# CIVIL AND SOCIAL GUARDIANSHIP FOR INTELLECTUALLY HANDICAPPED PEOPLE

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## INTRODUCTION

Handicaps may take many forms and be due to a host of differing causal factors. But handicapped people, whether they be the physically or intellectually handicapped, or the infirm aged, share two important characteristics. They have a diversity of needs and they constitute one of the disadvantaged minority groups in society.[1] The civil and social rights of these groups are frequently at risk. Rarely are they fully recognized or protected. Intellectually handicapped people[2] are especially vulnerable in this regard. They also constitute a group noteworthy for its considerable range of internal diversity.[3] Policies designed to enable intellectually handicapped people to participate fully and equally in society need to be flexible enough to accommodate these individual differences.

The role of the law and of legal institutions in assisting to promote the social and civil rights of handicapped members of the community cannot be exhaustively stated. Handicapped people have a capacity to engage the law

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1 C. W. Murdock, "Civil Rights of the Mentally Retarded—Some Critical Issues" (1973) 7 *Family Law Quarterly* 1, 1-3; A. J. Gittle, "Fair Employment and the Handicapped: a Legal Perspective" (1978) 27 *De Paul Law Review* 953, 953-8.

2 This is not the place to dwell on the analytical niceties of the term "handicap". However, this article endorses the distinction drawn by Dr. P. Gorman, and accepted by the South Australian committee on the law and handicaps, viz.: "[that a basic distinction should be made] between the terms 'impairment', 'disability' and 'handicap' [where] [a]n impairment is an anatomical or functional abnormality or loss which may or may not result in a disability; [a] disability is a loss or reduction of functional ability which results from an impairment [and] handicap is the disadvantage caused by disability. Thus, impairment is a medical condition, disability is the functional consequence and handicap the social consequence": South Australia, *Report of the Committee on Rights of Persons with Handicaps: The Law and Persons with Handicaps* Vol. 1 "Physical Handicaps" (1978) S.A. Gov. Pr. 11, para. 10. [hereafter cited as *Bright Committee "Physical Handicaps"*, Vol. II of the Report, published in 1981, will be cited as: *Bright Committee "Intellectual Handicaps"*]. See also: W.H.O., *International Classification of Impairments, Disabilities and Handicaps* (1980) W.H.O., Geneva, 11, 24-31.

3 Australia, Commission of Inquiry into Poverty, First Main Report, *Poverty in Australia* (1975) 282; Third Main Report, *Social/Medical Aspects of Poverty in Australia* (1976) 52; T. Carney, "Social Security and Welfare Services for Retarded People: the state of the art" (1979) 12 *Melbourne University Law Review* 19, 19-20.

at any level or in any area. Law for the handicapped is, therefore, largely the application of the general corpus of the law to a particular group. Nevertheless, there are certain aspects of the law which touch on the special vulnerability of handicapped people to be denied the opportunity to participate in society on an equal footing with other members of the community. For the physically handicapped one of the growth points in this regard has been the expansion of the jurisdiction of anti-discrimination (or "equal opportunity") legislation to encompass discrimination on the basis of "physical impairment" in addition to the longer standing jurisdiction in respect of discrimination based on race, sex, marital status and so forth.[4] Anti-discrimination legislation is, however, a less powerful instrument for protecting the interests of the intellectually handicapped (or the analogous interests of the infirm aged).[5]

The traditional response of the law to the needs of the intellectually handicapped has been rather fragmented,[6] but one mainstay has been to extend the protection of the relationship of guardianship of the person or the property of the person concerned. The legal institution of guardianship has been called into question recently because of its emphasis on property matters and its rather clumsy procedures. Guardianship, however, remains one of the very few legal relationships capable of being reformed and

[4] The extension of the anti-discrimination legislation into this field was recommended by the South Australian Bright Report: *Bright Committee "Physical Handicaps"* op. cit. 262 and 19-46. Legislation to implement this recommendation of 1978 was enacted by the South Australian Parliament in June 1981, and was proclaimed on 7th February 1982. New South Wales legislation to the same effect passed through the Parliament two months earlier: *Handicapped Persons Equal Opportunity Act* 1981 (S.A.); *Anti-Discrimination (Amendment) Act* 1981 (N.S.W.).

[5] The second report of the Bright Committee concluded that the further extension of anti-discrimination legislation to include discrimination on the basis of "intellectual impairment" might be "beneficial on balance": *Bright Committee "Intellectual Handicaps"* op. cit. 22, para. 20. In making this tentative proposal the Committee stressed the role which legislation can serve in establishing a sympathetic and appropriate climate of opinion in the community, and noted the inter-relationship of advocacy ("watch-dog") functions with the role of investigating acts of alleged discrimination. However, the committee was also cognizant of the peculiar difficulties confronted in administering such a head of power. In particular it identified the problem of determining whether an intellectually handicapped person has been treated unfairly when, for example, denied a job due to his handicap, and problems of developing practical criteria of impairment or in devising appropriate sanctions: ibid. 22-5, para. 21.

[6] The position at common law is that the intellectually handicapped person should continue to have his affairs governed by the rules of law of general application unless and until it can be demonstrated that the person concerned lacks the requisite degree of legal capacity, (generally expressed in terms of an inability to comprehend the "bare bones" of the legal relationship in question): S. C. Hayes and R. Hayes, *Mental Retardation: Law, Policy and Administration* (Sydney, Law Book, 1982) pp. 238-5. Various statutory provisions qualify this position. Thus in Victoria the provisions of the *Mental Health Act* 1959 presently (pending implementation of Government policy for their excision from the Act) govern admission to, and treatment in training facilities and other institutions, while the *Education Act* 1958 (Vic.) provides, less than satisfactorily, for the education of intellectually handicapped children. There is also legislation providing for various Commonwealth pensions, benefits and allowances. See further, T. Carney, "Social Security and Welfare Services for Retarded People" op. cit. 21-2; *Bright Committee "Intellectual Handicaps"* op. cit. 207-25.

transformed into an institution serving as a vehicle for the recognition and protection of the human rights of intellectually handicapped people.[7]

This article will review the adequacy of the existing guardianship provisions in advancing the civil and social rights of intellectually handicapped people. It will assess the strengths and weaknesses of the present arrangements and discuss possible reform measures which might better attain that goal. Proposals will be advanced which, it is argued, would do much to secure the human rights of intellectually handicapped people.

## 1. Human Rights and the Intellectually Handicapped

The human rights benchmark for the intellectually handicapped was enunciated by the United Nations General Assembly in a resolution carried in December 1971. The *Declaration of the Rights of Mentally Retarded Persons*[8] opened with a specific commitment to the realization of the goal of equality of opportunity. It asserted that

> "the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings."[9]

Although the declaration does not have any legal force under international[10] or domestic law,[11] it remains a highly persuasive document. The status of

[7] Various other measures have been proposed but, although each has its theoretical attractions, few of these have been put into practice. In the absence of concrete working examples of these measures there is a danger that more might be expected of them than they are capable of delivering. Among the more impressive of these proposals are the suggestions by a British Columbia Royal Commission that a legislative "Bill of Rights" be enacted for the intellectually handicapped and be made enforceable by the remedy of a declaration on non-compliance with its terms; the suggestion of the Bright Committee (discussed in this article) for the establishment of a special "Advocacy Agency"; and the proposal that legislation for the intellectually handicapped contain provisions establishing an indexed "presumptive budget" allocation (or alternately that an independent Commission—akin to the Tertiary Education Commission—table an annual report in Parliament recommending a budget figure and proposed distribution of the funds); see further T. Carney, "Social Security and Welfare Services for Retarded People" op. cit. 22; *Bright Committee "Intellectual Handicaps"* op. cit. 199-203.

[8] *U.N. Declaration of the Rights of Mentally Retarded Persons*, U.N. General Assembly 26th Session, Resolution 2856, XXVI: in D. J. Djonovich, (ed.) (1970-71) 13 *United Nations Resolutions: Series I* (Oceana, 1976) 449-50. The declaration was carried by 110 votes to nil, with 9 abstentions: ibid. 43.

[9] Ibid. cl 1.

[10] The declaration does not have the status of a ratified Convention which would be binding on the signatory states under the principles of international law. As with documents such as the Universal Declaration of Human Rights 1948, it does no more than provide an elaboration of the general obligations cast on member states of the United Nations by virtue of Articles 55 and 56 of the Charter of the United Nations. These oblige member states to "take joint and separate actions in co-operation with [the United Nations] to achieve [certain objectives: article 56]." One of those objectives is to achieve "universal respect for, and observance of, human rights and fundamental freedoms *for all* [article 55(c)]": see I. Brownlie, (ed.) *Basic Documents on Human Rights* (Oxford, Clarendon Press, 1971) pp. 93, 96; T. Carney, "Enquiry into Mental Retardation: Report on the Law" in Victoria, *Report of the Victorian Committee on Mental Retardation* (1977) Vic. Gov. Pr., Appendix II, 151, 154, paras 2.7-2.9. [hereafter cited as Carney, *Report on Law*].

[11] The declaration has not been incorporated into the domestic law of any state or territory. It has been incorporated into the Commonwealth *Human Rights Commission Act* 1981, but this legislation contains no sanctions and is confined to

the document is further enhanced because it encapsulates one of the fundamental value tenets of our legal and social institutions. That basic tenet is the principle of equality in the distribution of what one of the contemporary philosophers, John Rawls, terms "social values".[12] Rawls contends that a general conception of "justice" in human organizations requires that:

> "all social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to every one's advantage".[13]

In his view, "injustice" is "simply inequalities that are not to the benefit of all."[14]

The basic principle equating justice with even-handed treatment of each and every member of the community is not simply a pious or abstract theoretical principle. Lawyers in the English speaking, or common law, jurisdictions frequently rely upon it as an evaluative precept. Parliaments regularly enact laws which implicitly reinforce these sentiments. The Inquiry into Poverty, for example, in its report on Law and Poverty declared that

> "legal aid services are the means by which the goal of equality before the law will be transformed from an ideal into reality".[15]

The Australian experience, however, is that the goal of equality before the law is satisfied only at the level of formal compliance with the precept. Implementation of these sentiments has all too frequently relied on dogmatic adherence to the view that equality before the law dictates that legal rules and procedures should apply universally to *all* members of the community. The notion that minority groups might be singled out for special protections not accorded to the ordinary citizen has been regarded as subversive of the principle of equality.[16] Affirmative action, or positive

Commonwealth responsibilities (though co-operative arrangements with the states are also possible): *Human Rights Commission Act* 1981 (Cth.) ss. 9(1), 10 (powers and functions); 9(3), 11 (co-operative and inter-governmental arrangements). The weaknesses in the legislation were recognized by senators of all major parties: Australia, *Parliamentary Debates*, Senate, 12th March 1981, 592 (Senator Evans), 597 (Senator Puplick), 603 (Senator Hamer), 612 (Senator Chipp), 614 (Senator Missen).

12 J. Rawls, *A Theory of Justice* (London, Oxford University Press, 1972). The foundation of this thesis is a revival of the "social compact" school of jurisprudence.

13 Ibid 62.

14 Ibid. The validity of this thesis in the context of the handicapped is explored by R. Elliot, "Distributive Justice, Education and the Handicapped" in R. S. Laura (ed.), *Problems of Handicap* (Melbourne, Macmillan, 1980) p. 115.

