# Chapter 2

## Historical overview

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INTRODUCTION
2.1 In this chapter, we consider the history of guardianship laws and provide a brief overview of the events that led to the creation of the Guardianship and Administration Act 1986 (Vic) (G&A Act).

2.2 The development of modern guardianship laws accompanied the deinstitutionalisation of services for people with cognitive disabilities in Victoria during the late 1970s and the 1980s. These reforms to Victorian law were part of a growing international interest in formally recognising the human rights of people with a disability.

2.3 The most recent United Nations instrument, the Convention on the Rights of Persons with Disabilities (the Convention) entered into force in May 2008.

BEFORE 1986
2.4 Guardianship laws have existed in a limited form since the fifth century. The idea that a person could be appointed to protect others who were unable to manage aspects of their own lives originated in the Roman Empire.

2.5 Historically, guardianship laws sought to protect the financial and private property interests of people with impaired ability to care for themselves. In the 13th century, the English sovereign took control of the property of people with a mental illness or intellectual disability, largely to prevent feudal lords from exploiting them. Over time, the English courts developed the concept of parens patriae—literally, parent of the country—to explain the duty of the monarch to protect the interests of those people who were unable to look after themselves. However, those people who had neither property nor family to look after them were often ignored and isolated, sometimes resulting in their confinement in prisons.

2.6 Subsequent advances in medical thinking led to changing attitudes about people with impaired decision-making ability. In conjunction with the rise in respect for and power of the medical profession came the view that those with disabilities, including people with a cognitive impairment, were ill and needed treatment and care. This ultimately led to the development of the ‘medical model’, which characterised people with disabilities as being ‘inherently and inevitably pathological’. Under this model, mental health legislation gave medical experts the power to decide whether to detain people against their will for their own good, or for the safety of the community.

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4 Ibid. 205–6.

5 Standing Committee on Social Issues, NSW Legislative Council, Substitute Decision-making for People Lacking Capacity (2010)[2.5].


7 Terry Carney and David Tait, The Adult Guardianship Experiment: Tribunals and Popular Justice (The Federation Press, 1997) 11–12, 15. See also Substitute Decision-making, above n 6, [2.6].


2.7 From the mid-19th century, institutions were established in which people with a cognitive impairment were 'confined and managed' on a long-term basis.11 These institutions tended to be isolated from communities and residents were often referred to as 'lunatics' or 'insane'.12

2.8 Long-term institutionalisation of people with a mental illness and people with intellectual disabilities continued for much of the 20th century.13 During the 1960s the disability rights movement emerged and championed a shift in thinking from the 'medical model' to a 'social model' of disability.14 In essence:

[At] the heart of this work lay a central and unifying set of understandings about disability: a conviction, born of experience, that some of the most restricting and debilitating features in the lives of disabled people were not a necessary or inevitable consequence of living with impairment. Rather, it was held that these restrictions were socially and politically constructed and could, therefore, be changed by social and political means.15

2.9 This growing international movement gained momentum from advocacy by parents of people with a disability16 and led to widespread recognition that all people, regardless of any disability, had a right to equal treatment and to protection against discrimination.

2.10 Around this time, an understanding emerged that not all 'mentally disabling conditions' remained static, and that decision-making abilities could be developed, retained or, in some circumstances, exercised with assistance.17

2.11 While some people who moved from institutions to community care were capable of making decisions for themselves, others were vulnerable and required assistance when making or implementing decisions.18

2.12 Previously, staff of residential mental health facilities made decisions about medical treatment, lifestyle and education.19 Decisions about the management of finances and property were usually made by a state agency, such as the Public Trustee.20

2.13 The movement of people with an intellectual disability or mental illness from institutions into the community prompted the modernisation of mechanisms that could be used to make legally binding decisions about health care, finances or accommodation on behalf of people who lacked capacity to make their own decisions. In the absence of a legal substitute decision maker, informal decisions had no legal status and the liability of those who were caring for and treating people with impaired capacity became a matter of concern.21

11 Ibid 11–12.
17 Robin Creyke, Who Can Decide? Legal Decision-making for Others (Department of Human Services and Health, Aged and Community Care Division (Commonwealth), 1995) 38.
18 Law Reform Commission (United Kingdom), Mental Incapacity, Report No 231 (1995) [2.32].
19 Carney and Tait, above n 10, 12.
20 Ibid.
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VICTORIA

