. Commonly this is conveyed by an expression along the lines of: "the Board is not bound by the rules of evidence but may inform itself . . . in such manner as it thinks fit";[102] and that "proceedings . . . shall be conducted with as little formality and legal technicality and form as the circumstances of the case permit".[103] This is qualified, in Victoria, only to the extent that the rules of natural justice are expressly retained.[104]

New Zealand, which retains a strong streak of legalism in the core provisions just discussed, softens this by making provision for less orthodox elements. Thus provision is made for the Registrar to call a pre-hearing conference, chaired by a judge, on application by one of the parties or at the direction of the court itself; for the court to make 'recommendations' rather than orders; and for certain orders to be capable of ratification when made by consent (provided the court is satisfied that the person affected "understands the nature and foresees the consequences" of the order).[105] The conciliation arm has an even stronger equivalent in New South Wales, where the Board is not to make a decision without first seeking to bring the parties to a settlement; (New Zealand does not make it a pre-condition, though it is likely to be vigorously pursued in practice).[106] Both provide for conciliation to be private, and for material to be protected from being disclosed in subsequent hearings.[107]

B Legal representation

Representation of the person affected by a proposed order is not handled uniformly. Ironically, New Zealand, which already subscribes to a legal process model by vesting jurisdiction in the Family Court (a division of the District Court) insists, for good measure, that the person must be represented, at

---

[102] NSW (DS) Act 1987 s 55(1). See also: Vic Act s 10(3) [rules or practice]; NT Act s 12(2) [not bound by rules or practice]; NZ Act s 77 [may receive any evidence that it thinks fit, whether or not otherwise admissible]. South Australia is more obscure, allowing the Board to conduct proceedings "as it thinks fit", without adverting expressly to reception of evidence: SA Act s 24(7). In Tasmania the board may regulate its own proceedings, but the system seems to be designed simply to ratify the medical judgements in the certificates where these are formally correct: ss 23(1), Schedule 3, item 12.

[103] NSW (DS) Act 1987 Act s 55(2). See also Qld Act s 17(1) [conduct its business and proceedings in such manner as it determines]; Vic Act s 10(1)(a) [act according to equity and good conscience without regard to technicalities or legal forms], (c) [not bound to adopt a formal approach]; SA Act s 24(7); NT Act s 12(1) [regulate its own procedure]. The New Zealand Act, except where the legislation provides to the contrary, assumes that ordinary practices apply.

[104] Vic Act s 10(1)(b).

[105] NZ Act ss 66-73, 13, and 15 respectively. Consent orders may cover personal guardianship areas, the administration of property, the appointment of a welfare guardian, and interim orders.

[106] NZ Act s 66(1).

[107] NZ Act ss 68(4) [private except for the affected party and/or a lawyer], 72 [only any record of agreement may be referred to]; NSW (DS) Act 1987 ss 66(2) [private], (3) [not admissible]. New Zealand also authorises the same judge to preside at a hearing as chaired a pre-hearing conference, and for parties to be directed to attend: NZ Act ss 73, 71.

state expense if necessary.[108] The Northern Territory follows suit, though it does not address how representation is to be paid for.[109] Provision of legal representation in this way may not be as anomalous as it appears at first blush: courts are not comfortable with eliciting facts for themselves, and legal representation may be essential if the hearing is to be fair or accurate.

New Zealand seems to recognise the need for the court to be assisted in achieving such outcomes. The role of any lawyer appointed for the affected person, for example, has representational and fossicking dimensions. The role of the lawyer is to explain what to expect and to ascertain and give effect to that person's wishes. To further the policies of the least restrictive alternative and maximise self-management however, the lawyer is also to evaluate solutions for the problems which underlie the application for the order.[110] To serve the needs of the court itself, there is provision for appointment of counsel assisting.[111] All such lawyers are authorised to call witnesses and cross-examine parties,[112] another indication of the need for external assistance to the traditionally passive operation of the courts.

At the other extreme there are provisions, such as those in South Australia and Alberta, which merely extend an "opportunity to appear before and make representations to" the Board.[113] The Queensland Act merely allows the Council to "determine if legal representation is warranted".[114] Because hearings are not catered for in Tasmania, the legislation is entirely silent. These provisions, it is suggested, put too much faith in the welfare (or 'medical') aspirations held for the more informal Boards or Councils in these States. In recognition that neither extreme is advantageous, Victoria has sought the middle ground. The person affected and the applicant for an order are entitled to be represented as of right,[115] while other parties may be heard but may be represented only by leave.[116] If not already represented, the Board has a discretion to "appoint a *person*" (emphasis added) to represent them. Representation is neither mandatory nor need the person be a lawyer: the Public Advocate[117] or a lay advocate may act.[118] A lawyer may be appointed to assist the Board (other experts are also included).[119]

New South Wales also looks to a middle position, but there is no entitlement for the party affected to be represented as of right: all parties, including the person affected, may be represented only by leave.[120] This is however

---

[108] NZ Act s 65(1). There is provision for a contribution to costs: s 65(8), but otherwise appointed counsel are at state expense: s 65(5).

[109] NT Act s 13(2). The Executive officer to the panel shall "ensure" that the person affected is legally represented before the court.

[110] NZ Act ss 65(2)(a), (b) respectively.

[111] *Ibid* s 65(3).

[112] *Ibid* s 65(4).

[113] SA Act s 25b(1). The Mental Health Review Tribunal, by contrast, effectively provides for mandatory legal representation: s 39; Alberta Act s 5 (though costs may be re-imbursed: s 48).

[114] Qld Act s 29(4).

[115] Vic Act s 12(1).

[116] *Ibid* s 12(2).

[117] The Public Advocate may intervene and make representations on behalf of, or "act for" the person affected by an application for an order: Vic Act s 16(1)(c) and (f).

[118] This is explicitly provided for when parties nominate a representative directly: Vic Act ss 12(1)(b),(2)(a)(ii).

[119] Vic Act s 11(1).

[120] NSW (DS) Act ss 58(1) [the "parties"], 3(1) [definition of party].

leavened by other features. First, the Board may appoint a guardian ad litem and may order that the affected party be separately represented;[121] secondly, as in Victoria, a lay advocate may appear.[122]

While there are attractions in the New Zealand and Northern Territory approach, particularly in meeting the injunction of the United Nations Declaration to provide "proper legal safeguards against every form of abuse" in the processes for the restriction or denial of rights,[123] it would be wrong to place too much store in legal representation as a guarantee. The Board arguably should bear an onus of establishing facts in an active and balanced way, and lay advocates or the Public Advocate can play a major part in achieving the desired procedural result. The provisions regulating the conduct of the Board therefore have a bearing on this.

