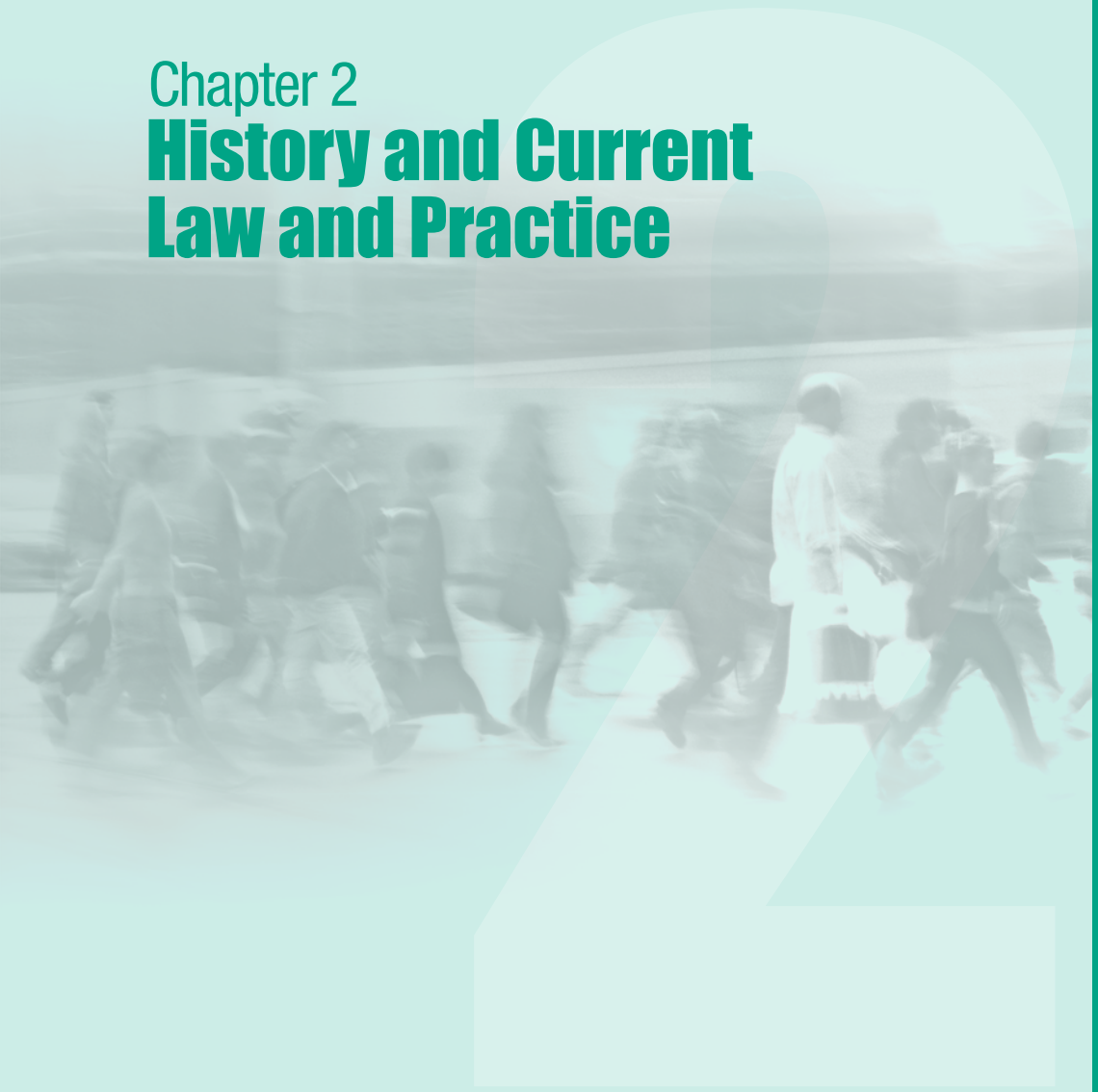
Part 1
History, Current Law and Change

The first part of this paper provides a background to our review. In Chapters 2 and 3, we look at the history of guardianship laws in Victoria, as well as changes to the landscape in which the laws operate.

CONTENTS

Chapter 2

History and Current Law and Practice



CONTENTS

Chapter 2 History and Current Law and Practice

HISTORY AND CURRENT LAW AND PRACTICE

2.1 In this chapter, we consider the history of guardianship laws in Victoria and provide an overview of the current law and the roles of key bodies. We also briefly introduce other recent reviews of substitute decision-making laws.

BEFORE 1986

2.2 In 1986, Victoria became the first Australian jurisdiction to enact guardianship legislation for people with impaired decision-making capacity due to a broad range of disabilities. That legislation 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.

2.3 The idea that the state has a responsibility to protect people who are unable to manage aspects of their own lives—particularly their private property—originated in the Roman Empire. As early as the 13th century, the English sovereign took control of the property of people with a mental illness, largely to prevent feudal lords from exploiting them.

2.4 Prior to 1986, Victorian law provided four 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).[1] Involuntary patients under the *Mental Health Act 1959* (Vic) were assumed by law to be incapable of managing their financial affairs and the Public Trustee was automatically appointed the administrator of their estates.[2]

2.5 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 hearing or order.[3] 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.[4]

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

- a primary focus on the management of property, rather than personal decision making[5]
- a focus on diagnostic status, rather than functional assessments of capacity[6]
- an expensive and largely inaccessible Supreme Court jurisdiction.[7]

THE COCKS COMMITTEE AND THE 1986 LEGISLATION

2.7 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 capacity 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.