15 Australia, *Commission of Inquiry into Poverty, Second Main Report, Law and Poverty* (1975) 9.

16 Carney, *Report on Law* op. cit. para. 2.1. One of the rare exceptions to this position is the provision written into the Human Rights legislation to expressly exempt "affirmative action" programmes for minority groups from being regarded as being in breach of international obligations: *Human Rights Commission Act* 1981 (Cth.) s. 9(2). The philosophic weaknesses in the case for affirmative action are detailed in D. Munro, "Preferential Treatment for the Handicapped" in R. S. Laura, (ed.) *Problems of Handicap* op. cit. p. 105.

discrimination, has been resisted because it allegedly conflicts with that formal notion of justice or equality.

## 2. Affirmative Action

This simplistic analysis of the implementation of the principle of equality was first challenged in the periodical literature and the litigation generated by the United States civil rights movement.[17] The point of departure for this new approach to the satisfaction of the goal of equality was to contrast rhetoric with reality. Merton's sociological insight identifying the often substantial gap between formal compliance and practical compliance (or as he put it, the distinction between "manifest" and "latent" functions), caused lawyers to shift their attention from the formal symmetry of the structure of legal rules. An examination of their practical impact became the central issue.[18] It was realized that a policy of even-handedness in the drafting of the rules and procedures of the law implicitly assumed that all citizens were equally capable of availing themselves of (or protecting themselves from) those rules and procedures. But many minority groups, such as the poor, ethnic and racial minorities, women and the handicapped, were manifestly less capable of doing so when compared to their mainstream contemporaries. Special protections and concessions were therefore required to be built into the legal structure in order that the law be even-handed in practice. That was the genesis of the affirmative action movement.

This article examines the extent to which one narrow branch of Australian law might be modified to give expression to a policy of affirmative action for intellectually handicapped people. The branch of the law selected as the vehicle for pursuing this general theme is that relating to the recognition and protection of the property, civil and social rights of this group of people. In short, the area now governed—less than satisfactorily—by the provisions of the *Public Trustee Act*.[19] But before turning from general jurisprudential issues to examine the specific features of guardianship, three general points might be made to place what follows into context.

## 3. The Role of the Law

First, it should be recognized that the law is no panacea for social problems. This is particularly so in an area such as guardianship. The essence of the relationship of guardianship is that certain powers and responsibilities normally entrusted to the citizen as an inherent right of

[17] O. M. Fiss, "A Theory of Fair Employment Laws" (1971) 38 *University of Chicago Law Review* 235.

[18] R. K. Merton, *Social Theory and Social Structure* (Free Press, 1968 enlarged ed.) pp. 114-36.

[19] *Public Trustee Act* 1958 (Vic.). The deficiencies of this legislation have been set out in general (but highly readable) terms in a recent publication sponsored by the Victorian Council of Social Service, Civil Rights and Public Trustee Task Group: V.C.O.S.S., *Money Protection and Rights: a discussion paper*, "The Role of the Public Trustee" (Melbourne, V.C.O.S.S., n.d. 1981).

adulthood, should be transferred to a third party to be exercised on behalf of the handicapped person. An arrangement of this type is but a very crude tool, and as with all tools, the benefit or the harm inflicted by its use will depend on the motives and the judgment of those responsible for invoking it. As McLaughlin put it:

> "Laws, like other technologies, have great potential both for good and for evil. The same guardianship law could be used to rescue one person and to place another in danger".[20]

Secondly, it should be appreciated that guardianship provisions, and legal mechanisms generally, cannot substitute for extra-legal solutions to social problems. Affirmative action programmes can be facilitated by legal reform measures—including the refurbishing of guardianship provisions—but these reforms should not divert attention away from the need to develop positive social attitudes, foster informal social supports, promote independence and social advocacy, and establish a proper network of human services.[21]

Finally, it should again be stressed that guardianship is only one of a range of areas of the law which might be selected to serve as an illustrative example of the potential role for affirmative action legislation. Access to education, discrimination in employment, the position of people in institutions, or rights of access to public facilities or social security entitlements might equally have been selected as the illustrative case.[22] In each of these areas the law has a limited contribution to make.[23] That contribution will be on a different plane from that of the moral exhortations contained in documents such as the United Nations Declaration. For law can but partially satisfy the moral claims so eloquently stated in this context; much scope will remain for extra-legal strategies of implementation in all areas.

Yet at certain points the moral and practical planes of activity will intersect and the line between mere exhortation and tangible legal rule will become blurred. For, as the Bright Committee has continually stressed in its most recent report, the law can serve as a powerful educative force.[24] The

[20] P. McLaughlin, *Guardianship of the Person* (Downsview, Ontario, National Institute on Mental Retardation, 1979) p. 17.

[21] Ibid.

[22] See for example: C. W. Murdock, "Civil Rights of the Mentally Retarded . . ." op. cit. 2 [guardianship, institutionalization and education]; R. J. Hodgson, "Guardianship of Mentally Retarded Persons: Three Approaches to a Long Neglected Problem" (1973) 37 *Albany Law Review* 407 [employment]; T. Carney, "Social Security and Welfare Services for Retarded People . . ." op. cit. [social security], M. S. Krass, "The Right to Public Education for Handicapped Children: A Primer for the New Advocate" [1976] *University of Illinois Law Forum* 1916 [education]; "Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled" (1973) 61 *Georgetown Law Journal* 1501 [education, access to buildings and transport, employment].

[23] These areas have been thoroughly explored in the second report of the Bright Committee in South Australia: *Bright Committee "Intellectual Handicaps"* op. cit. 138-53 [education], 155-76 [employment], 30-42, 52-61, 164-5 [institutionalized people], 63-70, 84-95; 158-62, 172-3 [social security and welfare issues].

[24] Ibid. 26, 156, 250.

very process of enshrining in legislation the principle of equality of access to education, employment and community facilities; or enactment of the principle that the intellectually handicapped should participate in the community to the maximum possible degree (the notion of "normalization") and be accorded the maximum autonomy of action and control over their own affairs (the principle of the "least restrictive alternative")—may of itself do much to give effect to these objectives.[25]

## GUARDIANSHIP

### 1. The History of Guardianship

Concern by the law to protect the interests of intellectually handicapped citizens is not new. Guardianship of the person and the property of vulnerable members of society was clearly recognized in Roman law at least as early as the 5th century B.C.[26] The concept of guardianship which developed in early English law was closely modelled on these principles.[27] This jurisdiction was assumed by the Crown in the thirteenth century and was grounded in the royal prerogative relating to those subjects unable to protect themselves.[28] So far as the intellectually handicapped were concerned, that jurisdiction had both a protective-welfare dimension as well as a revenue-raising role. "Natural fools", as this category was called,[29] fell within the ambit of the benevolent role of the Crown as *parens patriae*.[30] The Crown was expected to protect both the person and his property from exploitation

[25] The South Australian legislation to outlaw discrimination on the basis of physical impairments contains several innovative provisions designed to promote this educative role. Thus the Commissioner for Equal Opportunity is directed to "foster and encourage amongst members of the public a positive informed and unprejudiced attitude" towards such people and is charged with responsibility to provide advice and assistance to such people in gaining access to benefits and support, or in resolving problems relating to participation in the "economic or social life of the community": *Handicapped Persons Equal Opportunity Act* 1981 (S.A.) ss. 8, 8(2). In short, the institutions and procedures established, and granted legitimacy, by legislation, can further the achievement of parliamentary objectives which are incapable of being translated into narrow, specific rules of law. By setting up a body such as the Commissioner of Equal Opportunity and conferring a diffuse mandate to educate the community at large, and assist individuals with a grievance, Parliament has done much to bring about a redistribution of power and authority. Inequalities of power are at the heart of discrimination and the law is one of the vehicles by which such inequalities may be redressed.

[26] P. McLaughlin, *Guardianship of the Person* op. cit. 37.

[27] Ibid.

[28] R. Neugebauer, "Treatment of the Mentally Ill in Medieval and Early Modern England: a Reappraisal" (1978) 14 *Journal of the History of the Behavioural Sciences* 158, 159; D. G. Hunt, et al. *Heywood and Massey Court of Protection Practice* (9th ed., London, Stevens and Sons, 1971) pp. 5-9.

[29] This terminology (and the distinction between that group and those "non compos mentis"—i.e. the mentally ill) was embodied in the document *Prerogative Regis*, apparently drawn up by a Crown official and later (erroneously) regarded as a statute of the realm: loc. cit.

[30] The doctrine of *parens patriae* (the Crown as ultimate parent of all citizens) was first enunciated in judicial form in the early Chancery decision of *Eyre* v. *Shaftsbury* (1722) 2 P. Wms. 103; 24 E.R. 659.

and to provide him with the necessities of life. The dependents and the family of such a person did not, however, (unlike those of the mentally-ill) have a right to be maintained by the Crown. Most significantly, the Crown was entitled to receive and retain the revenues and profits generated by their property.[31] In short, benevolent guardianship of the intellectually handicapped was tempered by a revenue-raising (or taxation) function.[32]

This thirteenth century Crown prerogative has been modified and adapted over the intervening centuries. Prior to 1540, the Crown discharged these responsibilities through the agency of private citizens who were appointed as guardians or curators.[33] This institution survives to the present day in the form of provision for the appointment of a private "committee" of the estate or of the person.[34] In the 1540's, this jurisdiction was transformed from an *ad hoc* reliance on officials in the royal household (or Chancery) by way of the establishment of the Court of Wards and Liveries to act as a central administrative unit. That court fell into disfavour with the defeat of Charles I in the Civil War (in 1646) and in 1660 the court was wound up and the jurisdiction transferred to the Court of Chancery.[35] Victoria inherited this jurisdiction by virtue of provisions investing the Supreme Court with the traditional powers and responsibilities of Chancery.[36] But, as in Britain, that inherent jurisdiction first devolved on the administrative adjuncts of the court—the Master in Lunacy[37]—and was later hived off in the parallel,

31 R. Neugebauer, "The Treatment of the Mentally Ill in Medieval and Early Modern England . . ." op. cit. 160. By contrast the Crown was obliged to maintain the mentally ill (*and* their family) according to their station in life, and to account strictly for any surplus revenues.

32 That function was a by-product of the feudal system of social organization and government: ibid. 163; the revenue function eventually withered away with the advent of the less rapacious and more paternal Tudor reign: ibid. 165.

33 Ibid. 162.

34 Infra fn. 76 and accompanying text. The procedure (a petition for an Inquisition) and the powers and responsibilities of a committee of the person, are detailed in N. A. Heywood, A. S. Massey, R. C. Romer, *Heywood and Massey's Lunacy Practice* (4th ed., Chancery Lane, Stevens and Sons, 1911) 26-9, 31, 103, 134-5, 557-8, 572-3, 586.