C Towards satisfaction

The process by which the Board or court reaches its decision is a product of several inter-linked provisions. One of the least sharply drawn, but nevertheless most powerful, of these is the authority to develop and control specially tailor-made procedures. It is widely extended[124] and provides an important source of flexibility and creativity. Perhaps the next most significant is the ability to call for information (through witnesses, access to reports, commissioning fresh reports, etc). The ability for the Board to summon "*any* person" (emphasis added) to appear or produce documents, as provided under the Victorian Act,[125] unquestionably underpins a more proactive, inquisitorial (in the non-pejorative sense) stance for the body, one which parallels the active fact-finding role of the courts in the exercise of the inherent powers.[126] New South Wales and South Australia also furnish both powers to the Board.[127]

Queensland, on the other hand, provides only the second of the powers and that in limited measure: "*any* person or organisation" may be required to supply "*information* in . . . its *possession*" which relates to the "*functional* competence" of the person (emphasis added).[128] Beyond that sphere the Council falls back on either its discretionary power to hold an "inquiry" (thereby acquiring the powers of a Commission of Inquiry)[129] or the authority to

---

[121] NSW (DS) Act ss 58(2) [guardian ad litem], (3) [separate representation for the "prescribed person" (s 58(5))]. Legal aid is not, however, automatically attracted on the making of such an order: s 58(4).

[122] NSW (DS) Act s 58(1) [an "agent"].

[123] Article 7 of the Declaration, *Supra* n 84.

[124] Qld Act s 17(1); NSW (DS) Act 1987 s 53(1); Vic Act s 10, Schedule 2 item 2.3; Tas Act s 8(3), Schedule 3 item 12; SA Act s 24(7); NT Act s 12(1). In New Zealand, by contrast, procedures are laid down in the Act (including conciliation hearings) or are governed by rules promulgated by Order in Council: NZ Act s 111. Except to the extent that the Supreme Court moulds its own procedures when dealing with applications to appoint a committee of the person or property, neither WA, nor the ACT have this feature.

[125] Vic Act s 10(7).

[126] *Re Magavalis* [1983] 1 Qd R 59, 63-64.

[127] NSW (DS) ACT 1987 s 60(1)(a). In each instance, only relevant questions or documents may be insisted on, and, subject to a protection against self-incrimination, (s 61(2)) witnesses are required to attend and answer questions: s 62. SA Act s 25a(1)(a)(b) [relevance is again a limiting consideration: s 25(1)(e)].

[128] Qld Act s 31.

[129] *Ibid* s 42. The powers are detailed in the Commissions of Inquiry Act 1950 (Qld), but do not extend to clothing the Council with powers earmarked for judges under that legislation.

adjourn "to seek further information to support the application".[130] Tasmania fares worst, however: the Board has no express power either to receive or to seek information outside the medical certification lodged with it; (although the power to otherwise regulate its own procedures, and the ability to give direction to guardians arguably envisage some passive or even an active role)[131]. New Zealand is better served, in that the court may, of its own motion, call as a witness ". . . any person whose evidence may in its opinion be of assistance".[132] There is also a reasonably ample authority to commission what appear to be 'expert' reports (from people it considers qualified to prepare a medical, psychiatric, psychological *or other report* (emphasis added)).[133]

The Northern Territory, however, extends neither of these powers: certainly the Panel may *solicit* information, and the court is equally at liberty to receive information volunteered; but private parties may not be compelled to attend or to produce documents. This is a deficiency not completely offset by an ability to compel government agencies, service providers or any existing guardian, to lodge a report on any specified matter relevant to the hearing (an option also made available in Victoria in any event),[134] or by the power for the Court to "interview [parties] . . . or any other person the Court thinks fit", even if a wide reading is given to the investment of the Court with the power to "carry out those functions" entrusted to it under the Act.[135] So also in Alberta, where the only power is to seek a report when in doubt.[136]

Despite these variations in the ability of the decision-making body to garner its own material, or to shape the procedures to suit the circumstances and advance the overall object of eliciting the true state of affairs, the *standard* of proof ultimately called for is the civil standard of 'satisfaction' (subject to the possibility that Tasmania pitches it lower again when speaking of the Board "accepting" an application forwarded to it).[137] In this the legislature tracks the common law position.[138]

7 THE COERCIVE UNDERBELLY OF GUARDIANSHIP?

Going to the heart of the public acceptability of the new laws are concerns about the real, or perceived, misuse of guardianship laws as a means of supplanting protections against undue incursions on the rights of people not to be subjected to interference about where they live, what medical or other treatment they receive, or the conditions of their lives. These concerns present in two main ways. First, the powers of the guardian may be too extensive, or too insensitive to the nuances of decision-making in these areas. Secondly,

---

130 *Ibid* s17(2). Either parties, or the members of the Council may request that adjournment, but there is no authority to compel attendance or production of material.

131 Tas Act s 8(3), Schedule 1, item 12; s 30, Mental Health (Hospital and Guardianship) Regulations 1964 reg 14(d).

132 NZ Act s 78(1).

133 NZ Act s 76. The maker of the report may be called (s 76(7)) and the costs of the report may be ordered to be carried by the public purse: s 76(5).

134 NT Act s 12(3); Vic Act s 11(2).

135 NT Act ss 12(4) [interviews], 11(1) [general authority].

136 Alberta Act s 4(2).

137 Qld Act ss 16(1)(a) [may "approve"], 20 [by vote of members]; NSW (DS) Act 1987 s 14(1) ["satisfied . . . in need"]; Vic Act s 22(1) "satisfied . . ."]; SA Act s 26(1) ["satisfied . . ."]; NT Act s 15(1) ["satisfied . . ."]; NZ Act ss 9(2) ['satisfied/determine'], 10 [satisfied]; Tas Act s 23(1).

138 *McD v McD* [1983] 3 NSWLR 81, 86.

the inability of the disadvantaged person to give a valid consent to medical care may lead to concerns about the undue breadth or narrowness of legislative provisions requiring the consent of the Board or a guardian to fill that legal void.

A The powers of the guardian

The amplitude of the power entrusted to a guardian is not absolutely definitive of the likelihood of excessive controls being exercised over the liberty of the person. Such powers can be kept in check, to a degree, by policy directives about the extent to which (the least restrictive alternative), or the purposes for which (self-expression and necessary protection), the powers may be exercised. All the same, the base position is important, and is captured in four main models.

(1) The parental powers model

The base position originally was that the guardian had all the powers of a parent over a child under the age of fourteen years. Thus the medical guardianship power in the Mental Health Act 1959 in England (the model for Tasmania's current law) was in this precise form.[139] In 1982-1983 this was narrowed to powers to require the person to reside at a specified place; or to attend at places and times in order to receive treatment, education, or training; or to provide access to medical or welfare staff.[140] However no sanctions exist for non-compliance,[141] though (unintentionally) it may thereby lend itself to supporting community-based care options.[142]

Victoria's reform model embraced this approach, laying down 'parental powers' as the base for the 'undisputed authority' which the Committee proposed for plenary orders, together with an illustrative list of specific powers.[143] The partial order must pick from that illustrative list (and may add further conditions).[144] Consistent with the Committee's proposal that there be no practical fetters on the exercise of the powers, the Act goes much further than is now the case in England, in that it specifically authorises the Board to grant the guardian authority to "take such measures or actions as are specified . . . to ensure that the represented person complies with any decision of the guardian [under the order]".[145]

---

[139] Mental Health Act 1959 (Eng) s 34(1); Mental Health Act 1963 (Tas) s 23(1). A similar provision was found in the Mental Deficiency Act 1913 (Eng) s 10(2). Gunn, however, sees the real foundation in the 1957 Royal Commission on Mental Health, which saw guardianships as a means of enabling people to live controlled lives in the community: M Gunn, "Mental Health Act Guardianship: Where Now?" [1986] Jo of Social Welfare Law 144, 144-145.