2.8 The Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee)[8] was asked to develop proposals in relation to guardianship of people with intellectual disabilities and, if appropriate, of a 'wider class of persons'.[9] The Committee's terms of reference also specifically requested proposals for legislation independent of the *Mental Health Act 1959* (Vic).[10]

2.9 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.[11]

2.10 The Cocks Committee identified a number of problems with the law as it then was:

- 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 limited guardians, and instead appointed plenary guardians, regardless of the person's decision-making capacity.
- 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.[12]

2.11 The Cocks Committee's recommendations for an entirely new system of guardianship were accepted by the government of the day 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 administrators[13]
- 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[14]
- the establishment of a 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.[15]

2.12 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.

2.13 The notion of enduring personal appointments—allowing a person with capacity to appoint their own guardian to make decisions for them if they lose capacity in the future—was not part of the new framework, nor was it part of the Committee's considerations at the time.

CHANGES SINCE 1986

2.14 Victoria's guardianship legislation has been amended on 28 separate occasions since 1986. While many of these changes have been relatively minor and technical, they have contributed to a substantial decline in the overall readability of the legislation.

1 See *Mental Health Act 1959* (Vic) ss 42–113. The entire Act was repealed by the *Mental Health Act 1986* (Vic) s 143 (1).

2 *Public Trustee Act 1958* (Vic) s 33.

3 Ibid s 49.

4 Ibid ss 32–9.

5 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.

6 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.

7 See Neil Rees, 'The Fusion Proposal: A Next Step' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-based Mental Health Laws* (Hart Publishing, 2010) 73.

8 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.

9 As noted in the following chapter, the question of whether the issues examined by the Committee were also relevant to a broader range of people beyond those with an intellectual disability was added to the Committee's terms of reference only very late in its deliberations, and was not a major focus of the Committee's discussions throughout most of its lifespan.

10 Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 3 (*Report of the Minister's Committee*).

11 Victoria, *Parliamentary Debates,* Legislative Council, 22 April 1986, 558 (J H Kennan, Attorney-General).

12 *Report of the Minister's Committee*, above n 10, 24–5.

13 Ibid 28–42.

14 Ibid 42–6.

15 Ibid 53–4.

Chapter 2 History and Current Law and Practice

2.15 The more significant amendments are listed below.

THE ESTABLISHMENT OF VCAT

2.16 In 1998, the Guardianship and Administration Board was abolished and its functions were absorbed into the newly established Victorian Civil and Administrative Tribunal (VCAT) and the Act was renamed the *Guardianship and Administration Act 1986* (Vic).[16]

PERSONAL APPOINTMENTS

2.17 In 1999, provisions for personally appointed substitute decision makers, or 'enduring guardians', were introduced into the Act.[17]

MEDICAL TREATMENT

2.18 Also in 1999, new arrangements allowing an automatic appointee, or 'person responsible', to consent to certain medical and dental procedures were introduced into the Act.[18]

2.19 In 2002, the definition of 'patient' was broadened in the Act's medical treatment provisions, no longer requiring that the patient's disability be 'permanent or long-term', 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.[19]

2.20 In 2006, new provisions relating specifically to medical research procedures were introduced into the Act's medical treatment sections.[20]

INTERSTATE REGISTRATION

2.21 In 1999, new provisions to allow for the registration of interstate guardianship and administration orders were introduced into the Act.[21]

MISSING PERSONS

2.22 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.[22]

CURRENT LAW AND PRACTICE IN VICTORIA

A SUMMARY

2.23 In this part, we summarise current guardianship law and practice in Victoria. A more detailed examination of current law and practice is contained in the Commission's earlier information paper, available on our website. We also examine the current law when discussing reform options throughout this paper.

2.24 The term 'guardianship laws' is used throughout this paper to mean:

- the G&A Act
- those parts of the *Instruments Act 1958* (Vic) that deal with powers of attorney
- those parts of the *Medical Treatment Act 1988* (Vic) that deal with decisions by agents.

POLICY OVERVIEW

2.25 The G&A Act was developed within a policy context concerned primarily with the needs of people with intellectual disabilities moving from institutions into the community.

2.26 Since then, various matters have influenced the way guardianship laws have developed in Victoria. In Chapter 3 we look at the ways in which the ageing of the community, evolving attitudes to disability and the new international human rights focus have changed the environment in which guardianship laws operate.

LEGISLATIVE OVERVIEW

2.27 Guardianship laws deal with the appointment, powers and responsibilities of substitute decision makers.

2.28 There are various types of substitute decision-making arrangements. A person may be appointed to undertake one or more decision-making roles for another person. These roles are outlined below.

Personal or lifestyle decisions

- personally appointed enduring guardians
- VCAT appointed guardians

Financial decisions

- personally appointed general attorneys
- personally appointed enduring attorneys
- VCAT appointed administrators

Medical decisions[23]

- personally appointed medical agents
- people automatically appointed to be responsible for some medical decisions.

2.29 There are different ways—described below—of appointing a person to one or more of these roles.

Personal appointments

2.30 Personal appointments are made by a person who is at least 18 years of age and who has legal capacity. Broadly speaking, this means the person is able to understand the nature of the appointment being made. The various types of appointment all have their own documentary and witnessing requirements. They typically, but not always, come into effect when the person who makes the appointment loses capacity at some time in the future.[24]

Automatic appointments

2.31 Automatic appointments are made when consent is required before certain medical treatments can be given to a person with a disability who is unable to consent themselves. The G&A Act provides that a person is incapable of giving consent to medical treatment if that person cannot understand the nature and effect of the procedure or is unable to indicate whether they consent to the treatment.[25] The automatic appointment provision also applies to participation in medical research trials.

Tribunal appointments

2.32 VCAT has the power to appoint a guardian or administrator for a person with a disability who is unable to make reasonable judgments because of that disability and who needs a substitute decision maker.[26] The G&A Act defines a person with a disability as someone with an intellectual impairment, mental disorder, brain injury, physical disability or dementia.[27] The criteria for making a VCAT appointment are discussed in more detail in Chapter 10.