35 R. Neugebauer, "The Treatment of the Mentally Ill in Medieval and Early Modern England . . ." op. cit. 160.

36 See now *Constitution Act* 1975 (Vic.) s. 85; *Supreme Court Act* 1958 (Vic.) s. 133.

37 The Victorian Lunacy Statute of 1867 (based on the English *Lunacy Regulation Act* 1853) provided that judicial enquiries should be heard by the Master-in-Lunacy: s. 74 (who was in fact the Master-in-Equity for the time being of the Supreme Court: s. 97). The Supreme Court was authorized to appoint a guardian or committee of the estate or person of "lunatics" so found: s. 149. These arrangements remained unchanged until 1923 when the dual title was abandoned and the term Master-in-Equity was substituted: *Lunacy Act* 1923 (Vic.) s. 2. In 1958 the nomenclature was again altered to "Master of the Supreme Court"; the Master retained the power to inquire into alleged lunacy and was charged with supervising the discharge of the responsibilities of all private committees: *Mental Hygiene Act* 1958 (Vic.) ss. 111, 135. Finally, in 1959, these powers were relocated in the *Public Trustee Act* and the jurisdiction to enquire into "lunacy" was entrusted to a Judge or a Master of the Supreme Court: *Mental Health Act* 1959 Schedule 2 (bringing about the changes summarized in fns. 78, 79 and accompanying text infra).

but statutory, office of the Public Trustee[38] (subject, however, to consultative and supervisory linkages with the Supreme Court).[39]

2. The Guardianship Standard

The standard required of the law, and other administrative structures relevant to the guardianship of the intellectually handicapped, was well stated in the United Nations Declaration. Elements of three clauses of that Declaration are pertinent. They deserve to be quoted in full. So far as is relevant to this enquiry, they provide that:

> "The mentally retarded person has a right to a qualified guardian when this is required to protect his *personal well-being and interests* [and] . . . a right to *protection from exploitation*, abuse and degrading treatment."[40]

These propositions form part of a package of specific entitlements for the intellectually handicapped. Other rights recognized in the Declaration include entitlements to medical and other services necessary to reach full developmental potential; to economic security; to access to work and meaningful occupations; and to live with his family, foster parents or in a relatively "normal" family environment.[41] The nub of these propositions is the emphasis placed on social and civil rights to participate to the maximum degree in the ordinary community. In short, they embody the concept of "normalization".[42]

3. Victoria: The Guardianship Avenues

Victorian law falls well short of satisfying the standard set for guardianship laws by the Declaration.[43] As the law now stands there are only three ways by which a form of guardianship may be extended to those people for whom it may be of benefit.

The most straightforward of these concerns people who have not yet reached the age of majority (18 years). Guardianship of children, whether

[38] In Victoria, the first step in this direction was taken in 1939. The *Public Trustee Act* 1939 (Vic.) entrusted the Public Trustee with responsibility for patients found to be insane under the terms of the *Lunacy Act* (renamed as the *Mental Hygiene Act* in 1943). People found to be lunatics by judicial enquiry remained outside the new framework; however, from 1962 (when the 1959 Act was proclaimed) such people were deemed to be "protected" persons (i.e. governed by the Act) *if* the Public Trustee was appointed as the committee: see fns. 78, 79 infra and ss. 3(1), 34(2) *Public Trustee Act* 1958.

[39] E.g.: *Public Trustee Act* 1958 (Vic.) ss. 53, 54, 66, 67.

[40] *U.N. Declaration of the Rights of Mentally Retarded Persons* op. cit. cl. 5, 6. (emphasis supplied).

[41] Ibid. cl. 2-4. See also Carney, *Report on Law* op. cit. para. 2.8.

[42] "Normalization" is the accepted shorthand term to describe the proposition that handicapped people should, wherever feasible, live and participate in the community on the same footing as any other member of society: G. Dybwad, "Basic Legal Aspects and Provision for Medical, Educational, Social and Vocational Help to the Mentally Retarded" (1972) 2 *Australian Journal of Mental Retardation* 97, 104.

[43] The Victorian government has recognized the pressing need for reform of this area by appointing a working party with wide terms of reference: Minister of Health Working Party to formulate proposals for legislation to deal with the protection of intellectually handicapped persons (28th November 1980-to date).

handicapped or otherwise, is vested with the natural parent.[44] In the event of an inability to discharge these responsibilities the state—through the agency of the Children's Court—may admit a child as a ward of state, the consequence of which is that guardianship rights are transferred to the Director-General of Community Welfare Services.[45] Provision also exists for guardianship to be assumed by a person named in the will of a deceased natural parent, and for a child to be admitted as a ward of the Supreme Court in certain circumstances.[46] Although the incidents of guardianship and custody of children are not free from ambiguity—particularly with regard to parental rights to make important medical decisions on behalf of the teenage child[47]—for all practical purposes the law clothes natural parents of children with a range of decision-making powers which is more than adequate to provide a mandate for most of the decisions which a parent of an intellectually handicapped child might contemplate taking.

The second avenue—that of a power of attorney—is less satisfactory, although recent amendments to Victorian legislation have made this device a trifle more attractive. At common law there has long been a major fetter on the ability of a person to authorize a delegate or nominee to exercise specified powers over their affairs. An adult person wishing to create a valid power of attorney in favour of a designated donee of that power, is obliged to have sufficient understanding of the nature and effect of the powers conveyed to demonstrate that he possesses the requisite legal capacity to execute a valid instrument to that effect.[48] The degree of comprehension required naturally fluctuates according to the complexity of the matters which are the subject of the proposed power, but this "threshold" hurdle was (and remains) a major barrier to the intellectually handicapped adult who might contemplate appointing his own "attorney/guardian".[49]

Until recently there was a second potential obstacle created by the rule that a validly executed power of attorney should lapse when the donor's mental abilities declined to a point below the threshold level of understanding

[44] *Family Law Act* 1975 (Cth.) s. 61(1); H. Gamble, *The Law Relating to Parents and Children* (Sydney, Law Book, 1981) pp. 7-11.

[45] Such applications are, in Victoria, brought principally by members of the Victorian police force or designated officers of the Children's Protection Society (a voluntary agency). A wardship order ("admission to care") might be made only where specified criteria of neglect, abandonment and so forth are satisfied: *Community Welfare Services Act* 1970 (Vic.) ss. 31, 34, 35. The statutory powers of the Director General are contained in sections 36-40 of the Act. A similar, but by no means identical, position applies in the other Australian states: Australia, Law Reform Commission, *Child Welfare* (1981) A.G.P.S. 11-14; 189-234 [Report No. 18, based on the reference to review child welfare laws in the Australian Capital Territory], H. Gamble, *The Law Relating to Parents and Children* op. cit. pp. 113-27.

[46] H. Gamble, *The Law Relating to Parents and Children* op. cit. p. 10.

[47] Ibid. pp. 7-38. Thus in the case of *In re D* the English High Court, in the exercise of the equivalent powers of the State Supreme Courts to admit a child as a ward of the court, intervened to stay the proposed sterilization of an 11 year old Down's Syndrome daughter, despite the consent to the procedure given by her natural mother: *Re D (A Minor; Wardship and Sterilization)* [1976] Fam. 185.

[48] *Gibbon* v. *Wright* (1953) 91 C.L.R. 423.

[49] *Bright Committee "Intellectual Handicaps"* op. cit. 214.

required by the test of legal capacity. This much criticized rule[50] (which defeats the very objective sought to be achieved by a person who anticipates —and plans against the contingency of—subsequent incapacity later in life) has been abolished in Victoria. The *Instruments (Enduring Powers of Attorney) Act* 1981, specifies that an enduring power of attorney (one which conforms to a prescribed form) should not be revoked by subsequent incapacity of the donor.[51] In the light of the continuing obligation that a proposed donor have the requisite legal capacity at the point of execution of the power, these reforms will avail only the person with a very mild degree of intellectual impairment, enabling such a person to plan against the contingency of a subsequent deterioration in his or her mental capacities. The benefit of the reforms will, in practice, accrue principally to the infirm aged, since very few of the intellectually handicapped will successfully negotiate the first hurdle.

The final avenue is that provided by the statutory provisions which carry forward the ancient jurisdiction, first of the Crown and then of special courts, to appoint a guardian of the property or the person of a handicapped individual.[52] In Victoria these provisions are contained in two pieces of legislation, the titles of which are less than apt to describe the statutory home for this branch of the law. The provisions are to be found in the *Public Trustee Act* and associated provisions of the *Mental Health Act.* Despite the unlikely nomenclature, this set of provisions is the only one which is relevant to an assessment of the degree of compliance by Victorian law with the standards for guardianship law as set out in the United Nations Declaration. As mentioned previously, the existing Victorian guardianship law falls well short of meeting that standard.

Deficiencies in the existing law are manifold. They lie in two main areas. First, Victorian legislation as a whole is defective in that it concentrates on property and financial matters to the neglect of social and civil rights. This bias may have been appropriate to the social conditions of the nineteenth century[53] but it is something of an anachronism in this day and age. As one commentator put it, these days "few handicapped persons have any

[50] Ibid.

[51] *Instruments (Enduring Powers of Attorney) Act* 1981 s. 3 [inserting a new s. 114 in the principal Act] Schedule 13. In a more controversial move, the Government determined to accept the majority view of the committee which reported on this matter, and went on to preserve the validity of such a power of attorney even where the person subsequently becomes a "protected person" within the terms of the *Public Trustee Act* (the consequence of which would otherwise be that the Public Trustee would displace the donee of the power of attorney): s. 3 [inserting a new s. 117 in the principal Act]. The Public Trustee's actions are, however, fully authorized up to the point where he is informed of the existence of such an enduring power: s. 117(2); Victoria, *Parliamentary Debates,* Legislative Assembly, 25th November 1981, 3583, 3583-5. The Act came into force in March 1982.

[52] Supra fns. 26-39 and accompanying text.

[53] Until quite recently, the bulk of the intellectually handicapped were housed in large "total-care" institutions. Only the relatively affluent and well to do had financial or other interests which demanded the intervention of legal machinery to conserve and protect those assets in the interests of the long-term welfare of the patient or

fortunes".[54] The United Nations Declaration establishes that what is required now is a law which is biased towards the recognition and protection of the civil and social rights of the handicapped. The Alberta *Dependent Adults Act*,[55] to be discussed below, might serve as one possible model for bringing about this change in emphasis.

The second set of defects in the existing law might be described as structural weaknesses or barriers to access. Many features of the present law and its administration combine to make it an unattractive and unpopular resort within the very client group it is designed to serve. For a lawyer, one of the major structural weaknesses of the provisions of the *Public Trustee Act* is their "all or nothing" quality. As they stand, they do not expressly provide for intermediate situations of "partial" incapacity and they do not permit management of part only of a person's affairs.[56] Partial or limited guardianship should be expressly provided for, as is now the case in South Australia and Western Australia.[57] But in practice, this is by far the least significant of the weaknesses.[58]

The central issue is the way in which the public experiences or perceives the operation of the law. On this score, there is widespread dissatisfaction both locally and overseas.[59] Allen summed up the reasons for this poor image in a short checklist spelling out the major weaknesses of a guardianship model which relies on judicial enquiries and determinations.[60] Although some of these limitations are unique to an adjudicative procedure (such as the high cost of the procedure and lack of access to clinical expertise), most are equally applicable to the local procedures of the Public Trustee. Central to this critique is the contention that the terminology and the procedures employed "create unnecessary stigma for the retarded person in need of help and unnecessary pain for parents seeking to ensure that he will get

the family and dependants of the disabled person. For the mass of poor (and powerless) residents, such intervention was irrelevant.

54 Dr. R. Sterner (from Sweden) quoted in a paper delivered by Mr. Justice Beattie of the New Zeaalnd Supreme Court: Beattie, "Dependent Persons and the Law" (1978) unpublished paper delivered at the annual conference of the Australian Group for the Scientific Study of Mental Deficiency, Broadbeach, Queensland, 3rd September 1978, p. 5. In Victoria, however, the absence of fees for the care of many patients in government facilities, does allow substantial sums to accumulate from pensions (over long periods).

55 *Dependent Adults Act* 1976 (Alberta).

56 T. Carney, "Social Security and Welfare Services for Retarded People . . ." op. cit. 44; *Report on Law*, op. cit. para. 5.1.

57 Ibid.; *Aged and Infirm Persons Property Act* 1950 (S.A.); *Mental Health Act* 1981 (W.A.) s. 78(6). [The Act has not yet been proclaimed].

58 The Public Trustee has claimed that flexible arrangements could be accommodated within the framework of the existing statutory provisions: V.C.O.S.S., *Money Protection and Rights*, op. cit. 35.