[140] Mental Health (Amendment) Act 1982 (Eng) s 8; Mental Health Act 1983 (Eng) s 8(1).

[141] D Carson, "Mental Processes: The Mental Health Act 1983" [1983] Jo of Social Welfare Law 194, 198. Accordingly treatment may not be *imposed*: B Hoggett, "Analysis: The Mental Health Act 1983" [1983] Public Law 172, 189.

[142] J Shapland and T Williams, "Legalism Revived: New Mental Health Legislation in England" (1983) 6 Int Jo of Law and Psychiatry 351, 363.

[143] Victoria, Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (1982, Melbourne Vic Gov Printer), 44 [the committee proposed that certain sensitive medical powers require the consent of the Board: 61-67].

[144] Vic Act ss 24(1) [the plenary 'parental' power], (2) [the list], 25(1) [the partial order 'list selection'], (2) [the power to add conditions].

[145] Vic Act s 26(1).

(2) The 'enabling' model

On the other hand Queensland has opted for the current English 'enabling' model, but with a more restricted set of authorities. The powers of 'legal friends' (the nearest equivalent of the guardian) may encompass the giving of medical consents where the Council has so authorised.[146] That consent may be 'given effect to', but it does not carry coercive powers in relation to say admission to hospital for such procedures, nor is it accompanied by powers to determine where a person is to live.

(3) A common law guardianship model

To complicate the picture New South Wales adopts a more obscure approach, which has only one saving grace: that it remains faithful to the common law. Personal guardianship is essentially undefined, although, apart from its duration and plenary or limited nature, the status may be made subject to "such conditions as the Board considers appropriate".[147] Otherwise the core concept is the common law notion of the 'functions of a guardian', coupled with a power to specify the "extent (if any) to which the guardian shall have *custody* of the person" (emphasis added).[148]

The first head confines the Board to clothing the guardian with the traditional powers recognised under the equitable jurisdiction of superior courts. Those powers are wide and flexible.[149] Powell J commented that:

> While, once a person is committed to the care of a committee, the latter, in the absence of special order, has a general discretion as to the former's care and treatment, the court retains its supervisory role, and may, in an appropriate case, where it is in the patient's interests that it do so, make a variety of orders, including an order for access.[150]

The courts, however, have resisted conferring coercive powers as such.[151] The courts are readier to entertain such powers in the case of the non-consenting child under the age of 14.[152]

Custody of the person, although taken to be an incident of the relationship of parent to a younger child (and absolute below fourteen years of age) is more problematic in this context. As Lord Denning observed, it commences life as a right of control and, by eighteen, has 'dwindled' to little more than one of advice.[153] The custody head of the New South Wales specification of the powers of a guardian, then, recognises the slippery nature of incorporation by reference of parent/child law. It also has the considerable attraction of requiring that the Board spell out the extent of any potential

---

146 Qld Act s 26(3).

147 NSW (DS) ACT 1987 ss 16(1)(b)(c)(d).

148 *Ibid* ss 16(2)(b) and (a) respectively. The Act states that reference to a "function" includes "reference to a power authority, and duty": s 3(6)(a).

149 *Re R* [1983] 1 NSWLR 556, 564. [Powell J concluded that in special circumstances payments might be made for services rendered by a guardian].

150 *H v H* [1984] 1 NSWLR 694, 707.

151 *Re B (An Alleged Lunatic)* [1891] 3 Ch 274, 277. Morris, writing about the American position, agrees that while a common law guardian has the 'care and custody' of the person and may establish their residence anywhere, "the ward is not his prisoner . . . and may not be constrained without just cause": G Morris, *supra* n 101, 408 citing *Browne v Superior Court* 16 Cal 2d 593 (1940), 600-601; 107 P 2d 1, 4.

52 *S v McC; W v W* [1972] AC 24, 45 [the question involved the ordering of a blood test to determine paternity].

53 *Hewer v Bryant* [1969] 3 All E R 578, 582.

controls over movement, residence and so on. Where it is less palatable is in the breadth of that power (a defect shared by both main models). By contrast Alberta, the home of such laws, introduced amendments in 1986 to enable compulsory care orders to be tacked onto a guardianship,[154] but subject to the same procedural guarantees as would apply to say compulsory mental health admissions.

With the exception of New Zealand, the remaining jurisdictions fit into one of the above categories. South Australia, for instance, joins New South Wales. The list of statutory powers include orders placing a person in the 'care and custody' of a relative or other suitable person; orders requiring that a person be 'received into' a service facility; direction as to upbringing or education; and orders which "*require* . . . [the person] receive medical or psychiatric treatment" (emphasis added). For good measure the Board may wield "any power exercisable at law or in equity by a guardian".[155] The Northern Territory, on the other hand, follows Victoria to a tee.[156]

(4) The 'reasonable aspects of personal care' model

Only New Zealand breaks the mould. There personal guardianship (welfare guardians) joins nine other powers of the court, which run the gamut of orders to enforce wages and conditions, through to accessing services and facilities.[157] Welfare guardianships cover such "aspect or aspects of the personal care and welfare" as are specified by the court.[158] The basic principle is that the guardian have "all such powers as may be *reasonably required* . . . to make and *implement* decisions for the person" (emphasis added);[159] subject to the statutory removal from the field of listed major or sensitive powers (such as consent to marriage, adoption, and ECT treatment or brain surgery).[160]

Overall perhaps the New Zealand or the Alberta legislation is the most balanced of all the attempts at a reconciliation of the conflicting policy considerations. Practical needs dictate that guardians should have some working rule of thumb about the type of authority granted as a means of promoting the constellation of least restrictive intervention and the related objects of the legislation. Variants on the parent/child or 'custody' standards help to convey this. Yet they carry too much authority. By building in a reasonableness caveat, and by then subtracting the most dangerous of the powers, New Zealand restores a sense of balance, and deflects some at least of the concern that guardianships can become a back-door way of infringing against the basic rights and liberties of those they supposedly protect.

---

154 Dependent Adults Act RSA 1980 (Alb) ss 10.1-10.2.
155 SA Act s 27(1)(a)(e).
156 NT Act ss 17, 18.
157 NZ Act s 10(1)(a)(i). The welfare guardian is referred to in s 10(1)(k).
158 Section 12(1).
159 Section 18(2).
160 Section 18(1)(a)-(f). The guardian may not, however, refuse consent to life saving or standard medical care: s 18(1)(c).

B Protective orders against the threat of third party interference with basic rights

Excessive state paternalism is not the only source of incursions on the rights or interests of disadvantaged people. Of equal concern is the prospect of state disinterest, leaving them open to exploitation or simple neglect. This might take the form of an insufficiency of power to expose situations calling for intervention: such as the need to enter premises where the person may be living, or to remove people for assessment of their needs or for their security. Or it might involve protection against medical treatments which are irreversible, non-therapeutic, or simply not authorised by a valid consent. Here the concern will be to balance the adequacy of powers of intervention against the risk of excessive bureaucracy clogging the system of daily decision-making, mainly in relation to people not currently subject to guardianship (though practical problems also arise for those already under an order).