16 *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) pt 8; *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

17 *Guardianship and Administration (Amendment) Act 1999* (Vic) s 12; *Guardianship and Administration Act 1986* (Vic) pt 4 div 5A.

18 *Guardianship and Administration (Amendment) Act 1999* (Vic) s 14; *Guardianship and Administration Act 1986* (Vic) pt 4A.

19 *Guardianship and Administration (Amendment) Act 2002* (Vic) s 11; *Guardianship and Administration Act 1986* (Vic) s 36(1).

20 *Guardianship and Administration (Further Amendment) Act 2006* (Vic) pt 2; *Guardianship and Administration Act 1986* (Vic) pt 4A div 6.

21 *Guardianship and Administration (Amendment) Act 1999* (Vic) s 20; *Guardianship and Administration Act 1986* (Vic) pt 6A.

22 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. See *Guardianship and Administration Act* 1986 (Vic) s 60AD.

23 A personally appointed enduring guardian or a VCAT appointed guardian can also be authorised to make medical decisions for a represented person.

24 See *Guardianship and Administration Act 1986* (Vic) div 5A (appointment of enduring guardian); *Instruments Act 1958* (Vic) pts XI (powers of attorney) and XIA (enduring powers of attorney); *Medical Treatment Act 1988* (Vic) s 5A. The extent to which people have made personal appointments is not known because there is no registration system for personal appointments.

25 *Guardianship and Administration Act 1986* (Vic) s 36(2).

26 Ibid ss 22, 46. During the 2009–10 financial year there were 10 711 case initiations, 12 493 finalisations and 470 cases pending on the Guardianship List at VCAT. Of these case initiations, 71% were reassessment applications, and 29% originating applications: Victorian Civil and Administrative Tribunal *Annual Report 2009–2010* (2010) 46. During the 2008–09 financial year, the Guardianship List at VCAT dealt with 10 788 cases, applications by initiation type remained constant from 2008–09 to 2009–10. Application by type were as follows: 20% guardianship orders; 2% guardian reassessments; 26% administration orders; 45% administration reassessments; 2% advice to administrators; 4% orders about enduring power of attorney; 1% other: Victorian Civil and Administrative Tribunal, *Annual Report 2008–2009* (2009) 25.

27 *Guardianship and Administration Act 1986* (Vic) s 3.

Chapter 2 History and Current Law and Practice

Powers of substitute decision makers

2.33 Guardianship laws also deal with the powers of substitute decision makers. In short, these are:

- Guardians and administrators have the power to make decisions about the personal and financial matters stipulated by VCAT in its order. The G&A Act provides that the decisions of a guardian[28] or an administrator[29] have the same legal effect as if the person with the disability had made them with capacity.
- Personally appointed guardians, attorneys and agents have powers respectively in relation to lifestyle matters, financial matters and medical matters, which may be quite general or may be limited to decisions about particular matters.
- Automatic appointees can make decisions only in relation to consent to particular medical treatment procedures[30] offered by a medical practitioner.

Roles and responsibilities of a substitute decision maker

2.34 Guardianship laws identify the people who can be appointed to these roles:

- A VCAT appointed guardian can be an individual, such as a family member or friend, or the Public Advocate.[31]
- A VCAT appointed administrator can be an individual, a professional with appropriate expertise or a trustee company, such as State Trustees.[32]
- Personal appointments can be any adult person with capacity chosen by the person making the appointment provided the appointee agrees to being appointed.[33]
- Automatic appointments are the first willing, able and available person appearing on a list set out in the legislation, which includes a medical agent, a guardian or family member or carer.[34]

2.35 Guardianship laws describe the general responsibilities of the various substitute decision makers in slightly different ways. Guardians and administrators appointed by VCAT, as well as people automatically appointed to make medical treatment decisions, are required to act in the represented person's 'best interests',[35] while a personally appointed enduring attorney's responsibilities focus more on the exercise of due diligence and financial prudence to protect the donor's financial interests.[36] The different responsibilities of the various appointees are discussed in detail in Chapter 17.

2.36 The duration of a substitute decision maker's appointment also depends on the type of appointment:

- The duration of VCAT appointments is specified in the order, usually between one and three years.
- Enduring personal appointments are generally ongoing, unless they are revoked by the person who made the appointment or by VCAT.
- Automatic appointments usually operate only when a particular medical treatment decision needs to be made.
- General powers of attorney operate only for the time specified by the person making the appointment or, in any event, until that person loses capacity.

KEY AGENCIES

2.37 The public authorities most directly involved in the operation of the G&A Act are the Public Advocate,[37] VCAT and State Trustees.

Public Advocate

2.38 The G&A Act established the Public Advocate as an independent statutory officer to protect and promote the rights of people with disabilities.[38] The functions of the Public Advocate are discussed in detail in Chapter 20, together with our proposed options for reform. Current functions include acting as a guardian of last resort, undertaking investigations relevant to guardianship hearings at the request of VCAT, and providing advocacy for people with disabilities.

VCAT

2.39 VCAT makes decisions under many different laws. It has a number of different lists that specialise in hearing particular types of cases. The 'Guardianship List' of VCAT deals with guardianship, administration, powers of attorney and related matters. The function and role of VCAT and possible reform options are discussed in detail in Chapter 21.

State Trustees

2.40 The G&A Act originally provided for the Public Trustee to be a preferred administrator.[39] This provision was removed 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). It provides a range of financial services, including acting as an administrator when appointed to do so by VCAT under the G&A Act. While the G&A Act no longer provides for any default or last resort administrator, State Trustees is the most commonly appointed administrator when VCAT cannot find a suitable and willing family member or friend.