59 *Money Protection and Rights*, op. cit. passim; C. W. Murdock, "Civil Rights of the Mentally Retarded . . ." op. cit. 6-14; R. J. Hodgson, "Guardianship of Mentally Retarded Persons . . ." op. cit. 410-24.

60 R. Allen, *Legal Rights of the Disabled and Disadvantaged* (1969) U.S. Gov. Pr. Office 23.

it."[61] The imprecision of the terminology, the cumbersome nature of the procedures, the inadequate provisions for legal representation and review, and the lack of "individuation" of orders (an inability to tailor the order to the particular needs of the disabled person) were the other features singled out for criticism.[62] Each of these is pertinent to an evaluation of the Victorian law.

4. The Public Trustee Act

Under the existing Victorian provisions, an intellectually handicapped person receives a form of guardianship whenever his affairs are brought under the control of the Public Trustee. This may occur in one of three ways.[63] A person entering under the involuntary admission procedures of the *Mental Health Act* automatically has his affairs managed by the Public Trustee.[64] Voluntary patients, on the other hand, may elect to become "protected persons" and thereby transfer their affairs to the Public Trustee[65] —they do not pass automatically.[66] Once transferred, the authority may, in this case, be revoked by the person concerned.[67] By virtue of a 1981 amendment, the authority lapses upon discharge from the institution.[68] An increasing proportion, however, are brought within the jurisdiction of the Public Trustee by a third route.[69] This is by way of the provisions for "infirm persons". Intellectually handicapped people, whether living in the community or residing in an institution (otherwise than as a "patient" for the purposes of the *Mental Health Act*), may apply to become protected persons and thus have their affairs handled by the Public Trustee if "by reason of mental infirmity" they are "incapable of managing their affairs".[70]

61 Ibid. 23.
62 Ibid.
63 See generally, T. Carney, "Social Security and Welfare Services for Retarded People" op. cit. 43-5.
64 *Public Trustee Act* 1958 (Vic.) ss. 3(iii) & (iv) ("protected person"; "patient"), 49. Cf. *Mental Health Act* 1981 (W.A.) s. 76(1).
65 S. 48A. In late 1981 the Act was amended to permit the Public Trustee to decline to accept such an authority, provided a Supreme Court judge endorses that course: s. 48A(1A) [inserted by s. 10(1) *Public Trustee (Amendment) Act* 1981 (Vic.)].
66 *Mental Health Act* 1959 (Vic.) s. 41(8).
67 *Public Trustee Act* 1958 (Vic.) s. 48A(3).
68 S. 48A(3) as amended by s.10(1)(b) *Public Trustee (Amendment) Act* 1981 (Vic.). The provision governs all discharges following the coming into force of the amendment, irrespective of the date on which they became protected persons: *Public Trustee (Amendment) Act* 1981 (Vic.) s. 10(2) [transitional provision].
69 *Money Protection and Rights*, op. cit. 39. This is because many intellectually handicapped persons are not "patients" within the terms of the *Mental Health Act*, infra fn. 72 and accompanying text.
70 *Public Trustee Act* 1958 (Vic.) s. 28(1). Two medical practitioners must examine the person and certify that he is infirm. But infirmity is not precisely defined and there is no requirement that the medical practitioners have any specialized knowledge of infirmity: s. 28(2); *Money Protection and Rights*, op. cit. 3. The major protection is provided by the requirement that the Public Trustee be satisfied by the information contained in those certificates: s. 28(1). The Public Trustee aparently seeks "further and better particulars" in about 13 per cent of cases: informal interview 8 April 1981. A second protection is that the Public Trustee act within 21 "clear days" (prior to 1981 14 days) of the examination on which the certificates are based: s. 28(2) [as amended].

The central objective of these provisions is to conserve and protect the property and financial affairs of vulnerable people. On this score, the legislation has no doubt had a measure of success, judging from the number of people governed by these provisions. Over the last decade in Victoria, the number of "protected persons" (that is, the aggregate number of people coming within the jurisdiction of the Public Trustee by all three routes outlined) has fluctuated between a low of 5,914 (in 1973) and a maximum of 7,213 (in 1969).[71] During this period, the major variations have been in the proportionate contributions made by each gateway. The proportionate contribution by voluntary patients electing to bring their affairs under control has remained fairly constant at around 12-14 per cent of the total. By contrast, the share held by the involuntary (or recommended) patients has dropped from a high of 79 per cent in 1969 to 47 per cent in 1980. The slack has been taken up by the "infirm person" category, which has risen from nine per cent of the total in 1969 to 39 per cent by June 1980.[72] Within the infirm person group, "mental infirmity" is by far the most prominent of the five statutory grounds available to support that order. Thus, in the 1979-80 financial year, this was the principal factor specified in *both* of the required two certificates in 59.5 per cent of cases.[73] The next most popular of the five infirmity grounds—that of "senility"—accounted for only 14.5 per cent.[74]

Guardianship is, however, not exclusively a matter of conserving and protecting property interests. Nor is guardianship the exclusive preserve of public officials such as the Public Trustee. From the origins of this jurisdiction in the thirteenth century,[75] down to the present day, the law has recognized that guardians may be appointed of the person as well as (or in lieu of) the estate. And it has always been recognized that guardianship of intellectually handicapped people might be delegated to private citizens (called a "committee").[76] The present Victorian legislation contains

[71] Figures supplied by the Public Trustee for the period June 1969-March 1981.

[72] Calculations derived from data supplied by the Public Trustee.

[73] Indeed, if account is taken of *all* cases where one certificate mentions mental infirmity as a factor, then the total of cases where infirmity is a factor, rises to 67 per cent.

[74] The stigma associated with the senility ground no doubt artificially depresses this figure.

[75] R. Neugebauer, "Treatment of the Mentally Ill in Medieval and Early Modern England . . ." op. cit. 162.

[76] Ibid. The power to appoint a committee was recently exercised by Gobbo J. in order to protect the position of an elderly, infirm resident of a private, non government home for the aged (the Montefiore Home). By the time of the appointment the person subject to the order had, since this was then thought to be a necessary pre-condition to the jurisdiction to appoint a committee of the *person*, been admitted as a patient within the terms of the *Mental Health Act* 1959 (Vic.) and had been released from Kew Mental Hospital (a government institution) on "trial leave" (which does not affect the status of the person as a patient). Gobbo J. appointed the superintendent of Kew as the "committee" (pursuant to section 39(a)) on the basis that it was proper to select the person already entrusted with responsibility for the "medical care and welfare" of patients pursuant to section 15(2) *Mental Health Act* 1959 (Vic.). The choice of the superintendent is perhaps

extensive provisions which maintain (and regulate) that traditional jurisdiction to appoint a private committee of the person (or estate).

Thus, the Act preserves the common law power to appoint a guardian or committee and enables the Public Trustee to be so appointed.[77] The Supreme Court also has an extensive statutory mandate to appoint a committee (whether of the person, the estate, or both). This jurisdiction extends to any person who is thought to be "mentally ill" or "intellectually defective" within the terms of the *Mental Health Act*. It may be invoked by a petition from the Public Trustee or any other person. Should the court be satisfied (as a result of a judicial enquiry) that the person is incapable of managing his affairs, it may declare him to be a "lunatic" and may appoint a committee of the person (or the estate).[78] Similar machinery is available in the case of people who have *already* become "patients" or "infirm persons". Either the Public Trustee or a relative of the person may apply to the Court, but in this instance the private committee might be appointed without the need for special enquiries.[79] So far as a committee of the estate is concerned, there is a statutory bias in favour of appointing the Public Trustee as the committee. No similar presumption applies in the case of a committee of the person.[80]

Personal guardianship provisions have, however, fallen out of favour in Victoria. Despite the rather elaborate statutory framework which remains in place to regulate the appointment and the supervision of the exercise of responsibilities by committees of the person, they are now (and have long been) a dead letter.[81] The failure of interested parties to avail themselves

understandable in this instance (where the patient's son wished to remove her from the aged persons home and locate her in a domestic environment for which she was unsuited) but it creates a bad precedent by undercutting the important principle that the committee should be a person without any responsibilities for service delivery: *Wise* v. *Rosenbaum and Public Trustee* [1981] V.R. 765, 774 (Gobbo J.) Gobbo J. is, however, not alone. The Western Australian *Mental Health Act* 1981 [as yet unproclaimed] mandates a similar, unsatisfactory, result: s. 3(2)(a). The Act has since been amended to enable a committee of the *person* of an infirm person, to be appointed without the need for the individual to be obliged to jump though the additional hoop of becoming a "patient": see now *Public Trustee Act* 1958 (Vic.) s. 39(a) [as amended by s. 7 *Public Trustee (Amendment) Act* 1981 (Vic.)]. See also *M* v. *M* [1981] 2 N.S.W.R. 334 where Helsham C.J. ruled, in what he described as a "test case", that a committee should not be appointed if the "protected person" is already receiving "proper care and attention" from an appropriate statutory agency or individual. The judgment appears to assume that the role and the duties of a committee do not extend beyond "domestic" responsibilities for the accommodation, personal care and so forth of the person concerned. On this view the venerable jurisdiction to appoint a committee would be incapable of being called in aid to provide a "common law" solution to the needs of intellectually handicapped people for social and civil guardianship.

[77] *Public Trustee Act* 1958 (Vic.) s. 8(1).
[78] Ss. 32(1), 33, 34(2), 35.
[79] S. 39. The precursor of this provision was s. 95 of *An Act for the Regulation of the Care and Treatment of Lunatics* 1845 (U.K.). Doubts concerning the power to appoint a committee of the person, have now been resolved: supra fn. 76.
[80] S. 45; cf. *Mental Health Act* 1981 (W.A.) s. 3(3).
[81] *Rosenbaum* (supra fn. 76) was the last successful exercise of the statutory power to appoint a committee in respect of a person *already* found to be mentally ill or

of this statutory procedure for the appointment of committees of the person testifies to the grave inadequacies of this aspect of the legislation. There is an overwhelming case for review and reform of this branch of the Act. But the case for reform is not confined to the personal guardianship provisions. Despite their utility for the 7,000 or so Victorians whose property and financial affairs are regulated by the Public Trustee, the "property" provisions are not immune from criticism.

Assessments of the operation of the property provisions have been highly critical of their lack of flexibility; their "accountancy" flavour (which displaces a welfare mandate); and the lack of attention to the review and the discharge of orders.[82] Criticism has also been levelled at their failure to address the question of the recognition and protection of manifold civil or social rights; the inability to tailor orders to particular individual needs; and, finally, at the absence of any presumption that rights remain vested with the disabled person unless and until it can be shown that his welfare requires that this particular responsibility be assumed by some other person or body.[83] In short, the Act provides only a rather inflexible protection of property and financial affairs. Guardianship of the civil rights of the disabled person, and notions of social advocacy, are entirely outside the framework of the legislation.

Clearly, the Victorian legislation falls well short of the standards embodied in the United Nations Declaration. It fails to protect the "personal well being and interests" of disabled persons and it does not provide the required "protection from exploitation".[84] Nor does it establish decision-making procedures which could be regarded as satisfying the requirement that the

> "procedure used for . . . restriction or denial of rights . . . contain proper legal safeguards . . . [and be] based on an evaluation of the social capability of the mentally retarded person by qualified experts . . . subject to periodic review and to the right of appeal".[85]

infirm (s. 39). An earlier case was heard before Master Brett in 1977, but it was later struck out: information supplied by the Master of the Supreme Court 24th April 1981. The power to hold judicial enquiries in respect of people allegedly mentally ill or intellectually defective (i.e. the "lunacy" provisions in ss. 32-8) and to appoint a committee, has also been exercised infrequently. The last three cases were in 1973, 1972 and 1942—an average of one per decade: information supplied by the Public Trustee 24th April 1981 (files M.8427, M.9020). In each case, the Public Trustee was appointed as a committee of the estate alone; the application before Master Brett also involved only property matters.