2.14 Before 1986, Victoria had a limited number of substitute decision-making processes for people who were unable to make their own decisions due to cognitive impairment. Two of those processes overlapped. The detention and involuntary treatment of people with a mental illness or an intellectual disability could be authorised under the Mental Health Act 1959 (Vic).\(^{22}\) Involuntary patients under that Act were assumed by law to be incapable of managing their financial affairs and the Public Trustee was automatically appointed the administrator of their estates.\(^ {23}\)

2.15 The other two substitute decision-making processes were governed by the Public Trustee Act 1958 (Vic). If the Public Trustee was satisfied, after considering the certificates of two medical practitioners, that an ‘infirm person’ was incapable of managing their own affairs, the Public Trustee could assume responsibility for managing that person’s estate without any court or tribunal order.\(^ {24}\) The Public Trustee Act 1958 (Vic) also contained little-used processes by which the Supreme Court could appoint a guardian or administrator for people who were unable to make decisions for themselves due to disability.\(^ {25}\)

2.16 Three things that characterised this body of law before 1986 were:

- a primary focus on the management of property, rather than personal decision making\(^ {26}\)
- a focus on diagnostic status, rather than functional assessments of capacity\(^ {27}\)
- an expensive and largely inaccessible Supreme Court jurisdiction.\(^ {28}\)

THE COCKS COMMITTEE AND THE 1986 LEGISLATION

2.17 By the early 1980s, it was becoming increasingly clear that the law did not adequately cater for the many requirements of people whose decision-making ability was impaired due to disability. In response, the Victorian Government established contemporaneous reviews of the legal needs of people with intellectual disabilities and mental illness.

2.18 The Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee)\(^ {29}\) was asked to develop proposals in relation to guardianship of people with intellectual disabilities. The Committee’s terms of reference also specifically requested proposals for legislation independent of the Mental Health Act 1959 (Vic).\(^ {30}\)

\(^{22}\) See Mental Health Act 1959 (Vic) ss 42–113. The entire Act was repealed by the Mental Health Act 1986 (Vic) s 143(1).

\(^{23}\) Public Trustee Act 1958 (Vic) s 33.

\(^{24}\) Ibid s 49.

\(^{25}\) Ibid ss 32–9.

\(^{26}\) That is, the law’s main interest was in establishing means by which a person’s financial and property affairs could be managed when they were unable to do so themselves. Relatively little attention was given to formal means by which decisions could be made about matters such as a person’s housing, health care or access to services. Instead, these decisions were typically made by service providers, such as institutions, usually without any formal lawful authority to do so.

\(^{27}\) That is, determinations about a person’s decision-making rights were connected more to the person’s diagnosis rather than to any formal assessment of their capacity.


\(^{29}\) This Committee was established in 1980 by the then Hamer Government Minister of Health, William Borthwick MLA, and reported in 1982 to his Cain Government successor, Tom Roper MP.

2.19 The Cocks Committee noted that the laws of the time did not provide adequate non-institutional options to enable people with intellectual disabilities to live with dignity in the community, and that personal guardianship needed to be one part of a broad legislative reform agenda that would help provide these options.31

2.20 The Cocks Committee identified a number of problems with the existing law:

- The method for appointing a guardian was cumbersome.
- There was no regular automatic process for reviewing an order.
- Courts had not adopted a practice of appointing guardians with limited powers, and instead appointed plenary guardians with broad powers, regardless of the person’s decision-making capacity.32
- The law employed old-fashioned and stigmatising labels (‘committee of the person’ and ‘lunatic so found’).
- The law did not give any direction about the functions and duties of guardians, nor how they should exercise their authority.
- The law did not give the court any guidance on how it should determine who a guardian should be.
- The law was unclear about the process of revoking a guardianship order.
- The law provided no mechanism for the replacement of a guardian who dies or becomes incapacitated.33

2.21 While the Committee’s report focused primarily on issues concerning people with intellectual disabilities, it expressed a strong preference for guardianship laws to be available for use by people with a range of disabilities.34 The Committee accepted that some adjustments to its proposals might be required if future legislation were to benefit people other than those with an intellectual disability.35