INFORMAL ARRANGEMENTS

2.41 Many people in the community informally assist others to make decisions. This assistance is provided outside the guardianship law framework. An example of an informal arrangement is a friend, family member or neighbour requesting services on behalf of an elderly person who cannot request the services for themselves. In consultations, the Commission was told that many carers informally assist people with disabilities, often without difficulty. When a service is denied or a third party refuses to recognise the informal role of the carer, a guardianship or administration order can be needed.

2.42 The G&A Act requires VCAT to consider whether less restrictive options are available when deciding whether a person needs a guardian or administrator.[40] In many cases, this means allowing informal arrangements to be established, or to continue, where they are working well and not causing concern.

COMMUNITY RESPONSES TO THE CURRENT SCHEME

2.43 The Commission received a great deal of information from consultations and submissions about how well the current system is working. In the following chapters we explore responses to the operation of existing guardianship laws and ideas for reform.

28 Ibid ss 24(4), 25(3).

29 Ibid s 48(3).

30 An automatic appointee can also consent to the represented person's participation in various medical research trials: ibid s 42S.

31 VCAT received approximately 3100 new guardianship or administration applications during 2009–10: Victorian Civil and Administrative Tribunal, *Annual Report 2009–2010* (2010) 46. The Public Advocate was appointed guardian in 749 cases with a further 825 cases being carried over from 2008–09. Closure rates for the year rose to around 50%: Office of the Public Advocate (Victoria), *Annual Report 2009–2010* (2010) 5.

32 VCAT appointed State Trustees as administrator in 988 cases during 2009–10. State Trustees currently provides administration services to approximately 9000 represented people: State Trustees, *Annual Report 2009–2010* (2010) 55. The number of private appointments of administrators made by VCAT during this period is unknown. However, the Office of the Public Advocate note that in 80% of cases, private guardians also assume the role of administrator of the represented person: Office of the Public Advocate (Victoria), *Guardianship and Support for Private Guardians* (20 October 2009) <http://www.publicadvocate.vic.gov.au/services/104/>.

33 The extent to which people have made personal appointments is unknown because there is no registration system for personal appointments. However, State Trustees reports that 1836 enduring powers of attorney were prepared during 2009–10, an increase of 43% from the previous year. During the year, 720 enduring powers of attorney were under administration and 168 new enduring powers of attorney were activated: State Trustees, *Annual Report 2009–2010* (2010) 10.

34 No records are kept of the number of automatic appointments that are made.

35 *Guardianship and Administration Act 1986* (Vic) ss 28(1), 49(1), 42H(2).

36 *Instruments Act 1958* (Vic) s 125B(5).

37 While the legislation creates the statutory position of Public Advocate (*Guardianship and Administration Act 1986* (Vic) s 14(1)), in practice it is common to refer to the Office of the Public Advocate (OPA).

38 *Guardianship and Administration Act 1986* (Vic) s 14(1). See also Office of the Public Advocate (Victoria), *Annual Report 2008–2009* (2009) 4.

39 See Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 559 (J H Kennan, Attorney-General).

40 *Guardianship and Administration Act 1986* (Vic) ss 22(2)(a), 46(2)(a).

Chapter 2 History and Current Law and Practice

2.44 In Chapter 4 we consider some of the overall themes that emerged in response to our information paper. There is widespread acceptance of a continuing need for guardianship laws. Although the Commission believes that the existing legislation is not fundamentally flawed, guardianship laws could be changed in ways that might substantially improve their effectiveness and therefore enhance the lives of the many Victorians who use them.

2.45 Many people and organisations have stressed the need to create a system that is sensitive to the complex issues of disability and capacity, yet sufficiently straightforward to permit easy understanding and use. Satisfying these very different requirements will not be easy.

2.46 As will be seen often throughout this paper, community views about how well the system currently responds to these matters varied considerably. For example, some consider the operation of guardianship laws to be unwelcome and intrusive, while others are critical of the reluctance to make appointments for people with impaired decision-making capacity in the absence of clearly demonstrated need.

OTHER RELEVANT REVIEWS

2.47 A number of other important reviews of substituted decision-making laws have been completed recently or are still underway. Some of these reviews are directly relevant to our inquiry because they consider Victorian laws that overlap with the G&A Act. Others are useful because they examine similar issues in other Australian states.

THE VICTORIAN PARLIAMENT LAW REFORM COMMITTEE'S *INQUIRY INTO POWERS OF ATTORNEY*

2.48 The Victorian Parliament Law Reform Committee has conducted an inquiry into powers of attorney. The committee, which focused on financial powers of attorney and enduring guardianship, considered streamlining and simplifying power of attorney documents so Victorians can better plan for their future financial, lifestyle and healthcare needs. The committee released its report in August 2010, and its recommendations are discussed in Chapters 6 and 8 of this paper.[41]

VICTORIAN DEPARTMENT OF HEALTH REVIEW OF THE *MENTAL HEALTH ACT 1986* (VIC)

2.49 The *Mental Health Act 1986* (Vic) is currently being reviewed by the Victorian Department of Health. The review is examining whether the Act provides an effective legislative framework for the treatment of people with a mental illness in Victoria.

2.50 The former Victorian Minister for Mental Health released an exposure draft for new mental health legislation in October 2010. The implications of that review for future guardianship laws are discussed in Chapter 23.