(1) Cases at risk?

On the face of it there seems little argument that guardianship laws should contain provisions for gaining access to people whose status is uncertain or who are thought to be at risk. Yet there is need for care in drafting such provisions, if they are to avoid unduly trenching on civil rights of those families and agencies currently providing some level of care. And, if they are to be more than mere window dressing, it is essential that there be an agency with the carriage of those powers (such as Victoria's Public Advocate).

Cases thought to be at immediate risk call for the prompt exercise of powers of entry should access be denied. Queensland and, via general mental health powers, also Tasmania, deal with such situations by way of a warrant for entry, with criteria of "immediacy" of the risk,[161] adjudication by a justice[162] and provision for execution by police.[163] (Less urgent cases in Queensland are governed by a show cause power entrusted to the Council).[164] Rather similar powers are available in Victoria in relation to people the subject of an *application* for guardianship, but there are two further matters. First, the Board itself grants the authority for the Public Advocate (or other specified persons) to be accompanied by police in a visit to the person for the purpose of preparing a report to the Board (on the basis of which it may order that the person be temporarily transferred to a safe place). Secondly, one of two grounds must be satisfied, namely that the person: (a) is being unlawfully detained against her or his will, or (b) is likely to suffer serious damage to her or his physical, emotional or mental health or well-being unless immediate action is taken.[165] New South Wales follows the same pattern to Victoria, except that the power is not confined to applications, the decision

---

[161] Qld Act s 44(5) [failure to show good reason to deny entry plus "immediate risk"], (6) [elements of application]; Tas Act s 99(1) [ill-treatment, neglect etc, or inability of a single person to care for themself].

[162] Qld Act s 44(5); Tas Act s 99(1).

[163] Qld Act s 44(7); Tas Act s 99(2).

[164] Qld Act s 44(3).

[165] Vic Act s 27(1) [criteria], (2) [report as foundation for removal to a safe place], (3) [police may use reasonable force].

is that of a justice not the Board, and an officer of the Board substitutes for the Public Advocate.[166]

Victoria provides some additional options. Cases of indeterminate status may also be dealt with by applying for the appointment of the Public Advocate as temporary guardian,[167] if necessary under abbreviated hearing procedures,[168] or may be handled by way of the power of the Public Advocate to "investigate any complaint or allegation that a person . . . is being exploited or abused or is in need of guardianship".[169] The Northern Territory provides for temporary orders, but is otherwise silent;[170] while South Australia and New Zealand legislation makes no provision at all for this situation (apart from New Zealand making it an offence to impede visits, interviews or examinations authorised by the court during a hearing).[171]

The question to be weighed up is whether these powers are needed and, if so, in what form. Older models placed these powers in the hands of the mental health authorities or the police. Canada, however, took this somewhat further in Newfoundland, where the Neglected Adults Welfare Act 1973 required the public to *report* the existence of people "incapable of properly caring" for themselves (as with mandatory reporting of child abuse) and allowed the Family Court to declare them to be so neglected, and to make placement orders for their care (including with suitable persons or in a hospital).[172] The aim is laudable enough: to provide protection and services to vulnerable people, without distinction. But these are dragnet powers, which pay scant regard to civil rights, and would arguably fall foul of any statement of fundamental rights.[173] For these reasons the preferred way of organising access to services is through a broader social advocacy service (including by a Public Advocate).[174] Preference therefore goes to confining the entry and other powers discussed here to the narrow purposes of 'guardianship' alone.

(2) Medical procedures

The lawfulness of administering medical treatment to an adult lacking the capacity to grant informed consent to that treatment is highly dubious, other than in cases of medical urgency. Cases where treatment might be needed are not uniform, however. Some treatments are therapeutic or medically necessary while others are non-therapeutic or elective procedures (such as

---

166 NSW (DS) Act 1987 ss12(1) [criteria], (2) [powers of entry, search and removal], (5) [police may use reasonable force], 13 [place of safety].

167 Vic Act ss 32, 33.

168 Vic Act s 32(3)(4).

169 Vic Act s 16(1)(h). Although headed 'powers and duties', the section does not confer any direct powers of entry.

170 NT Act s 19.

171 NZ Act s 110(a).

172 G Sharpe, "Guardianship: Two Models for Reform" (1983) 4 Health Law in Canada 13, 14-15. Similar provisions exist in states such as New York: *ibid.* A 1973 Victorian Bill to provide to similar effect for alcoholics was blocked in the upper house: Vagrancy (Insufficient Means) Bill 1973; T Carney, *supra* n 76, 236.

173 J Dawson, " "Fundamental Rights" and the Mentally Disabled" (1986) 6 Otago L Rev 291, 296-297.

174 See for instance S Herr, "Legal Advocacy for the Mentally Handicapped" (1980) 3 Int Jo of Law and Psychiatry 61, 62-63; or, for more extended treatment, "Rights of Disabled Persons: International Principles and American Experiences" (1980) 12 Columbia Human Rights L Rev 1.

cosmetic surgery). Some treatments are of major dimensions (whether due to the risks of major surgery for instance, or the irreversible nature of say a hysterectomy) while others are minor (such as treatment for a wart). Some are invasive; others are not. Some are routine (consultations for a cold) others are not. These boundaries — while helpful for the purposes of discussion — are neither sufficiently precise, nor sufficiently distinct, to serve as a firm foundation for legal policy.

The common law is in flux in this area. The latest pronouncement in England is the House of Lords ruling in *In re F: (Mental Patient: Sterilisation).*[175] It was common ground that the parens patriae jurisdiction had been terminated in Britain by the withdrawal of the Sign Manual of delegation to the courts of the crown prerogative;[176] and in the absence of legislation in point, the medical treatment of adults unable to give a consent was governed by the common law principle that consent was necessary other than in exceptional circumstances (such as emergencies).[177] The Court of Appeal endorsed lower court rulings authorising sterilisation for a 36 year old woman with a general mental capacity of a child of four or five who lacked the power to consent. It concluded that exceptions to the principle that it is a battery or trespass to the person to operate (or interfere bodily) without their consent rested on a principle of public interest. In the more routine situation of medical care of the intellectually disadvantaged, then, unlike the case of providing emergency treatment to an unconscious patient, medical practitioners have time to determine the balance between respect for bodily integrity (the prior consent principle) and the medical duty to seek to preserve life.

In the routine cases medical practitioners would place themselves in the shoes of the patient and judge their 'true welfare' (including by reference to prevailing medical ethical standards on the treatment of non-competent adult patients). That burden of 'proxy' justification, if discharged, would then authorise the treatment of people who lacked capacity to consent on their own behalf. In other words the court envisaged what may be termed a 'professionally responsible free market' approach. Medical practitioners who reflected adequately on their responsibilities to adult patients lacking the capacity to consent, might lawfully act on that assessment, without the need to seek the consent of a guardian or the approval of a court.