82 An infirm person's order may be discharged within three months, on an application by the person affected or his next of kin. But thereafter a certificate from a medical practitioner and the approval of the Public Trustee is required: s. 29; *Money Protection and Rights*, op. cit. 4. Similar criticisms were levelled at the legislation governing the operation of the Public Trustee in South Australia: *Bright Committee: "Intellectual Handicaps"* op. cit. 191.

83 A presumption against detracting from the rights of disabled people other than in accordance with legal safeguards and based on expert assessments of social capacity was written in as the final clause of the U.N. Declaration: *U.N. Declaration on the Rights of Mentally Retarded Persons*, op. cit. cl. 7.

84 Ibid. cl. 5 and 6 respectively.

85 Ibid. cl. 7. The European Court of Human Rights has ruled that provisions of the

## 5. North American Models

Spurred on by academic commentaries, enquiries, and (later) by the adoption of the principles of the United Nations Declaration, several North American jurisdictions enacted new legislation which was designed to avoid some of the problems evident in the Victorian law. The early reform measures introduced in some of the states in America have been nicely documented by Hodgson.[86] He identifies Minnesota as leading the way in the early part of the century through the establishment in 1917 of public guardianship mechanisms. Later, in 1967, this state broke new ground by severing the link between incompetency and guardianship. This nexus was destroyed by a provision expressly declaring that guardianship should not of itself affect civil rights such as the right to vote, drive a car, or enter into a valid contract, and should not be equated with a judicial finding of total incompetence.[87] The breaking of this nexus is one important element of any viable reform proposal.

Other innovatory measures were introduced in the reform legislation carried by other states. None of the states managed to enact a convincing or comprehensive reform package, but some of these isolated features proved to be worthwhile. They were eventually incorporated in the more carefully crafted reforms ultimately enacted in Alberta and elsewhere.

In an attempt to ensure that people in need of protection were not denied access to the law, several states broadened the standing requirements so that interested third parties, friends and public officials might all be permitted to apply for guardians to be appointed.[88] Another key element to be pioneered in some of the early American state legislation was the separation of guardianship responsibilities from other service delivery functions. To boost confidence in the integrity and impartiality of guardianship some jurisdictions established autonomous agencies divorced from service delivery responsibilities.[89]

The role of the guardian also began to undergo a transformation. Responsibilities were placed on guardians to assist in arranging housing, education, cultural and recreational activities and in dealing with financial matters.[90] Lest the powers of guardians become overly paternalistic or

Netherlands legislation which automatically deprived a mentally ill person of his rights to administer his property, constituted a violation of Article 6(1) of the European Convention on Human Rights: *Winterwerp* v. *The Netherlands* (1979) 2 E.H.R.R. 387, 414. The substance of Article 6(1) of the European Convention duplicates that of clause 7 of the U.N. Declaration. But for the fact that the Human Rights Commission lacks jurisdiction over state laws (and lacks enforcement machinery) it would be conceivable that a provision such as s. 49 of the Victorian *Public Trustee Act* would likewise be struck down: see fn. 11, 64 and accompanying text, supra.

86 R. J. Hodgson, "Guardianship of Mentally Retarded Persons . . ." op. cit. 410-23.
87 Ibid. 411.
88 Ibid. 412 (Washington), 416 (Maine), 418 (Ohio).
89 Ibid. 413-14 (California), 416 (Maine). See also fn. 186 infra.
90 Ibid. 414 (California, draft), 420 (Colorado).

oppressive, some jurisdictions took steps to require personal guardianship plans to be prepared in each case, particularizing the rights to be retained by the handicapped person and detailing those to be transferred to the guardian.[91] Some states also placed the emphasis squarely on the *needs* of the people concerned, irrespective of the "diagnostic category" arguably responsible for generating or explaining those needs. Thus categorical definitions of eligibility (such as "intellectual defective", "retarded") were replaced with generic definitions encompassing functional disabilities irrespective of cause.[92] Eligibility by "label" was replaced by the criterion of "need" standing alone. Tentative moves, abortive at the time, were taken by one jurisdiction to introduce an outreach or advocacy role into the charter of responsibilities of the guardian.[93]

More limited measures were also pioneered. These included guardianship for adults left in limbo following the expiration of the equivalent of Victoria's state wardship for children[94] (the precursor of the New South Wales guardianship reviews)[95] or following the death of the last surviving relative.[96] Co-guardianship (between the citizen and the state) was also mooted.[97] Other refinements are of much more recent origin. They have followed, rather than anticipated, the more comprehensive measures.

6. Alberta

The disparate threads of the early American legislation were finally drawn together in legislation enacted by one of the constituent provinces of the Canadian federation. The Alberta legislation is worthy of mention for two reasons. First, because of its innovative character and secondly, because it has been enacted by a jurisdiction with a very similar historical, constitutional and social structure to that of Victoria. Unlike some of the United States models, it ranks as a sister jurisdiction, the experience of which cannot lightly be put to one side. The Alberta *Dependent Adults Act* was enacted late in 1976 and ultimately came into force in 1978.[98] The Act purports to provide Albertans with a

> "new legal means to provide support and protection to those . . . whose disabilities put them in danger of being abused, neglected or victimized. [It] allows dependent adults the freedom to function independently where

91 Ibid. 414 (California "consultation model"), 415 (California), 416 (Maine), 418 (Ohio "review model").
92 Ibid. 417 (Ohio).
93 Ibid. 421 (Saskatchewan draft).
94 Ibid. 412-13 (New Jersey).
95 *Child Welfare Act* 1939 (N.S.W.) Part IX ss. 43A-431 (introducing the Intellectually Handicapped Persons Review Tribunal). See further, T. Carney, "Social Security and Welfare Services for Retarded People" op. cit. 28. These provisions were replaced, and the ambit of the law broadened, by the *Community Welfare Act* 1982 (N.S.W.) Part XI.
96 R. J. Hodgson, "Guardianship of Mentally Retarded Persons" op. cit. 413 (California).
97 Ibid. 412 (Washington).
98 *Dependent Adults Act* 1976 (Alberta) c. 63 1976.

they have the ability, encourages them to develop skills for self-management, and provides guardianship in those areas where they are unable to function themselves".[99]

The legislation seeks to discharge this ambitious mandate by way of court appointed "plenary" or "partial" guardians.[100] Provision is made for applications for guardianship to be made by any "interested person" over the age of 18 years.[101] An interested person is broadly defined. It includes both the Public Trustee (a role similar to that in Victoria), the Public Guardian (the new statutory office created to administer this legislation) and "any other [adult] concerned for the welfare" of the person in question.[102] The target group intended to be benefited by the legislation is also broadly defined. And the legislation selects language which focuses on generic description of functional need. Categorization by reference to the causal origins of that need has been rejected. An inability to care for himself on the part of an individual, or an inability to make reasonable judgments in respect of all or some of the "matters relating to his person" will suffice.[103] The category of potential guardians is also generously defined. Adult members of the family, relatives or friends, and interested third parties, may all be considered as eligible for appointment.[104] In default, the Public Guardian shall be appointed.[105]

Consistent with the dictates of the United Nations Declaration, the Alberta legislation emphasizes civil and social rights, provides for elaborate procedural protections (including a presumption in favour of the disabled person retaining each and every particular power unless good cause for transfer of it to the guardian can be shown by expert evidence) and it insists that orders be "tailor made". The Act isolates critical elements of social functioning and insists that these be canvassed in the enquiry and be specifically dealt with in the order. Matters listed for possible delegation to the guardian include place of residence, choice of fellow residents, participation in social activities, employment, educational and vocational training, applications for licences or permits, health care, and day-to-day decisions in matters such as diet and dress.[106]

[99] Alberta, Social Services and Community Health, Office of the Public Guardian, "Guardianship and the Dependent Adult" (1978) departmental information pamphlet.

[100] *Dependent Adults Act* 1976 (Alberta) ss. 9 (the authority of a plenary guardian), 10 (the powers of a partial guardian).

[101] S. 2(1).

[102] S. 1(i) (definition).

[103] S. 6(1).

[104] Ss. 1(f), 7. The main criteria to be satisfied in order to be eligible is that the court be satisfied that the person to be appointed will act in the best interests of the dependent adult, that their interests not conflict, and that the guardian be "suitable" to act: s. 7(1)(a)-(c).

[105] S. 13.

[106] Ss. 9 (plenary guardian) 10 (partial guardian). These provisions are, however, open to criticism; see fn. 190 infra.

The court is directed not to make any order whatsoever, unless that order would be in the best interests of the individual concerned,[107] Furthermore, the court may not make a plenary guardianship order (which automatically carries authority over *all* the areas of social activity listed)[108] unless it is convinced that a "partial" order will not suffice.[109] Partial orders require that the court particularize which restrictions or powers are to be invested in the guardian.[110] And the court is directed to invest only those powers or authorities "as may be necessary for [the guardian] to care for or assist in caring [and] to make or assist in making reasonable judgments [in social or personal matters]".[111] Finally, the legislation issues a directive to the guardian himself. It insists that the powers and authorities be exercised only in a manner consistent with the promotion of the best interests of the dependent adult and

> "in such a way as to encourage the dependent adult to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person".[112]

These provisions are coupled with very extensive guarantees of procedural fairness. A detailed report/certificate from a medical practitioner or psychologist must accompany all applications for guardianship;[113] and notice of the application must be served on relatives, the person subject to the application and various other public officials, not less than 10 days before the hearing.[114] Those parties may appear and may make representations at the hearing,[115] and the court must be satisfied that the best interests of the person will be advanced by making the order. Consistent with that obligation, the hearing may be adjourned while a comprehensive, court-ordered report is obtained.[116] Finally, it is specified that guardianship orders must be brought back for judicial review at least once every two years.[117]

## 7. Taking stock: the Australian position

By comparison with the Victorian provisions, the Alberta legislation appears almost utopian. Nor would a comparison with other Australian

[107] S. 6(2). The "best interests" standard is rather too vacuous to serve as a sufficient guideline: infra fn. 192.
[108] See s. 9(1). The court may, however, impose "conditions or restrictions as it considers necessary": s. 9(2).
[109] S. 6(3).
[110] S. 10(2).
[111] S. 10(1). See also fn. 191 and accompanying text infra.
[112] S. 11(a) & (b) respectively.
[113] S. 2(2). This requirement may properly be criticized for placing an undue cost burden on the applicant, and for overemphasizing medical perspectives: cf. cl. 4 Draft *Guardianship Act* 1981 (Saskatchewan) [appended to the Law Reform Commission report cited in fn. 186 infra].
[114] S. 3(2).
[115] S. 5.
[116] S. 4(2).
[117] S. 8. See also Division 4 (provisons regulating conduct of review and procedures for variation or discharge of the order).

jurisdictions be significantly less flattering. Only three states—New South Wales, Tasmania and South Australia—improve on the Victorian position and only the latter has made a reasonable fist of it. New South Wales has to date made only very limited provision.[118] It presently caters only to the needs of a small group of former state wards who require some machinery to keep their status under periodic scrutiny and review once they attain the age of majority.[119] The Guardianship Board established in Tasmania by the *Mental Health Act* 1963, constituted a step forward in that state, but this legislation was designed to cater only for the needs of people who would otherwise qualify as a "patient" under that Act.[120]