2.22 The Cocks Committee’s recommendations for an entirely new system of guardianship were accepted by the Cain government and the Victorian Parliament passed the Guardianship and Administration Board Act 1986 (Vic) (G&A Act). The main features of the new system included:

- the creation of an informal tribunal, the Guardianship and Administration Board, to appoint guardians and administrators36
- the establishment of ‘tailor-made’ guardianship orders, which would allow a guardian to be appointed to make decisions only in those areas where there was a need.37

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31 Victoria, Parliamentary Debates, Legislative Council, 22 April 1986, 558 (Jim Kennan, Attorney-General).
32 In Chapter 3, the Commission considers the meaning of ‘plenary’ and ‘limited’ guardianship orders.
34 Ibid n 96.
36 Ibid n 96.
37 Report of the Minister’s Committee, above n 30, 28–42. The Guardianship and Administration Board had more flexibility and discretion in relation to the orders it could make compared to the Tribunals already established in South Australia and Tasmania. As a result, the Guardianship and Administration Board has been referred to as the first of the ‘modern’ independent guardianship tribunals: Nick O’Neill and Carmelle Peisah, Capacity and the Law (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2011) [5.3.3], [5.4.3].
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- the establishment of an independent statutory officer—the Public Advocate—to advocate on behalf of people with disabilities, to assist the tribunal, to investigate abuse, to educate the public and to act as guardian of last resort.38

2.23 The G&A Act was accompanied by a new Mental Health Act 1986 (Vic) and the Intellectually Disabled Persons’ Services Act 1986 (Vic). Together they formed a trilogy of legislation that replaced the old Mental Health Act and set up an entirely new framework for disability legislation in Victoria.

2.24 The passage of Victorian guardianship legislation in 1986 stimulated the development of new guardianship laws throughout the country, placing Australia alongside Canada as a world leader in progressive legislative reform for people with disabilities.

ENDURING PERSONAL APPOINTMENTS

2.25 The notion of enduring personal appointments—allowing a person with capacity to appoint their own representative to make decisions for them if they lose capacity in the future—was not part of the new framework, and nor was it part of the Cocks Committee’s brief.

2.26 Personal appointments of substitute decision makers have been available for centuries, with the most widely used mechanism being the general power of attorney, which enables one person to appoint another to make legally binding decisions about financial and property related matters on their behalf.39

2.27 A general power of attorney cannot be used once the principal, or donor of the power, no longer has capacity to make their own legally binding decisions. The Victorian Parliament addressed this gap in the common law in 1981 in relation to financial decision making, when it legislated to permit a person with capacity to make an enduring power of attorney (financial).40 This appointment continues, or endures, beyond the principal’s loss of capacity.

CHANGES SINCE 1986

2.28 Victoria’s guardianship legislation has been amended on 30 separate occasions since 1986. While many of these changes have been relatively minor and technical, they have contributed to a substantial decline in the readability of the legislation. Changes to legislation that interact with the G&A Act have also contributed to the growing complexity of Victoria’s guardianship laws.

2.29 The more significant amendments to the G&A Act and other relevant legislation are discussed below.

MEDICAL TREATMENT ACT

2.30 The introduction of the Medical Treatment Act 1988 (Vic) clarified and gave statutory force to the common law right of people to refuse medical treatment.

2.31 This Act was amended in 1990 to allow a person with capacity to appoint an agent to make medical treatment decisions for them. The appointment—an enduring power of attorney (medical treatment)—gives the agent power to refuse treatment if the person has lost capacity to make their own decisions.41

41 Medical Treatment Act 1988 (Vic) s 5A.
MEDICAL TREATMENT AMENDMENTS UNDER THE G&A ACT

2.32 In 1999, a new mechanism allowing an automatic appointee, or ‘person responsible’, to consent to certain medical and dental procedures for a ‘patient’ incapable of giving consent, was introduced into the Act.42

2.33 In 2002, the definition of ‘patient’ was broadened, no longer requiring that the patient’s disability be ‘permanent or long-term’ and thereby allowing people with temporary or indeterminate disabilities to come under the Act’s ‘person responsible’ provisions when they are unable to consent to medical treatment.43