However, due to the irreversible and emotive nature of sterilisations, abortions and tissue donation, the Court of Appeal laid down a different procedure — that it be mandatory to first obtain the consent of the court, as had been foreshadowed by Lord Templeman in the earlier juvenile wardship case of *Re B*[178] — and a higher standard — that the procedure be necessary and in the interests of the person. This was broadly consistent with the statutory

---

[175] [1989] 2 WLR 1063; 2 All ER 545.
[176] *Eg* per Neill LJ in the Court of Appeal; Lord Brandon in the House of Lords.
[177] See n 181 below.
[178] [1988] AC 199, 205-206.

approach: thus, under the Australian model of guardianship, irrespective of its form, such cases are usually singled out for special statutory protection.[179]

The House of Lords, however, did not entirely agree.[180] They preferred to rest the exceptions, where consent is not required, on a principle of 'necessity' rather than on public interest,[181] and drew attention to the duty which a medical practitioner owes to provide treatment,[182] and to the undesirablity of expressing the common law in terms which would not be readily understood by health care practitioners or in ways which would make it less likely that disadvantaged people would receive medical care.[183] In the words of Lord Brandon, medical procedures performed on non-capable adult intellectually disadvantaged patients are lawful if the treatments are in their 'best interests' and where they are carried out "either to save their lives or to ensure improvement or prevent deterioration in their physical or mental health".[184] Lord Goff gave a wide mandate to such care when the person (unlike the unconscious medical emergency) is unlikely to subsequently acquire the power of consent, which would otherwise justify deferring decisions on less urgent (or 'necessary') care. He concluded that:

> the permanent state of affairs calls for a wider range of care than may be requisite in an emergency . . . action properly taken to preserve the life, health or well-being of the assisted person may well transcend such measures as surgical operation or substantial medical treatment and may extend to include such humdrum matters as routine medical or dental treatment, even simple care such as dressing and undressing and putting to bed.[185]

The check would be that the need for care be 'obvious' and that the medical practitioner "act in the best interests of his patient, just as if he had received his patient's consent so to do".[186] However, according to the House of Lords, the standard of care in determining the appropriate treatment is no different from that applying to medical care generally: namely, treatment accepted as appropriate by a reasonable body of medical opinion skilled in that area.[187]

---

[179] NSW (DS) Act ss 33(1) [major medical treatment declared by regulation], 37 [person responsible, or the Board, must consent]; Vic Act s 37 ["major medical procedures" specified by the Board in guidelines; a compromise category and process settled in Parliament to replace the 'list' approach]; SA Act s 28c(1) [sterilisation or abortion requires consent of the Board]; NT Act s 21(4) [major medical procedures include abortions, "contraception" and "medical procedure(s) . . . generally accepted by the medical profession as being of a major nature" and which do not remove an "immediate threat to a person's health"]. New Zealand lists ECT, brain surgery and medical experimentation: NZ Act s 18(1)(d)-(f). Tasmania's scheme of entrusting a guardian with the powers of a parent over a child under 14 would presumably lead back into the common law: Tas Act s 23(1). Queensland makes no such provision, the thrust of the legislation being enabling rather than protective: K Rosser, "Medical Consent — Legislate or Leave Alone?" (1989 unpublished), 5. WA and the ACT are also silent.

[180] *In re F: (Mental Patient: Sterilisation)* [1989] 2 WLR 1063; 2 All ER 545.

[181] [1989] 2 WLR 1063, 1067 (Lord Brandon, interpreting public interest as necessity), 1085 (Lord Goff), 1093 (Lord Jauncey concurring); 1080 (Lord Griffith not deciding but implying a preference for public interest), 1064 (Lord Bridge not deciding).

[182] *Ibid* 1064 (Lord Bridge), 1067 (Lord Brandon).

[183] *Ibid* 1064 (Lord Bridge), 1067 (Lord Brandon), 1093 (Lord Jauncey).

[184] *Ibid* 1067.

[185] *Ibid* 1086.

[186] *Ibid* 1087.

[187] *Id.* The standard was enunciated in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.

The House of Lords did agree that sterilisation (and other treatments yet to be identified[188]) justified one gloss to this: although compliance is not necessary to establish the lawfulness of the operation, the court's jurisdiction should in practice be invoked to obtain a declaration of its appropriateness.[189] Lord Goff went somewhat further, commenting that "the application of [the best interest] principles . . . calls for special care".[190] From the context in which this was said, it seems to have been intended to embrace the possibilities of consulting relatives and carers, taking specialist advice, or of involving inter-disciplinary teams, even though he thought it unwise to go further than to

> stress that, for those who are involved in these important and sometimes difficult decisions, the overriding consideration is that they should act in the best interests of the person . . . prevented from deciding for himself what should be done to his own body in his own best interests.[191]

The ruling by the House of Lords provides one possible model. Broadly it takes what may be termed a 'professionally responsible free market' approach to routine care. Medical practitioners who make careful reflective decisions about treating an adult patient lacking the capacity to consent, do not require either the consent of a guardian or the approval of a court. But sterilisation (and possibly other drastic procedures) however, while lawful if carefully handled by the normal medical decision-making and professional standards of judgement, should desirably be exposed to the added check of independent, judicial scrutiny, where the interests of the person affected can be protected by separate legal representation.

In Australia the latest guidance is the ruling by Nicholson CJ in *'Jane's* case'.[192] Here the Victorian Public Advocate had intervened as the 'next friend' to Jane to seek an injunction restraining her parents from authorising a hysterectomy for Jane, a seventeen year old retarded woman. Chief Justice Nicholson concluded that the Family Court held the ward of court jurisdiction of the Victorian Supreme Court in this instance,[193] and went on to insist that the consent of a court is necessary in order to perform certain medical procedures on a child or intellectually retarded person. Following Lord Templeman's dicta in *Re B*,[194] he focused on procedures which have non-therapeutic objects as their principal aim and which 'involve interference with a basic human right'. In judging this latter, some regard might be had to

---

[188] *Ibid* 1068 (Lord Brandon). The special features were the irreversibility of sterilisation, its negation of a fundamental right to procreate, the moral and emotional implications, the risk of error, the risk of improper reasons influencing the decision and the advantage in shielding the practitioner from criticism or legal action.

[189] *Ibid* 1063 (Lord Bridge), 1068 (Lord Brandon), 1089 (Lord Goff), 1093 (Lord Jauncey concurring). Lord Griffiths dissented, ruling that, for such "a grave decision with all its social implications", it was not satisfactory to do other than insist that the consent of the court should be mandatory: *ibid* 1080.

[190] *Ibid* 1088.

[191] *Id.* Lord Jauncey expressly concurred; and Lord Bridge must have had this passage of the judgment in mind when he, somewhat enigmatically, wrote that the "special considerations which apply in the case of [sterilisation] . . . arise only because such treatment cannot be considered either curative or prophylactic": *ibid,* 1064.

[192] *Re 'Jane'* (1989) FLC 77,234; also (1988) 12 Fam LR 662.

[193] (1989) FLC 77,234, 77,241 and 77,246. Nicholson CJ did not decide between (i) reading the Commonwealth Powers (Family Law — Children) Act 1986 (Vic) and the Family Law Act 1975 (Cth) ss 60E, 60F, 63A as achieving this; and (ii) reaching this conclusion by force of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth).

[194] *In Re B (A Minor) (Wardship: Sterilisation)* [1987] 2 WLR 1213, 1218.