The newly established Guardianship Board created by the South Australian *Mental Health Act* 1976 by contrast has a much wider, and more flexible charter. Although the contributions to the parliamentary debate on the legislation concentrated on the needs of that group of intellectually handicapped people liable to be admitted as in-patients in accordance with the provisions of the *Mental Health Act*, the terms of the legislation itself allow the Board to cater to the much more extensive group of people living in the general community.[121] The legislation enables a person to be received into guardianship if he is *inter alia* mentally handicapped and, as a consequence of that handicap, either incapable of managing his affairs or in need of supervision, care or control in the interests of his own health or safety or for the protection of others.[122] Applications may be entertained from the person concerned, his relatives, members of the public with a genuine interest in the person and public officials such as the police or the Public Trustee.[123]

The Board has two main courses of action open to it. First it is empowered to admit a person to guardianship. If guardianship is appropriate, the Board acquires the power to order that the person concerned be placed in the care of an appropriate relative (or other person), to require that treatment be provided and undertaken, and to exercise other powers normally entrusted to a guardian.[124] Alternatively the Board may appoint an Administrator of the property of the person concerned.[125] That order may be made independently of, or in conjunction with, a guardianship order.[126] Orders made by the Board must be periodically reviewed by the Board itself[127] and may be

[118] The Anti-Discrimination Board recently made wide ranging recommendations for reform of the law in this area: N.S.W., *Discrimination and Intellectual Handicap* (December 1981) [a report of the N.S.W. Anti-Discrimination Board].
[119] Supra fn. 95.
[120] *Mental Health Act* 1963 (Tas.) ss. 8, 22.
[121] South Australia, *Parliamentary Debates*, House of Assembly, 14th October 1976, 1566-67, 1569 (Mr. Payne, Minister of Community Welfare). *Mental Health Act* 1977 (S.A.) ss. 20-4, 27.
[122] *Mental Health Act* 1977 (S.A.) s. 26(1)(b).
[123] S. 26(2).
[124] S. 27(1).
[125] S. 28.
[126] S. 28(1).
[127] S. 27(3).

the subject of an appeal to the Mental Health Review Tribunal.[128] The Tribunal is also obliged to conduct regular reviews of all custody orders made by the Board.[129]

The statistics and reports on the operation of the Board—the most recent of which cover the year ended June 1981—disclose something of the practical impact of the new Act. In the 12 months to June 1981 a total of 346 applications were received by the Board; a figure which continues to exceed the original projections of an annual case load of about half that number.[130] These applications were drawn in roughly equal proportions from institutional sources (hospitals and so forth) and the community at large.[131] Nearly three quarters (72 per cent) of those applications resulted in an order being made by the Board.[132] The bulk of those orders (61 per cent in total) were made in respect of the people with a "mental handicap" (41 per cent) or "mental retardation" (20 per cent).[133] During this period 131 guardianship orders were made and 141 orders were made for the appointment of an Administrator (in over 90 per cent of these cases the Public Trustee was selected). Apart from 27 cases where a combined guardianship/administrator order was made, the administrator was appointed without the making of an associated guardianship order. Thus guardianship was thought appropriate in over 60 per cent of the cases where orders were made.

In view of the (commendably) broad jurisdiction of the South Australian Board, it is not at all easy to draw conclusions from these figures. The definition of mental handicap is broad enough to catch people with senile dementia, brain damage from accident trauma or alcoholism, as well as the intellectually handicapped. The most reliable statistic for judging the utility of the legislation for intellectually handicapped people would therefore be the figure for "mental retardation".[134] If the distribution in types of orders made by the Board does not differ between categories, it may be estimated that 30 intellectually handicapped people were admitted to the guardianship of the Board in the 12 months to June 1981. This is a minimum figure. Some of the people classified as "mentally handicapped" might be intellec-

[128] S. 37(1).

[129] S. 35(1). The first review must be conducted within two months and, unless the Tribunal is of the view that the condition will not improve, thereafter at six monthly intervals.

[130] Statistics supplied by the Secretary of the Board, December 1981. The 1981 statistic compares with a figure of 360 applications received in the first full year of operation between October 1979 and September 1980.

[131] *Report of the Guardianship Board to the Director of Mental Health Services 1979-1980*, 3.

[132] By contrast only 56 per cent of applications resulted in an order being made during the period October 1979-September 1980.

[133] Corresponding figures for the first full year of operation disclosed that only 38 per cent of orders related to the intellectually handicapped. The discrepancy is in large part attributable to the decision to reclassify senile dementia as a "handicap" rather than an illness: information supplied by the Secretary of the Board.

[134] Supra fn. 133 and accompanying text. The category of "mental retardation" accounted for 51 orders in the period ending June 1981.

tually handicapped rather than infirm aged or accident victims; and a higher proportion of the intellectually handicapped might be the recipients of guardianship (rather than other types of orders).

At this stage the most accurate conclusion to draw is that the South Australian legislation is dealing with a modest, but not inconsequential, number of intellectually handicapped people each year. In part this modest result may be due to the fact that in South Australian the Board itself becomes the guardian and then issues directions and so forth which clothe agencies or individuals with authority to act in accordance with that mandate. Unlike the body proposed for Victoria (or its much narrower Tasmanian counterpart) the Board cannot delegate guardianship to others.[135]

## 8. Taking Stock: Empirical Evaluations

Law reform plainly cannot be conducted as an abstract formal exercise. The prospect of a possible divergence between the law on the statute book and the practical implementation of those provisions must always be borne in mind. The question must therefore be posed as to whether the reform models work in practice. One must always look behind the formal statement of the law to examine the reality of its implementation. Empirical studies of the operation of the law serve to provide an important counterpoint to legal analysis. The available journal literature does not disclose much by way of hard evidence on the workings of the new legislation. However, the small number of empirical studies which are accessible all seem to provide good grounds for caution. That evidence suggests that something more is required than merely the enactment of a superficially attractive model statute.

The first of these "straws in the wind" was a study of the Minnesota legislation reported by Levy in 1965.[136] This survey is particularly interesting because it was generally accepted at the time that this jurisdiction was several decades in advance of other states.[137] Levy found a considerable discrepancy between the legislative intent of the Minnesota guardianship programme and its practical administration. Local pressures to admit substantial numbers to guardianship, financial advantages to local administrators consequent on guardianship, and guardianships entered into as a side-wind of institutionalization, all proved to be more powerful influences than were the policy directives set by the legislation and its central administrative agency.[138] In short, the desirable legislative policies of selective resort to guardianship and of breaking the nexus linking provision of advocacy or assistance with guardianship, were thwarted in practice by external pressures.

The second study is even more telling. A recently reported study of the implementation of the 1978 North Carolina legislation found that, despite

135 *Bright Committee "Intellectual Handicaps"* op. cit. 188-9.
136 R. J. Levy, "Protecting the Mentally Retarded . . ." (1965) 49 *Minnesota Law Review*, 821.
137 R. J. Hodgson, "Guardianship of Mentally Retarded Persons . . ." op. cit. 411.
138 R. J. Levy, "Protecting the Mentally Retarded . . ." op. cit.

its progressive features, use was only very rarely made of it. Mesibov *et al.* report that in a state with an estimated 100,000 developmentally disabled adults, less than ten people took advantage of the new limited guardianship provisions in the first 13 months following its commencement.[139] Detailed interviews were conducted with disabled people, their parents and others with day-to-day contact with, or responsibility for, disabled people and with those people charged with the administration of the new law at the local level. These interviews enabled the authors of the study to suggest some of the reasons behind this catastrophic failure—a failure, it should be added, which is alluded to in other jurisdictions as well.[140]

The picture built up by the evidence collected from these interviews is a depressingly familiar one. Knowledge of the law was minimal: not even the clerks of court responsible for administering it could grasp the concept of partial incapacity and they perceived the law to be impractical.[141] There were also major attitudinal barriers to its acceptance.[142] The survey established that handicapped people had deeply felt needs for assistance in areas such as the location of accommodation, employment and interpersonal relationships.[143] So there was no question that the legislative intent of limited guardianship laws was well founded. Those good intentions were however frustrated in practice by the attitudes of other relevant parties. According to the evidence presented in this study, the fears and misconceptions of parents constituted a major impediment to implementation.

Parents were reluctant to use the law on two counts. First, because it required "formal legal recognition that their child is incompetent" and second, because the parents would, once appointed as guardians, become accountable to the relevant Department responsible for monitoring their activities.[144] Finally, the study found that the negligible impact of the law was in part due to the generous *locus standi* provisions, allowing virtually anyone to seek an order. Paradoxically, this generous "open access" provision contributed to the failure of the law. It allowed each group to leave it to the other to take responsibility for mobilizing the law.[145] Rather than facilitating access, it impeded access. By failing to sheet home to a

139 G. B. Mesibov, B. S. Conover, W. G. Saur, "Limited Guardianship Laws and Developmentally Disabled Adults: needs and obstacles" (1980) 18 *Mental Retardation* 221, 221.

140 The authors report that inquiries in jurisdictions with analogous legislation, such as Texas and Illinois, disclosed a similar picture: ibid. 221. Other writers also point to similar problems: R. J. Hodgson, "Guardianship of Mentally Retarded Persons . . ." op. cit. 413 (New Jersey), 416 (California). See also: Comment, "Limited Guardianship: Survey of Implementation Considerations" (1980) 15 *Real Property, Probate and Trust Journal* 544, 544 n. 2 [citing a 1979 A.B.A. survey reporting on the limited public awareness of such laws].

141 G. B. Mesibov, et al. "Limited Guardianship Laws and Developmentally Disabled Adults" op. cit. 225.

142 Ibid. 224.

143 Ibid. 223.

144 Ibid. 224, 225.

145 Loc. cit.

defined group or body the responsibility to take the initiative of seeking an order, it allowed everyone to escape that responsibility.

The lesson to be drawn from this experience is clear. Not only must the law be framed in a way which gives effect to the laudable objectives of the United Nations Declaration[146] but it must also be designed with an eye to the practical issues which will affect its implementation. A soundly based law will anticipate the forces likely to cause divergence between the formal aims and objectives of the law and its practical impact. In this branch of the law relating to the handicapped, the Alberta legislation[147] provides the elements of the formal proposition which might, with advantage, be enacted in Victoria. What is required is the complementary strategy to ensure that such new laws operate to achieve the desired effect when put into operation. We cannot afford to duplicate the 0.01 per cent penetration achieved by the North Carolina legislation.[148] Proposals canvassed in the discussion paper issued by the Victorian Ministerial working party[149] go some distance towards achieving this objective, but the alchemy of the potion could be further improved.

## VICTORIAN GUARDIANSHIP: INDIGENOUS OR IMPORTED PRODUCT?

### 1. Ends and Means

One of the more commendable features of the Victorian discussion paper is the attention devoted to establishing the basic objectives and guiding principles to which the proposed guardianship reforms should conform. The six principles isolated by the report[150] can be reduced to two main concerns.

The first concern is to enhance the rights of intellectually handicapped people to participate in society with individuality and dignity. This is embodied in the principle of the "least restrictive alternative", which the committee views as a bulwark against well meaning but over-protective legislation or the tendency to assume general incompetence from evidence of incapacity in a narrow (and often complex) area of personal decision. It is also encapsulated in the related "presumption of competence", which the committee envisages serving to protect each and every element of the bundle of normal life decisions from being unnecessarily taken out of the control of the individual by virtue of a guardianship (or partial guardianship)

146 *U.N. Declaration on the Rights of Mentally Retarded Persons*, op. cit.
147 *Dependent Adults Act* 1976 (Alberta).
148 Supra fn. 139 and accompanying text.
149 *The Protection of Intellectually Handicapped Persons and the Preservation of Their Rights: a discussion paper* (October 1981) Health Commission of Victoria [a report prepared by a Ministerial working party; hereafter cited as *Victorian Discussion Paper*]. Guardianship was also reviewed by the Victorian enquiry into Mental Health legislation: Victoria, *Report of Consultative Council on Review of Mental Health Legislation* (December 1981) [hereafter cited as: *Consultative Council Report on Mental Health*].
150 Ibid. 7-10.

order.[151] These twin principles serve to protect the civil rights of citizenship of the intellectually handicapped person against benevolent—but nonetheless cloying—state paternalism, and also dictate that guardianship orders be "tailor-made" to the individual assets and liabilities of the person concerned. In short that guardianship be parsimonious, flexible and individual.