THE QUEENSLAND LAW REFORM COMMISSION'S REVIEW OF *THE GUARDIANSHIP AND ADMINISTRATION ACT 2000* (QLD) AND THE *POWERS OF ATTORNEY ACT 1998* (QLD)

2.51 The Queensland Law Reform Commission's review of guardianship laws covered similar issues to those we are considering. The Queensland review examined issues such as:

- the general principles of Queensland guardianship law
- the powers of guardians, administrators and other appointments
- confidentiality provisions
- review of decisions

- access to medical treatment for people with impaired capacity
- the appropriateness of treatment provided
- whether there is a need for additional provisions to allow a parent to make a binding direction to appoint a guardian or administrator for their son or daughter who has impaired decision-making capacity.[42]

2.52 The Queensland Law Reform Commission conducted its review in two stages. The first stage focused on the legislation's confidentiality provisions. The final report, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, was published in 2007. The Queensland Government implemented most of the recommendations in the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld).[43]

2.53 The second stage of the review focused on the principles contained in the legislation and Queensland's guardianship laws more generally. The final report was tabled in Parliament in November 2010.[44]

2.54 The Queensland Law Reform Commission's final report is substantial. The Commission will consider its comprehensive reform recommendations in detail in the coming months.

THE NEW SOUTH WALES LEGISLATIVE COUNCIL STANDING COMMITTEE ON SOCIAL ISSUES' INQUIRY INTO SUBSTITUTE DECISION MAKING FOR PEOPLE LACKING CAPACITY

2.55 This parliamentary committee had extremely broad terms of reference. It was required to consider whether any New South Wales legislation should be changed to better provide for the management of estates of people incapable of managing their own affairs and the guardianship of people who have disabilities.[45]

2.56 The committee released its report in February 2010 and we refer to its recommendations when they are relevant to specific issues throughout this paper.[46]

NEW LAWS FOR THE 21ST CENTURY

2.57 Victoria's guardianship laws have evolved slowly over the past 25 years in response to changing needs. This review provides an opportunity for that evolution to continue, perhaps at a greater pace.

2.58 In the next chapter, we consider the changing environment in which guardianship laws operate and outline a possible new legislative framework that is examined in detail throughout this consultation paper.

41 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010).

42 See Queensland Law Reform Commission, <http://www.qlrc.qld.gov.au/guardianship/index.htm> for full terms of reference.

43 See Queensland Law Reform Commission, *Publications* (7 October 2008) <http://www.qlrc.qld.gov.au/guardianship/index.htm>. You can access the paper at <http://www.qlrc.qld.gov.au/guardianship/publications.htm#6>.

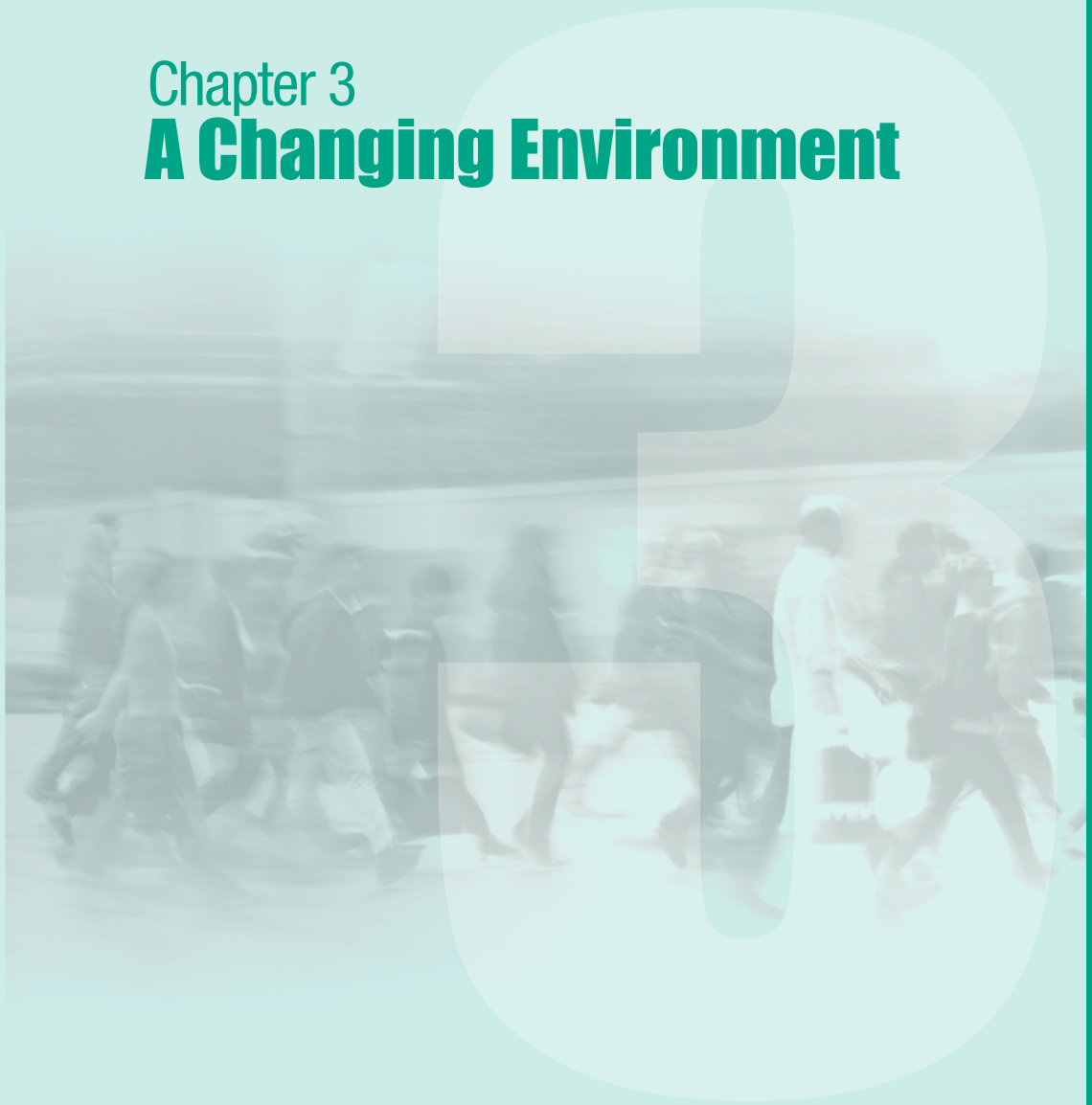
44 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).