United Nations Declarations annexed to the Human Rights and Equal Opportunity Act 1986 (Cth) to resolve doubts, but the dominant responsibility would remain that of judging the 'welfare' of the person.[195] When, as in the case at hand, the operation has a grave effect, the standard of satisfaction required from the court is more than a mere tipping of the balance in favour of giving consent.[196]

In insisting on prior consent of the court as a matter of *routine*, however, Nicholson CJ went further than the 'self-regulatory' model of the Court of Appeal and also reversed the ruling by Cook J that consent would be needed (on welfare grounds) only in special or exceptional cases.[197] Victoria already implicitly adopts a position closer to the self-regulatory scheme of the Court of Appeal (subject to common law actions for assault and battery or negligence should the common law standard discussed above not be reached). However statutory arrangements in other States, such as South Australia and New South Wales,[198] have sought to provide for permission of a guardian (or the Board) to be obtained either for all disadvantaged people (optional in South Australia for all except sterilisation and abortion; mandatory in New South Wales, though a spouse or guardian is extended the requisite authority), or at least for those people the subject of existing orders (Northern Territory for 'major' treatments, as defined).[199] They prefer a more regulatory model, and would defend this approach on the ground that the common law requirements are not sufficiently closely followed, or leave too much room for medical discretion.[200]

8 CHOOSING A CONSENT MODEL: ETHICAL AND PRACTICAL LIMITS

The choice between these three models — Victoria's mainly 'laissez faire', South Australia's 'hybrid' and New South Wales's regulatory approaches[201] — turns on both ethical and practical considerations. On the ethical plane the question is whether one should accept Blumstein's general line of argument that decision-making is best left to micro-level processes (such as to the doctor-patient relationship, family or hospital committee), subject only to provision of information necessary for rational decision.[202] Against this there is the argument that the emotional pressures placed on those called to make such decisions — the "elemental fact that medical care is about living and dying

---

195 (1989) FLC 77,234, 77,260. Family Law Act s 60D. No real guidance was provided on whether the standard would be different for an adult, but, since the welfare and best interests test is a creature of the ward of court jurisdiction, it is unlikely to differ.

196 (1989) FLC 77,234, 77,257.

197 *Re A Teenager* (1989) FLC 77,192 (Family Court).

198 These two States come closest to the common law standard laid down in *Jane's* case.

199 K Rosser, *supra* n 179, *passim.*

200 Rosser, for example, argues for a workable and balanced reconciliation of laissez faire and regulatory approaches: K Rosser, *supra* n 179, 21.

201 Vic Act ss 36-42 (Victoria does, however, clothe a plenary guardian with the power to consent to any health care "that is in the interests" of the represented person: s 24(2)(d)); SA Act ss 28a-28k; NSW (DS) Act 1987 ss 35-48.

202 J Blumstein, "Rationing Medical Resources: A Constitutional Legal and Policy Analysis" (1981) 59 Texas L Rev 1345, 1348.

. . . something . . . rather different . . . from the purchase of tomatoes"[203] — requires that there be a detached, public regulatory presence.[204]

(1) Irreversible procedures

Sterilisations of young women for reasons of convenience of contraception or management of menstruation provides a classic test, since it is widely agreed that some operations were inappropriately performed on these grounds.[205] As we have seen, both the statutory regimes and the common law (at least in England) are in agreement that such cases require consideration by the Board or the courts. Indeed in Victoria, where under the legislation the Board is strictly confined to issuing guidelines on what constitutes a major medical procedure for a person under guardianship,[206] the initial (December 1987) guidelines instead listed situations in which it would be desirable for an application to be made,[207] thus endorsing the importance of giving universal coverage to the public interest principle at stake here.

(2) Ordinary care

The remaining cases are more problematic, however. Certainly there is force in the argument in favour of a regulatory presence: abuses may occur here as well, perhaps more readily when the gravity of the medical procedure does not so closely concentrate the mind of the medical decision-maker or family member. New South Wales therefore sought to cover the field in a graduated way which distinguished between 'minor' and 'major' medical treatment (with sterilisations etc classed as 'special' and with separate provision for 'emergency' care — a matter left to the common law in Victoria[208]). Where the New South Wales scheme has got into enormous strife, however, is in drawing a workable line between these two categories, and in finding practical regimes for granting the requisite consents. Neither has been satisfactorily resolved, with the result that the scheme has rightly been called a cumbersome bureaucratic nightmare.[209] A similar verdict has been passed on the 'optional' scheme in South Australia, which has the capacity to overwhelm the Board with minor medical consent cases,[210] a difficulty compounded by the fact that the apparent necessity to apply has apparently been productive of considerable agitation on the part of people who appear at the Board and feel that it meddles unduly in decisions which they regard as their preserve.[211]

---

203 B Vladeck, "The Market vs Regulation: The Case For Regulation" (1981) 59 Milbank Memorial Fund Quarterly/Health and Society 209, 211.

204 R Fein, "Social and Economic Attitudes Shaping American Health Policy" (1980) 58 Milbank Memorial Fund Quarterly/Health and Society 349, 381; H Teff, "Regulation Under the Medicines Act 1968: a continuing prescription for health" (1984) 47 Mod L Rev 303.

205 Victoria, Report . . . *supra* n 143, 62-63.

206 Vic Act ss 36(2) [jurisdictional limit], 37(3) [guidelines].

207 K Rosser, *supra* n 179, 15.

208 Vic Act s 36(3).

209 K Rosser, *supra* n 179, 19-21.

210 *Ibid* 10 (citing the concerns of the Chair of the Board).

211 Private communication, Ms A Burgess, SA Health Commission, 15 March 1989.

(3) A crisis model

The solution to this conundrum may lie in acceptance of the argument that guardianship laws should confine themselves to 'crisis management',[212] rather than that they serve as a routine preventive management tool. On this view, issues which do not lead to disputation, or which do not otherwise sufficiently impact themselves on the minds of some detached person as to generate an application to the Board, are not properly the business of the law. Tangible and non-trivial present disputes should be the only concern of guardianship legislation. Lesser, more remote and speculative concerns should be left to another day, or should be dealt with by extra-legal means. That is, two criteria should govern access: first a 'social gravity' threshold and, secondly, a 'social proximity' test.

The attraction of this double barrel resolution is that it restricts the numbers of people caught by the law at any time. If the law is thought to be a necessary evil, always at risk of running amuck and trampling on individual rights, then the citizen is, as Tay and others argue, best served by a minimalist role for the state. But if it is accepted that the state may be a "positive force in the lives of its citizens . . . enhanc[ing] the common good",[213] — that is, that there can be a partnership between public law and administration, with support for what McGarity terms the 'positive state', then the lack of state involvement in the 'marginal cases' is a bane rather than a boon. The first view sees advantage in insulating people from state interference, creating 'zones of immunity',[214] while the other looks to empowering people by across the board measures which are not distorted by the inequalities of knowledge, income or status which might otherwise lead to uneven coverage of the new protections.