2.34 In 2006, new provisions dealing with substitute consent for participation in medical research procedures were introduced.44

ENDURING PERSONAL APPOINTMENTS

2.35 It has never been possible at common law for a person with capacity to appoint another person to make personal or lifestyle decisions for them—such as consenting to medical treatment or deciding that they should live in a secure environment—when they have lost capacity. It was only in 1999 that the Victorian Parliament legislated to permit a person with capacity to appoint an enduring guardian to make personal decisions for them when they are no longer able to do so themselves.45

PUBLIC TRUSTEE

2.36 The G&A Act originally provided for the Public Trustee to be a preferred administrator.46 Parliament removed this provision in 1999. The Public Trustee has now been replaced by State Trustees, a state-owned company, set up under the State Trustees (State Owned Company) Act 1994 (Vic).47 We discuss State Trustees further in Chapter 3.

THE ESTABLISHMENT OF VCAT

2.37 In 1998, the Guardianship and Administration Board was abolished and its functions were absorbed into the newly established Victorian Civil and Administrative Tribunal (VCAT). The Guardianship and Administration Board Act 1986 (Vic) was renamed the Guardianship and Administration Act 1986 (Vic).48

2.38 The establishment of VCAT as a ‘one stop shop’ amalgamation of a number of different tribunals sought to improve all Victorians’ access to justice by making the process more efficient, flexible and cost-effective.49 Cases arising under the G&A Act are heard in the Guardianship List, which is one of 17 lists operating within VCAT.50

INTERSTATE REGISTRATION

2.39 In 1999, new provisions to allow for the registration of interstate guardianship and administration orders were introduced into the G&A Act.51

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42 Guardianship and Administration Act 1986 (Vic) pt 4A, as amended by Guardianship and Administration (Amendment) Act 1999 (Vic) s 14.
43 Guardianship and Administration Act 1986 (Vic) s 36(1), as amended by Guardianship and Administration (Amendment) Act 2002 (Vic) s 11.
44 Guardianship and Administration Act 1986 (Vic) pt 4A div 6, as amended by Guardianship and Administration (Further Amendment) Act 2006 (Vic) pt 2.
45 Guardianship and Administration Act 1986 (Vic) pt 4 div 5A, as amended by Guardianship and Administration (Amendment) Act 1999 (Vic).
46 See Victoria, Parliamentary Debates, Legislative Council, 22 April 1986, 559 (Jim Kenman, Attorney-General).
47 State Trustees (State Owned Company) Act 1994 (Vic) pt 1.
51 Guardianship and Administration Act 1986 (Vic) pt 6A, as amended by Guardianship and Administration (Amendment) Act 1999 (Vic) s 20.
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MISSING PERSONS

2.40 The G&A Act was amended in August 2010 to allow families, or others, to apply to VCAT for administration of a missing person’s estate.52

2.41 These amendments were introduced to provide an accessible, cost-effective mechanism for the management of a missing person’s financial affairs during what may otherwise be a distressing and difficult time.53

2.42 Before these amendments, a family member or friend of a missing person who sought to administer the financial affairs of the person was required to pursue the matter in the Supreme Court to establish a presumption of death.54

52 Guardianship and Administration Act 1986 (Vic) pt 5A. Administration orders for a missing person operate for up to two years, but can be revoked if the person is found to be alive or dead, or if the person themselves applies for it to be revoked: at s 604D. As noted in the second reading speech, the amendments are small but practical with the potential to make a substantial difference to the families and friends of missing persons: Victoria, Parliamentary Debates, Legislative Assembly, 12 August 2010, 3271 (Bob Cameron, Minister for Police and Emergency Services and Minister for Corrections).

53 Victoria, Parliamentary Debates, Legislative Assembly, 12 August 2010, 3271 (Bob Cameron, Minister for Police and Emergency Services, and Minister for Corrections). Similar legislation already operates in NSW and ACT that provides for the management and protection of a missing person’s estate: NSW Trustee and Guardian Act 2009 (NSW) pt 4.4; Guardianship and Management of Property Act 1991 (ACT) ss BAA–BAC.

54 Victoria, Parliamentary Debates, Legislative Assembly, 12 August 2010, 3271 (Bob Cameron, Minister for Police and Emergency Services and Minister for Corrections).