45 See Parliament of New South Wales, <http://www.parliament.nsw.gov.au> for full terms of reference.

46 Standing Committee on Social Issues, NSW Legislative Council, *Substitute Decision-Making for People Lacking Capacity* (2010).

Chapter 3

A Changing Environment



CONTENTS

Chapter 3 A Changing Environment

INTRODUCTION

3.1 The Victorian demographic, policy, service and legal environment has changed considerably since the passage of the *Guardianship and Administration Act 1986* (Vic) (G&A Act). In this chapter, we examine some of those changes and consider the challenges they pose when designing new guardianship laws.

A CHANGING SOCIETY

3.2 The G&A Act has an interesting history. Although the legislation was initially designed to serve the needs of one group of people—those with an intellectual disability—it has been adapted over time to cater for many other needs.

3.3 In 1980, the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee) was established to develop 'proposals for legislation to deal with the protection of intellectually handicapped persons independently of the Mental Health Act, and the preservation of their rights'.[1]

3.4 In September 1982, almost two years after it had been formed, the Cocks Committee was asked to consider whether the legislative framework it was developing for people with an intellectual disability might also benefit 'a wider class or classes of persons'.[2] Given the timing of this change to the Committee's terms of reference, it is unsurprising that its final report, delivered only two months later in December 1982, focused primarily on issues concerning people with intellectual disabilities. That report formed the basis of the new legislation that was passed in 1986.

3.5 Although the Cocks Committee noted its preference for guardianship legislation that applied to people with a range of disabilities, the Committee indicated that it did not have the opportunity to consider the impact that this might have on the detail of the legislation:

> *As a committee set up to investigate the needs of intellectually handicapped people, we have not, despite the extension of our terms of reference, proceeded further along this path by adapting our proposals to meet the needs of a wider class or classes of persons. We have reason to believe that some adjustments may be required.*[3]

3.6 The second reading speech, delivered in 1986 by the Attorney-General, the Hon Jim Kennan MLC, reveals that while the initial legislation had a broad application, it was largely seen as a response to the needs of people with an intellectual disability.[4]

3.7 Since that time, social conditions and the demographic profile of people using guardianship legislation have changed markedly. It is useful to identify some of those changes.

AN AGEING POPULATION

3.8 Victoria's population, like that of the rest of the developed world, is an ageing one. Both the number of older people and their proportion of the state's population are increasing. Importantly, people with age-related disabilities are now the main users of guardianship laws. This trend is likely to continue well into the future.

Data

3.9 Over the past two decades, the median age of Australians has increased by more than five years to almost 37 years in 2008.[5] The proportion of Australians aged 0 to 14 years has fallen from 22.4 per cent in 1988 to 19.3 per cent in 2008.[6] Over the same 20-year period, the proportion of Australians aged 65 and over has risen from 10.8 per cent to 13.3 per cent of the community.[7]

3.10 The Australian Institute of Health and Welfare (AIHW) published a report in November 2007 titled *Older Australia at a Glance*. Numerous demographic figures were analysed in this report and various predictions made. AIHW estimated that in the 30 years to 2036, the number of Australians aged 65 years and over is expected to more than double, from 2.7 million to 6.3 million, and will represent 24 per cent of the total population at that time.[8]

3.11 The number of Australians over the age of 85 years is projected to grow more rapidly than any other age group.[9] In 2006, 333 000 people in Australia were over the age of 85.[10] This figure is expected to increase to 1.1 million in 2036 and represents a jump from 1.6 per cent of the total population to 4.2 per cent in 2036.[11]

3.12 People aged 85 years and over are projected to increase their proportion of the total older population from 12 per cent of 'older Australians' in 2006 to 18 per cent in 2036.[12]

3.13 The number of Victorians aged over 60 years is expected to grow from one million in 2010, to 1.4 million in 2020, and to 2.4 million in 2050, representing 19, 23 and 29 per cent of the population respectively.[13]

3.14 While the population as a whole will continue to grow over the decades to come, growth in the number of older Victorians will outpace it.[14]

A CHANGING INCIDENCE OF DISABILITY

3.15 An increase in the incidence of age-related disability, particularly dementia,[15] will accompany the ageing of the population.

Demographic trends

3.16 The AIHW noted that dementia is a very disabling condition that can require a high level of care in the long term. Older age is the greatest risk factor for most types of dementia, the prevalence of which doubles every five years from the age of 65.[16] Dementia is now the leading cause of disability in Australians aged 65 and over.[17]

3.17 Access Economics reported that in 2009, there were an estimated 245 000 people with dementia in Australia. This is expected to increase to 1.3 million by 2050.[18] It is estimated that around 63 000 people in Victoria currently experience dementia, and this figure is expected to rise to approximately 146 000 by 2030.[19]

3.18 The growing prevalence of dementia-related illnesses is evident worldwide. *The New York Times* recently reported that an estimated 13.5 million Americans will suffer from Alzheimer's disease by 2050, up from five million in 2010.[20] Currently, the United States spends US$172 billion a year to care for people with Alzheimer's disease. By 2020, it is estimated that this cost will rise to US$2 trillion, and by 2050 will increase to US$20 trillion.[21] Legislation has recently been passed in the United States to establish an Office of the National Alzheimer's Project, which will create an 'integrated national plan to overcome Alzheimer's'.[22]

1 Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 3 (*Report of the Minister's Committee*).

2 Ibid.

3 Ibid 96.

4 Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 558–60 (J H Kennan, Attorney-General).