The second concern is to devise institutions and procedures which are widely accessible, yet fair and accurate in the decisions reached. This concern was translated as a requirement for a "visible and highly accessible" service[152] where decisions are taken in conformity to the requirements of a "fair hearing".[153] Cognizant of the failures of some overseas reforms, the report is at pains to eliminate economic or psychological barriers to access and to give the guardianship process an active central focus akin to that accorded to the work of consumer protection or anti-discrimination bodies. Accessible, low-key "coffee table" justice has therefore been preferred to judicial forms of decision-making;[154] and (guarded) preference is expressed for guardianship legislation which eschews labels and offers its services to everyone—whether aged, accident victim or the intellectually handicapped —provided they can demonstrate that they are in need of guardianship.[155]

The committee has, however, recognized the danger that the head-long rush to foster participation by the public and to fashion a system which is highly accessible may result in processes which jettison the entitlement to a fair hearing or to accurate and responsible decisions. Sensibly the report has not responded to these proper concerns by insisting on the injection of standard judicial or administrative decision-making procedures. Instead the report has sought to identify the ultimate objectives served by procedural protections. The report contends that the objective should be to allow for interested parties to participate in the process, to ensure that facts are accurately established and taken into account in decisions, and to win public confidence in the probity of the procedure and in the resultant decisions.[156] Based on this premise the report went on to insist that the protection and monitoring of rights (including that of guardianship) be strictly segregated from responsibilities for service provision or delivery. Separate structures were proposed for the two functions.[157] Various innovative adjudicative and fact-finding procedures are also recommended

151 Ibid. 7-8, paras. 6.1, 6.3.
152 Ibid. 9, para. 6.5.
153 Ibid. 8, para. 6.2.
154 Ibid. 18, para. 7.6.1.
155 Ibid. 9, para. 6.6. The committee was however constrained by its terms of reference (which restricted its deliberations to the needs of the intellectually handicapped) and, reluctantly, proposed that an unholy amalgam be struck and that guardianship services be confined to people able to demonstrate both need and membership of the "retardation" category. The Mental Health enquiry faced similar constraints, but also expressed guarded support for a generic approach: *Consultative Council Report on Mental Health* op. cit. 67, 70, paras. 6.14, 6.18.
156 Ibid. 8, para. 6.2.
157 Ibid. 9, para. 6.4.

—notably the proposal that decisions on guardianship be taken by a body adopting outreach (or "semi-inquisitorial") fact-finding procedures,[158] and that orders be periodically reviewed without the need for any application to be made to that effect.[159]

2. The Main Features of the Reform Measures

The details of the reform measures advanced in the discussion paper fall short of full compliance with the two main concerns which underlie the six guiding principles articulated by the committee, but the basic structure of the scheme is sound. The essence of the scheme proposed by the committee can be found in the Alberta and South Australian legislation discussed earlier.[160] As with the Alberta Act, it is proposed that provision should be made for guardianship to be delegated (or "farmed out") to members of the community who would be approved (and reviewed) by a body with adjudicative powers;[161] the South Australian expedient of relying on that body to assume the guardianship itself has been rejected.[162] However the South Australian style of adjudication by an administrative body (albeit that the discussion paper prefers a "Tribunal" to a "Board") has been recommended in place of Alberta's reliance on adjudication by a superior court.[163] So far as the type of order is concerned, the discussion paper has generally endorsed the notion favoured in Alberta of individually tailored, and preferably "partial", guardianship orders.[164] Most of the presumptive evidentiary rules designed to limit the scope and duration of orders, together with the procedural guarantees at and before the hearing, and the requirements for regular review of orders, are also based on Alberta (or other North American) models.[165]

The innovative new features to be found in the package brought forward in the report lie mainly in the area of the distribution of powers between the guardian, the person for whom he is responsible and the bodies to whom he is accountable. Thus the report takes a rather jaundiced view of the suggestion by the South Australian Board and the Bright Committee that

158 Ibid. 18, para. 7.6.2.
159 Ibid. 33, para. 7.15.
160 Supra fns. 100-15; 122-9 and accompanying text.
161 *Victorian Discussion Paper* op. cit. 16, para. 7.5.
162 *Bright Committee "Intellectual Handicaps"* op. cit. 187-9. The major argument in favour of delegated guardianship is that this promotes localized, personal and sensitive decision-making on the part of guardians. However, as pointed out by the Mental Health enquiry, there are occasions on which it is proper for the Tribunal (or Board) to itself assume guardianship. Emergency situations, and those situations requiring temporary periods of guardianship, are both characterized by the need for speed and the difficulty of assessing the precise ambit of the guardianship powers required; in such cases it is proper for the Tribunal to exercise guardianship powers itself (subject to review aimed at transferring those powers to a citizen/delegate as soon as possible): *Consultative Council Report on Mental Health* op. cit. 69, para. 6.16(iii).
163 *Victorian Discussion Paper* op. cit. 16, para. 7.5.
164 Ibid. 24, para. 7.7; 29, para. 7.11.
165 Ibid. 17-24, paras. 7.6-7.6.9; 33, para. 7.15.

questions relating to sterilization, abortion, or tissue donation be entrusted to the Board or Tribunal.[166] It also advances sensible improvements which should ensure that guardians would be less likely to acquire powers over matters related to the values and lifestyle of the person affected,[167] would receive orders which were rather more specific and detailed than their overseas counterparts,[168] and would be encouraged to act more in the role of advocates for their charges.[169] The report also takes up the admirable suggestion of the Bright report that a separate "watchdog/advocacy" body be established to co-ordinate the provision of advice and assistance to intellectually handicapped people, and to serve as a tangible manifestation of the new service.[170]

On the debit side of the ledger, the major weaknesses of the scheme might be summed up in terms of a lack of adequate attention to the problem of access, the restriction of the service to the intellectually handicapped to the exclusion of other equivalent groups in need,[171] the failure to integrate guardianship of the person with that of the estate,[172] and its failure to adequately grapple with the thorny problem of the line of demarcation between the family and the state. So far as access is concerned the report rather underestimates the level of resistance (and resentment) likely to be mounted by the parents of adult handicapped people who, when informed that they have no legal power of guardianship, will demand automatic, carte blanche appointments as guardians, free of red tape or scrutiny. The denial of access to guardianship for the infirm aged, and the failure of the committee to take on board guardianship of the estate, are both self-evident weaknesses. The reluctance of the committee to extend the jurisdiction of the proposed law to people under 18 is less self-evident,[173] but it is a weakness which could impede attempts by aged parents to "break-in" older siblings by arranging for them to become guardians of an under-age brother or sister, the care of whom might present a daunting prospect on the death of the parents if some such transition of power is not provided for.

166 Ibid. 26-8, para. 7.8; *Bright Committee "Intellectual Handicaps"* op. cit. 122-9, 190. Instead the discussion paper proposes that the Tribunal should be granted standing to bring such matters to the Supreme Court, free of cost to the parties concerned: ibid. 27-8.

167 Ibid. 13.

168 Ibid. 25-6.

169 Ibid. 28, para. 7.10.

170 Ibid. 37, para. 7.19.

171 Ibid. 9, 14, paras. 6.6, 7.3.

172 The committee raises the question of whether guardianship of the person and the estate should be governed by the same principles and operate as an integrated package, but concludes that the "complexities of the law" (and its limited terms of reference) precluded definitive solutions: ibid. 39, para. 7.20. The Mental Health enquiry, however, supported integration of the two areas: *Consultative Council Report on Mental Health* op. cit. 69, para. 6.16.

173 Ibid. 14, para. 7.4. The report justified the exclusion of children from the new law on the basis that the common law and statutory powers of guardianship of the natural parent, or of the Director General of Community Welfare Services in respect of state wards, were more than ample: see further fns. 44-7 and accompanying text supra.

The reform proposals advanced in the Victorian discussion paper are at least the equal of, and generally superior to, the overseas models. Certainly they are to be preferred to the South Australian legislation as it presently stands, or would stand should the recommendations of the Bright report be acted on.[174] However, as foreshadowed above, the reforms might be brought into closer compliance with the principles articulated by the committee by paying more attention to the solution of two conundrums. These are the conundrums of providing generous access without undue incursions into civil rights, and of finding ways of ensuring that the powers available to guardians are not excessive or inappropriate and that they are held accountable for the exercise of those powers. These are the two final matters to which we must turn our attention.

3. Conundrums of Access: taking the law to people who do not want (and may abuse) it

The dilemma confronting the law reformer in this area is quite daunting. On one side there is the monumental failure of the North Carolina legislation which, despite its technical perfection, became a proverbial white elephant—unwanted and unloved by the people it was designed to serve.[175] Yet on the other hand, the literature is replete with articles warning of the danger that open-ended guardianship laws will be subverted and abused by family members, and others intent on advancing their own interests. Guardians—including family members—not unnaturally pursue their own objectives, whether they be to achieve the quiet life by transferring the intellectually handicapped person to what one writer calls the "managed stratum of society";[176] by using guardianship as an alternative to mental health or other services;[177] or by becoming overprotective. The law reformer

[174] The Bright report drew attention to some of the weaknesses in the Act. It isolated the conflict between "protective" actions (which derogate from individual freedom) and the countervailing goal of promoting the development and independence of the individual, and went on to suggest reforms which might better promote this latter objective. The report commented favourably on the delegation of "day to day" personal assistance to private citizens; recommended that the obligation to pursue the "least restrictive" order be written into the Act; queried the role of the Board in respect of its capacity to contract on a person's behalf, make orders for people under 18, or delegate custodial powers; and urged that sterilization decisions should be an explicit responsibility of the Board: ibid. 184-90. The report might, with advantage, have considered general procedural questions (such as notice and representation; the onus of obtaining expert evidence) or the issue of accessibility of the Board, its ability to communicate meaningfully with the affected group, and so on, but the charter of reforms outlined would appear to be a sensible starting point in strengthening the Act.

[175] Supra fn. 139 and accompanying text.

[176] A. M. Mitchell, "The Objects of our Wisdom and our Coercion: involuntary guardianship for incompetents" (1979) 52 *Southern California Law Review* 1405, 1448-9.

[177] The South Australian Board has already confronted this phenomenon. In its most recent report it (rather pungently) commented that "[T]here are grave dangers in extending . . . controls to alcoholics without brain damage or eccentric little old ladies who are not senile". It made a plea for people to realize that the Board "cannot solve all problems . . .": *Report of the Guardianship Board to the Director of Mental Health Services 1979-1980*, 11.

must tread a fine line indeed, if the new law is to be both popularly received and resistant to being subverted by being used for perverse ends.

Resistance on the part of family members to any new law should not be underestimated. Many aged parents view it as their inalienable right to be able to continue to exercise *de jure* the absolute powers of guardianship and control which they have—albeit without a shred of legal authority—assumed in respect of their adult intellectually handicapped "children". The majority could—and should—become wise and sensitive holders of partial guardianship powers under new legislation. But they must be attracted to, and won over by, an administration which they will be tempted to characterize as bureaucratic intermeddling with matters properly the preserve of the family unit.[178] It is imperative that they be won over, for the dangers of any carte blanche or unsupervised guardianship are well documented;[179] it would be immoral for the state to wash its hands of this matter and allow the civil rights of intellectually handicapped adults to be suppressed by well-meaning, over-protective parents. What is required, daunting though the prescription appears, is a law which will win that support and confidence.