(4) Radical liberalism

On the first view law is thought to be fatally flawed as an instrument of social advancement. It assumes that law is an instrument of a narrowly conceived social purpose, the boundaries of which fall well short of the territory of politics or public policy. The proper role of law is assumed to be two-fold: first, to confer, and to protect from interference, private rights of autonomy of action ('private law' as evidenced by doctrines of freedom of contract etc), and, secondly, through the agency of 'public law', to regulate or coerce citizens and corporations in order to advance collective social goals.[215] Under this conception a challenge to the legitimacy of the legal system is posed by two groups of people: those who lack the intellectual resources to be entrusted with spheres of autonomy (or 'choice rights'); and those who lack sufficient economic, or personal resources (such as educational status) to realise those rights.[216] This is precisely the challenge in the health care field. It is the justification for the mildly interventionist provisions, such as

[12] The scheme is implicit in L Frolik, "Plenary Guardianship: An Analysis, A Critique and Proposal for Reform" (1981) 23 Arizona L Rev 599, 649-650.

[13] T McGarity, "Regulatory Reform and the Positive State: An Historical Overview" (1986) Administrative L Rev 399.

[14] W Simon, "The Invention and Reinvention of Welfare Rights" (1985) 44 Maryland L Rev 1, 23-37.

[15] P Fennell, "Law and Psychiatry: The Legal Constitution of the Psychiatric System" (1986) 13 Jo of Law and Soc 35, 40-41.

[16] *Ibid* 42-43.

those in Alberta, which call for a second opinion before medical care is given to an incompetent person not under guardianship.[217]

(5) The positive State

There are however more positive conceptions of the role of law. The notion of 'developmental rights' as conceived by Eekelaar; the citizenship rights articulated by Marshall; and Gostin's 'new legalism of entitlement'[218] — all proceed on an alternative assumption which is at odds with the jurisprudential legacy of the positivist school of legal philosophy. In the same vein Foley turns to the sociological and realist schools of jurisprudence for sustenance. Drawing on Pound's five stages in the evolution of law, he notes that a system giving pre-eminence to individual rights typifies the fourth stage. Against this he asserts that "the fifth and current stage is concerned with securing social as opposed to individual interest . . . to satisfy the sum total of human demands".[219] In short, the most highly developed evolutionary stage of law is concerned to positively guarantee notions of 'equity' or social participation and equality for all citizens. This would justify the most interventionist health care provision: such as that legislated for in New South Wales.

(6) Regulatory limits

Tay, however, cannot accept this thesis. Her argument is that such 'rights' to welfare are a misnomer : an abuse of the true meaning of rights in law.[220] These reservations stem from the jaundiced view which she has formed about the main elements of the contemporary (or 'fifth') stage of legal development. In place of the liberal model of law as maximising opportunities for individuals to freely bargain and transact social relations on the basis of personal autonomy, Tay finds a cloying bureaucratic/administrative state — a government presence which is all too pervasive.[221] Heady stuff, and surely overstated. But regulation *does* have a price, one which may prove fatal. As Koch laments "[t]he greatest danger is that unnecessary costs, including indirect costs, will compel society to move away from the regulation of health, safety and welfare".[222] He therefore recommends that the focus shift from the design of regulatory agencies and their procedures, to the front-line areas where basic decisions are taken in practice ('street level'). Viable health laws for vulnerable people not under guardianship must come to terms with this

---

217 Alberta Act s 20.1(1). The scheme covers an "examination or medical surgical, obstetrica or dental treatment needed" where they have not, to the knowledge of the medical practitioner/ dentist previously withheld consent: ss 20.1(1)(b)(c).

218 J Eekelaar, "The Emergence of Children's Rights" (1986) 6 Oxford Jo of Legal Studie 161, 170; T Marshall, *Sociology at the Crossroads and other Essays* (1973) 67-127; T Gostin "The Ideology of Entitlement" in P Bean (ed) *Mental Illness: Changes and Trends* (1983) 27-54.

219 M Foley, "The Revolution in Law — Towards a Jurisprudence of Social Justice" (1983) 1 Australian Jo of Law and Soc 60, 79.

220 A Tay, "Law, the Citizen and the State" in E Kamenka, R Brown, and A Tay, (eds) *Law and Society: The Crisis in Legal Ideals* (1978) 1.

221 Tay writes of "a revolution replacing contract between the parties by contract dictated fron above, law by administration, politics by ombudsman, property by hand-outs, individua legal responsibility by statistical analysis and consequent "treatment" or manipulation": *ibid* 4

222 C Koch, "Effective Regulatory Reform Hinges on Motivating the "Street Level" Bureaucrat (1986) 38 Administrative L Rev 427, 431.

bureaucratic challenge, one which has brought, or will bring undone laws such as those in South Australia and New South Wales.

(7) Towards reconciliation

The Victorian approach to guardianship is firmly wedded to the 'crisis model' as the sole justification for intervention. This interpretation of the legislation by the Board was challenged in two cases before the Victorian Administrative Appeals Tribunal. After some soul-searching, the Tribunal ruled in the Board's favour, on facts which could hardly have been less supportive of that outcome.[223] In the first case the person was 75, unable to control bodily functions, move herself in bed, or to dress or feed herself. She reportedly had a concentration span of "about 10 seconds" and "seem(ed) to have little understanding of the world outside her". In short, she was totally reliant on the extensive care provided by the nursing home in which she resided, supplemented by the close attention, care and assistance provided every second day on visits from the disaffected applicants for review. So also with the second case — an 85 year old senile dementia patient, cared for in a nursing home, but in receipt of close and concerned interest from her son and daughter-in-law, who visited twice weekly.

In both cases the Tribunal agreed with the Board that, by reason of their disabilities, the proposed represented persons were unable to make reasonable judgements in respect of their person or circumstances. What was in issue was whether there was a 'need' for a personal guardian to be appointed when, irrespective of their lack of legal authority, daily needs were being fully catered to by the caring adult children of the disadvantaged person. In the absence of evidence that a lack of authority was causing problems in the care and management of Mrs M in the first case, and despite the fact that to make the order would not in fact diminish her freedom of decision or action (since this had effectively been lost for all time), the Tribunal concluded that the scheme of the legislation required that an order not be made whenever "the person's needs and best interests can be met by another means or arrangement that does not go so far".[224] A dispute about care, or a lack of a carer and consequent neglect or exposure to harm, on the other hand, would found an order; but an abstract legal need, or some speculative future contingency would not.[225] So also in the second case.[226]

In default of the availability of a guardianship order to resolve the alleged problems in the areas of health care, residence or general care, which were raised in argument in these two cases, a form of private resolution prevails. Unless the parties had the forethought to use the provision made for enduring powers of attorney, these questions are left to the knock-about common sense solutions struck on by practical individuals concerned about the welfare of the person. What this lacks is the structured local environment envisaged by Koch. Functioning families may often approximate what is needed; but some externality also is desirable. In health care that externality might be

[223] *Re M and R and the Guardianship and Administration Board* (1988) 2 VAR 213, 218-219; applied in *Re E and the Guardianship and Administration Board and the Public Advocate* (1988) 2 VAR 222, 224-225.

[224] *Re M* (1988) 2 VAR 213, 220.