5 Australian Institute of Health and Welfare, *Australia's Health 2009* (2009) 8. These statistics are based on research carried out by the Australian Bureau of Statistics: Australian Bureau of Statistics, *Population by age and sex, Australian states and territories 2008*. ABS cat. no. 3201.0. Canberra: ABS.

6 Ibid.

7 Ibid.

8 Australian Institute of Health and Welfare, *Older Australia at a Glance* (2007) 5.

9 Ibid 5–6. The number of older Australians aged 85 years and over doubled over the past 20 years (1986–2006).

10 *Older Australia at a Glance*, above n 8, 6.

11 Ibid.

12 Ibid. Older Australian figures represent those people in the age bracket 65+.

13 Department of Planning and Development (Victoria), *Ageing in Victoria: A plan for an age-friendly society 2010–2020* (2010) 6 (*Ageing in Victoria*).

14 Ibid 6.

15 Dementia can result from a number of causes, but is invariably a symptom of organic cerebral disease, affecting the cognitive and intellectual functions of the brain, usually manifesting initially in memory loss, and always resulting in some degree of permanent change. See Macdonald Critchley (ed), *Butterworths Medical Dictionary* (Butterworths, 2nd ed, 1978) 477.

16 Australian Institute of Health and Welfare, *Australia's Health 2010* (2010) 172. See also Access Economics, *Keeping Dementia Front of Mind: Incidence and prevalence 2009–2050* (2009) 4 ('*Keeping Dementia Front of Mind*'); Sandra O'Connor, Stanley Prusiner and Ken Dychtwald, 'The Age of Alzheimer's', *The New York Times* (New York City), 28 October 2010, A33.

17 *Keeping Dementia Front of Mind*, above n 16, v.

18 Ibid. Access Economics notes that the rates of incidence and prevalence of dementia reported in their publication is based on international studies due to the lack of epidemiological data relating to Australia.

19 *Keeping Dementia Front of Mind*, above n 16, 70–1.

20 O'Connor, Prusiner and Dychtwald, above n 16, A33.

21 Costing is in current dollar terms: ibid.

22 *National Alzheimer's Project Act*, USC § 3036 (2011).

Chapter 3 A Changing Environment

3.19 South Korea is also working on policy to help fight the stigma associated with dementia and push for early diagnosis and widespread support from the community. This includes, among other things, the creation of neighbourhood diagnostic centres and a tripling of nursing homes since 2008. Education programs initiated by the government train young people to recognise the symptoms of dementia and care for patients.[23] South Korea is one of the fastest-ageing countries in the world, and currently approximately 400 000 people suffer from dementia.[24]

3.20 The changing age profile of the population is the main factor affecting the incidence of disability in the community. The likelihood of acquiring a disability increases with age: almost 96 per cent of those aged over 90 have some form of disability.[25] Without the impact of the ageing population, the overall incidence of disability in the population has remained constant for some time. For example, after removing the effects of different age structures there was little change in the disability rate between 1998 (20.1 per cent) and 2003 (20 per cent), and the rate of profound or severe core-activity limitation remained relatively stable between 1998 (6.4 per cent) and 2003 (6.3 per cent).[26]

CHANGING PROFILE OF PEOPLE USING GUARDIANSHIP

3.21 In keeping with the changing nature of the Victorian community, the profile of people using guardianship legislation is also changing. People with dementia, people with mental illness and people with acquired brain injury are now the major users of legislation designed initially with the needs of people with intellectual disabilities primarily in mind.

3.22 In 2009–10, 14 per cent of the Public Advocate's clients had an intellectual disability.[27] In contrast, approximately 35 per cent of the Public Advocate's guardianship clients had dementia,[28] making it the single largest client group.[29] The next largest user groups were people with mental illness (18 per cent) and acquired brain injury (19 per cent).[30]

3.23 The profile of the Public Advocate's client group is also ageing. In 2009–10, 41 per cent of guardianship clients were 80 years of age or older,[31] whereas in 1988 this figure was 26 per cent.[32] However, the increase in the total number of clients aged 60 and above has been less profound—rising from 63 per cent in 1987–88 to 67 per cent in 2007–08.[33]

3.24 In future, it is highly likely that the actual number of people who will need a guardian or administrator appointed by the state will increase substantially due to the ageing population and the resulting increase in the number of people with a dementia-related illness. This projected increase requires the Victorian community to examine both the amount and the effectiveness of resources devoted to the administration of guardianship laws.

Different experiences of capacity

3.25 Issues of capacity can be very different for the many groups of people who now use guardianship laws. A person with an age-related disability, for example, is likely to experience a gradual loss of capacity over time. A person with an acquired brain injury might recover important areas of capacity over time. A person with a mental illness might experience fluctuating capacity.

3.26 The Cocks Committee did not consider the ways in which people with different disabilities might experience changes in capacity. Because of the very late change to their terms of reference, the Committee had little opportunity to consider the relevance of their decision-making model to people other than those with an intellectual disability.[34]

3.27 The extent to which different experiences of diminishing capacity affect the way in which a person can be helped with decision making is a matter of central importance when considering new guardianship laws. It seems desirable that new laws should be sufficiently flexible to accommodate changing levels of capacity. If possible, new laws should acknowledge that there is no sharp dividing line between capacity and incapacity, but rather differing levels of capacity along a decision-making continuum. People may move along that continuum according to the nature of their disability and the complexity or the novelty of the decisions they are asked to make.