Salvation for the timorous law reformer is, however, provided by the analytical writing of Professor D. Black of Yale University and by the practical example provided by successful models such as the *Consumer Affairs Act* 1972 (Vic.). In an influential article, Black distinguished between two different types of delivery systems.[180] First, the passive or "reactive" system where static facilities and institutions await contact from their designated client groups. Secondly, an active outreach or "proactive" system where there is a mechanism for taking the service or facility to the client. Plainly, the Alberta and North Carolina legislation conforms to the passive/reactive model.[181] While the target client group (and their close associates) remain apprehensive, it is doomed to failure. A more active, "proactive" model is called for in this type of situation.

Examples of a more active "outreach" service delivery system abound. The high public profile assumed by people holding the offices of Director of Consumer Affairs or Chairman of the Equal Opportunity Board, serves as one local model.[182] Overseas examples suggest that such a body can be

[178] Further adjustments should be made to the model outlined in the Discussion paper in order to minimize hostility from natural parents. Adjustments might be made to procedures to allow for very temporary guardianship to be accorded on the basis of parental showing of a written prima facie case, which case can be confirmed by telephone enquiries by the Tribunal. Any such temporary order should automatically trigger a prompt and full enquiry by the Tribunal, which enquiry might be required to be held within 60 days. Where parents seek guardianship of adult offspring living at home, the preferred course might be for the Tribunal to go out to the applicant's home rather than require parents to come to the Tribunal offices.

[179] Infra fn. 189 and accompanying text.

[180] D. J. Black, "The Mobilization of Law" (1973) 2 *Journal of Legal Studies* 125.

[181] The role of Office of the Public Guardian in Alberta does, however, have some potential as an outreach body.

[182] *Equal Opportunity Act* 1977 (Vic.) Part II, Division 1 (Commissioner), 2 (Board),

equally as effective in giving practical effect to legislative protections for handicapped people.[183] Prospects for success would be immeasurably enhanced by appointing a respected and popular (and otherwise qualified) parent of a handicapped person to this position. There may also be considerable potential for the recruitment and deployment under the auspices of an independent co-ordinating agency of "citizen advocates" of the type proposed by Wolfensberger and others.[184] Public education booklets, such as that prepared in 1979 in Alberta,[185] might also have a role to play in achieving this objective of designing a more active outreach service.

The advocacy/outreach role should however be differentiated from one of statutory guardian of last resort (rather than, as in Alberta, for both to be combined in the Office of Public Guardian). That can be justified, both as a means of winning public confidence and support for what is in essence a watchdog role (and thereby closing the gap between the law and practice), and as giving expression to the important principle that advocacy for the recognition and protection of rights be independent of service delivery functions.[186] Finally, careful consideration should be given to the framing of decision-making mechanisms which guarantee procedural fairness for handicapped people, without attracting some of the countervailing disadvantages of the judicial model relied on in Alberta. The proposals of the Victorian discussion paper for a quasi-judicial hearing by an administrative board or tribunal (bearing responsibilities for *initiating* enquiries and for marshalling facts) might, if carefully designed, manage to make the system more accessible and less stigmatizing to the client group than would otherwise

3 (Education role); *Consumer Affairs Act* 1972 (Vic.) s. 8 (Director and functions).

183 See, for example: *An Act to Secure the Handicapped in the Exercise of their* Rights 1978 c. 7 1978 (Quebec) ss. 2, 6 (constituting a Board or Bureau) 25, 26 (powers and functions): noted in (1978) 5 *Commonwealth Law Bulletin* 806. An approach along these lines received some support from the Bright Committee: *Bright Committee: "Intellectual Handicaps"* op. cit. 199-203.

184 This notion is elaborated by Hodgson. It is a concept for which Mr. Justice Beattie found some support following his overseas survey (particularly in Scandinavian countries) and which was incorporated into a draft Bill prepared for (but not introduced into) the New Zealand Parliament (the concept has apparently been dropped from subsequent drafts): R. J. Hodgson, "Guardianship of Mentally Retarded Persons . . ." op. cit. 428-30; Beattie, "Dependent Persons and the Law", op. cit. passim; *Dependent Persons Bill* 1977 Draft (N.Z.).

185 D. Cruickshank, G. Lacouriere, *Law For the Handicapped* (Calgary, Baker Planning Committee Appeal Procedures Sub-committee, 1979).

186 A modification of this type has recently been advocated by the Saskatchewan Law Reform Commission: Saskatchewan Law Reform Commission, *Tentative Proposals for a Guardianship Act: Part I "Personal Guardianship"* (January 1981) L.R.C.S., Saskatchewan, 27. The principle that protection and advocacy functions for handicapped people be entirely independent of service delivery functions, is enshrined in the relevant legislation enacted by the U.S. Congress: 42 U.S.C. s. 601 2(a)(2)(B)(C) (1976) as amended by *Developmental Disabilities and Bill of Rights Act* 1978: Pub. L. 95-602 s. 508(a)(2); L. L. Athan, "Protecting the Rights of the Developmentally Disabled: Alternatives to the Existing Statutory and Regulatory Scheme" (1979) 4 *American Journal of Law and Medicine* 461, 462. See also *Bright Committee: "Intellectual Handicaps"* op. cit. 199-203.

be the case should the more formal, rigid (and somewhat elitist) judicial adjudication be relied on.

4. Conundrums of Power and Accountability: who guards the guardians?

The age old question of who guards the guardian is no mere piece of academic semantics when applied to this branch of the law. It is imperative that it be solved, lest the law fall into disrepute. The solution, it is argued, is to be found by way of resort to procedural and substantive protections to be incorporated in the new guardianship laws. In general terms the discussion paper does a first-rate job of delineating what is required. There are, however, some additional refinements which might with advantage be included to further shore up this critical feature of the proposed scheme.

Procedural protections are absolutely indispensable. They are the front-line defence against misuse of benevolent guardianship laws to promote the interests of guardians (or the community at large) at the expense of handicapped people. Overseas studies confirm that there is a real risk that guardianship may be invoked for ulterior purposes. Thus in California it was found to serve as an alternative admission route to institutional care, "by-passing" the more rigorous controls over long term compulsory detention of people for psychiatric evaluation.[187] In short, it can prove to be an attractive way of advancing the interests of the guardian as distinct from those of the ward.[188] This should come as no surprise. The law in this area principally serves as an adjunct to the family unit. Frequently, though not of course universally, it is invoked when that unit malfunctions.

There is also a substantial risk that guardians, once appointed, will misuse the powers delegated to them. Empirical studies of related areas confirm the need for caution in appointing a family member as the guardian "since it often may be his or her family from which the patient most needs protection".[189] Substantive provisions of the guardianship legislation can serve as an important line of defence in this area. The package of powers which may be delegated to guardians must be carefully tailored and must always exclude the more sensitive powers (such as those over sterilization and public protection matters).[190] The purpose and ambit of each particular

187 G. H. Morris, "Conservatorship for the 'Gravely Disabled': California's Non-declaration of Nonindependence" (1978) 15 *San Diego Law Review* 201, 214-15.

188 D. T. Jost, "The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from their Zealous Protectors" (1980) 56 *Chicago-Kent Law Review* 1087, 1089.

189 J. Monahan, "Empirical Analyses of Civil Commitment: Critique and Context" (1977) 11 *Law and Society Review* 619, 624.

190 The legislation should differentiate between the exercise of powers in a manner which facilitates a handicapped person in reaching a fuller potential, as distinct from those which may be utilized to conserve or protect the individual from harm or exploitation, or—least defensible of all—to protect the property or person of other citizens (as by denial of a driving licence at the instigation of the guardian). The legislation should also seek to achieve an optimal distribution of powers between the courts (which arguably should adjudicate on all irreversible "life decisions" such as sterilization or abortion), the Guardianship Board (which

head of power to be delegated to the guardian should be spelled out in as much detail as is practicable at the time of taking that decision[191] and there should be clearly enunciated general directives to guide guardians in the exercise of their powers.[192] Prerequisites should also be established to guide the body responsible for the selection and appointment of a guardian and there should be regular monitoring and reviews of the manner in which they discharge their responsibilities.[193] In short, effective procedural and substantive protections are required.[194] But they need not be coupled with judicial procedures which will deter those handicapped people which the law is designed to serve.

## CONCLUSION

What Victoria requires is a well balanced guardianship law. The new law should not be so difficult to mobilize that it fails, as in North Carolina, to assist those handicapped people in need. On the other hand, it should not be so malleable as to be capable of becoming an instrument of oppression in the hands of family members, or others, who wish to facilitate institutionalization or to usher in overly rigorous supervision and control of the lives of handicapped people. That is the lesson of the Minnesota, and, most recently, the Californian[195] experience. A balanced guardianship law can be devised if these cautionary tales from North Carolina and Minnesota are heeded. But that requires that careful consideration be given to the main elements of the reforms contained in the recent discussion paper, together with the proposed modifications canvassed above. Neither should be lightly discarded for fear that the law will err by creating machinery which is either too cumbersome to be effective or, alternatively, is too easily capable of being invoked against the interests of the handicapped.

Whatever the final solution, it is clear that good laws must be backed by well-thought-out administrative systems. If Victoria can manage to design

should decide many or all questions where restrictions are imposed—or assistance of the guardian is to be denied—in order to protect the interests of the community; such as in admissions to residential facilities, impositions of curfews) and the personal guardian to whom specific powers might be delegated.

191 The legislation might be enhanced by the inclusion of an obligation that "further and better particulars" be included in the order by way of further guidelines as to the precise ambit and purpose to be served in delegating particular "heads of power" to the guardian.

192 The legislation should require the guardian to take maximum account of the views of the person subject to the order, act as a "vigorous lay advocate" for that person, protect him from "neglect, abuse or exploitation" and encourage his integration into the mainstream community" (normalization): see s. 8 of the draft Act proposed by P. McLaughlin, *Guardianship of the Person*, op. cit. *Victorian Discussion Paper* op. cit. 29, para. 7.10.

193 See for example fns. 102, 104, 117, and accompanying text supra.

194 The finding cited by Allen should be borne in mind at this point. Procedural protections which appear on the face of the statute book to be adequate may not always be honoured in practice (and vice versa): see R. Allen, *Legal Rights of the Disabled and Disadvantaged* op. cit. 4-5.

195 Supra fn. 189.

such a package of laws, it will make a major contribution to the recognition and protection of the human rights of a group in society which has for too long been relegated to the status of a minority group subjected to serious discrimination. The recent report of the Victorian Ministerial Working Party has made a major contribution, but further refinements are called for if Victoria is to discharge its responsibilities in respect of the United Nations declaration. If the legacy of the International Year of the Disabled is to be carried forward, Victoria requires both anti-discrimination and guardianship legislation, which would complement the recently acquired jurisdiction of the Commonwealth Human Rights Commission to consider compliance by Commonwealth bodies with the dictates of the Declaration of the Rights of the Intellectually Handicapped.[196] Well designed guardianship laws are an important element of that state response.

There is no finer task for the law or for law reform, than the protection and enhancement of human rights. Yet it is sadly all too true that the manner in which society responds to the needs of its weakest members provides the most accurate index of the level of civilization of that community. The extent, the speed, and the diligence with which the Victorian guardianship proposals are refined and carried forward, will be the acid test of our commitment to enforcing the civil and social rights of the intellectually handicapped citizens of this state.

[196] Supra fn. 11.