[225] *Id.*

[226] *Re E* (1988) 2 VAR 222, 225.

supplied by ethical guidelines or procedures — an expanded form of the approach to the 'irreversible procedures' category as envisaged by the Court of Appeal decision in *In Re F (Mental Patient: Sterilisation).*[227] Parallel provisions might be made for some accommodation decisions through voluntary (or imposed) 'codes of conduct' adopted by the Commonwealth for the nursing home and related industries,[228] or through reliance on the voluntary 'community visitors' approach popular in Victoria.[229] But the power of such arrangements is limited. Abuses may still go undetected.

9 CONCLUSION

Guardianship laws clearly serve to meet an important community need. Australian law has been at the forefront of international developments. However there is a major tension between the ethical standpoints of promotion of individual freedom and provision of protective paternalism. The law also confronts the prospect that a major gap may exist between the law (whether common law or statutory) and the practical level. Those tensions are highlighted in the sensitive areas of consent to medical care and protection from exploitation and neglect.

As we have seen, there are no easy answers to these concerns, least of all in the medical consent area. Even for the patient who retains capacity to withhold consent to treatment, legislative reinforcement of the common law right to do so is rarely provided,[230] and mental health legislation often tacitly assumes the right to treat in any event. Where the right to withhold consent to treatment is spelled out, guardianship may negate that entitlement,[231] though so far, de facto exercise of authority usually goes unchallenged.[232] Lacking public sector regulatory controls, such health care decisions are effectively 'privatised', and the individual becomes

> a 'commodity' to be bought and sold in the welfare marketplace by the private sector, as it assumes many of the social-control and welfare functions relinquished by the state because of changes in its fiscal policies.[233]

This is the heart of the conundrum: how to regulate or influence that private marketplace in a practical way.

---

227 *Supra* text at n 178.

228 For example the Minister may, by notice, "determine standards to be observed in the provision of nursing home care": National Health Act 1953 (Cth) s 45D (inserted by s 16 Nursing Homes and Hostels Legislation Amendment Act 1987).

229 Health Services Act 1988 (Vic) Part 5 Community (Residential Services) Visitors; ss 11([functions of visitor], 121 [requests to see visitor], 123 [twice yearly reports to the Public Advocate].

230 After a survey of legislation in Canada, Australia, New Zealand, England and Scotland the right has been said to be "virtually non-existent": R Gordon and S Verdun-Jones, "The Right to Refuse Treatment: Commonwealth Developments and Issues" (1983) 6 Int Jo o Law and Psychiatry 57, 63.

231 *Ibid* 67. Under North American experience delays in obtaining guardianship consent considerably extended the periods of in-patient care, without, it is judged, doing much to enhance the dignity of decision-making by the individual: J Bloom L Faulkner, V Holn and R Rawlinson, "An Empirical View of Patients Exercising Their Right to Refus Treatment" (1984) 7 Int Jo of Law and Psychiatry 315, 317-318, 326.

232 *Ibid* 71.

233 R Gordon and S Verdun-Jones, "The Impact of the Canadian Charter of Rights and Freedom upon Canadian Mental Health Law: The Dawn of a New Era or Business as Usual?" (198 14 Law, Medicine and Health Care 190, 195.

In view of the prominence of 'advocacy solutions', such as Victoria's community visitors, as a way of resolving this conundrum, it is instructive to look at the success or otherwise of this approach for institutionalised people. Doty and Sullivan suggest that there are at least six possible strategies for those living in institutions, if their preferred reform of a new Board is included.[234] Leaving aside advocacy by voluntary welfare organisations, class action litigation, and 'community receivership' (or appointment of a government administrator), the most interesting observations are those on the 'volunteer ombudsman' (or visitors) and the 'neglect reporting/public ombudsman' (or public advocate) strategies. The first is commended for its strong case-finding and mediation capacity in relation to minor complaints, and for building human relationships and providing bridges with the wider community.[235] Major concerns, however, tended not to be voiced. The latter isolated many fewer cases in the absence of reporting obligations,[236] and suffered from being "long on investigation and short on enforcement" and was confined to a narrow range of problems — "physical abuse and gross neglect".[237]

This gives no ground for optimism. Despite their theoretical attraction as an example of the localised, 'soft/responsive' forms of law which are touted by Teubner as the solution to the dilemmas of regulation[238] (and the crisis of the welfare state),[239] they seem unable to deliver the goods at a practical level. In short such schemes are no more capable of closing the gap between law and its administration than are the more traditional regulatory approaches taken in several of the Australian States.

The ethical and the practical dilemmas, then, remain unresolved. Selection of the preferred model remains a matter of judgement. On balance the arguments seem to favour a bifurcated approach. For the majority of situations where possible guardianship is raised, a 'crisis/last resort' policy should prevail. While the common law cannot adequately meet community needs,[240] there is merit in preferring guardianship legislation which gives effect to the autonomy enhancing policy which it encapsulates, at least in the routine cases. Such a stance also recognises that there are severe limits to legal resolution of community concerns. This stance cannot be maintained in all cases, however.

The second strand of policy must provide adequately for the cases at serious risk of exploitation or of inappropriate medical intervention. Certainly one

---

234 P Doty and E Sullivan, "Community Involvement in Combatting Abuse, Neglect, and Mistreatment in Nursing Homes" (1983) 61 Milbank Memorial Fund Quarterly/Health and Society 222, 246-249. The Board would comprise mainly community representatives, would mediate or make findings on the severity of complaints, and in the latter case would report the gradings to licensing authorities, who would be obliged to suspend or de-register on a 'points system' akin to that for traffic violations.

235 *Ibid* 232, 247.

236 *Ibid* 230.

237 *Ibid* 245.

238 G Teubner, "Substantive and Reflexive Elements in Modern Law" (1983) 17 Law and Soc Rev 239; also P Nonet and P Selznick, *Law and Society in Transition: towards responsive law* (1978); A Parkin, "Public Law and the Provision of Health Care" (1985) 7 Urban Law and Policy 101.

239 M Moran, "Crises of the Welfare State" (1988) 18 British Jo of Political Science 397.

240 As evidenced by the 1,941 applications, and the 1,772 orders made in the first year of operation of Victoria's 'crisis' model Board: Victoria, Annual Report 1987-1988 Guardianship and Administration Board (1988, Melbourne) 10.

of the front-line responses should be watchdog/ombudsman functions such as those entrusted under Victorian law to the Public Advocate and community visitors.[241] There is clearly also a need to control medical procedures for people already the subject of a guardianship order, as is the case in Victoria and elsewhere. But it is doubtful if this goes quite far enough, despite the encouraging ruling of the Family Court in *Jane's* case.[242] Some statutory framework is justified as a way of protecting people not yet under guardianship from the incursions on their human rights should major medical intervention be authorised without the imprimatur of an independent body (or court).

Despite the administrative difficulties with their medical consent provisions, South Australia may have come closest to striking a balance between the competing considerations. Arguably Victoria has the optimal model of how to structure and administer a Board and to balance this with strong watchdog and advocacy agencies. South Australia falls well short of this standard in these spheres, but, in the public interest of the welfare of intellectually disadvantaged people, there is a case for looking closely at the South Australian resolution of the difficult medical consent conundrum.

---

[241] Vic Act ss 15, 16 [Public Advocate]; Intellectually Disabled Person's Services Act 1986 (Vic) ss 53-60 [Community Visitors].

[242] *Re 'Jane'* (1989) FLC 77,234.