OTHER FACTORS INFLUENCING THE PROFILE OF PEOPLE USING GUARDIANSHIP

3.28 A range of other factors is likely to affect the way guardianship laws operate in the future. Some relevant issues are:

- The growing number of people in Victoria from culturally and linguistically diverse backgrounds, particularly among older people, means that the system will need to be more linguistically accessible and culturally relevant in the future.[35]
- An ageing population in regional areas will put greater pressures on a system that is, at the moment, largely centralised.[36]
- The growing awareness of a lack of engagement of Indigenous people with guardianship laws, and their overall under-representation as users of disability services, highlights the need for the system to be more accessible and relevant to Aboriginal and Torres Strait Islander people.[37]

23 Pam Belluck with Su-Hyun Lee, 'Children Ease the Alzheimer's in Land of Aging', *The New York Times* (New York City), 26 November 2010, A1.

24 Ibid.

25 *Ageing in Victoria,* above n 13, 57.

26 Australian Bureau of Statistics *Survey of Disability, Aging and Carers: Summary of Findings 2003*. ABS cat. no. 4430.0 Canberra: ABS. These figures relate to all kinds of disability, and are not limited to disabilities that might lead to incapacity in some areas of decision making. For the purposes of the survey, disability was defined as 'any limitation, restriction or impairment, which has lasted, or is likely to last, for at least six months and restricts everyday activities'.

27 Office of the Public Advocate (Victoria), *Annual Report 2009–2010* (2010) 6.

28 Ibid 5.

29 Ibid.

30 Ibid 6.

31 Ibid 9. Email from the Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.

32 Office of the Public Advocate (Victoria), *Guardianship Trends in Victoria 1988–2008* (2009) 9.

33 Ibid.

34 *Report of the Minister's Committee,* above n 1, 95–6.

35 The culturally and linguistically diverse (CALD) population is ageing more rapidly than the Australian-born population. According to the Australian Institute of Health and Welfare, people aged 65 years and older from CALD backgrounds are expected to increase by 66% over a 15-year period, while the corresponding increase for the Australian-born population is projected to be 23%: Diane Gibson et al, Australian Institute of Health and Welfare (AIHW), *Projections of Older Immigrants: People from Culturally and Linguistically Diverse Backgrounds 1996-2026, Australia* (2001) 12. Based on these projections, AIHW estimate that by 2011, one in every five people aged 80 and over will be from CALD backgrounds: at 12. See also Warren P Hogan, *Review of Pricing Arrangements in Residential Aged Care* (2004) 198. Access Economics reports that there is currently no epidemiological data on dementia incidence and prevalence rates among CALD populations in Australia: *Keeping Dementia Front of Mind*, above n 16, 11.

36 Although VCAT currently conducts regular hearings throughout regional Victoria, the Office of the Public Advocate is based only in Melbourne. State Trustees has offices in Melbourne, Glen Waverley, Dandenong and Bendigo. The proportion of older people in rural and regional Victoria is greater than in metropolitan Melbourne. In 2006, 21% of regional Victorians were aged 60 years or over, compared to 17% in metropolitan areas. By 2020, it is predicted that 28% of the regional population will be over 60, estimated to increase to 35% in 2050: *Ageing in Victoria,* above n 13, 6. Currently, the Managers of the Advocate Guardian program within the Office of the Public Advocate estimate that 30–40% of their guardianship clients are in regional and rural areas (principally the regional centres such as Shepparton, Ballarat, Geelong and the Mornington Peninsula): email from Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.

37 While the 2006 census data indicated that 2.4% of the total Australian population are Indigenous, they represent only 0.6% of people using disability services in Victoria. See Australian Bureau of Statistics, *Experimental Estimates of Aboriginal and Torres Strait Islander Australians*, June 2006. ABS cat. no. 3238.0.55.001. Canberra: ABS. See also *Australia's Health 2009*, above n 5, 8, and Parliament of Victoria, *Inquiry into Supported Accommodation for Victorians with a Disability and Mental Illness* (2009) 32 (*Inquiry into Supported Accommodation*).

Chapter 3 A Changing Environment

A DIFFERENT POLICY ENVIRONMENT

3.29 Much of the policy environment within which the guardianship system operates has changed over the past 25 years.

PEOPLE WITH DISABILITIES, SERVICES AND THE COMMUNITY

3.30 Many aspects of public policy concerning people with intellectual disabilities have evolved substantially since the *Intellectually Disabled Persons' Services Act 1986* (Vic) (IDPS Act) and the *Guardianship and Administration Act 1986* (Vic), were enacted in 1986. At that time, supported residential services for people with an intellectual disability were moving from large institutions to smaller community residential units. The emphasis of the new laws of the 1980s was on service provision and the funding and regulation of disability service providers rather than confinement in institutions.

3.31 As a result of an agreement between all Australian governments in 1991, states and territories became responsible for support services for people with all disabilities. Victoria's capacity to fund and regulate services to people with disabilities other than intellectual disabilities was provided in the *Disability Services Act 1991* (Vic), later repealed, along with the IDPS Act, by the *Disability Act 2006* (Vic).[38] From 1991, the focus of service policy and delivery in Victoria was on people with all disabilities.

3.32 The *State Disability Plan 2002–2012* (State Plan) in 2002 brought about a different emphasis. The focus was less on facility-based services and more on building accessible and supportive communities. The vision upon which the State Plan is built makes no mention of disability services at all:

> *By 2012, Victoria will be a stronger and more inclusive community—a place where diversity is embraced and celebrated, and where everyone has the same opportunities to participate in the life of the community, and the same responsibilities towards society as all other citizens of Victoria.*[39]

3.33 This shift of emphasis was subsequently reflected in the *Disability Act 2006* (Vic) (Disability Act). While the IDPS Act was essentially an Act to regulate disability service provision, the Disability Act has a broader focus. It includes, for example, provisions for Disability Action Plans across government departments and establishes a Disability Advisory Council to provide whole-of-government advice to the Minister.[40]

3.34 The Disability Act has a quite different framework for planning supports for people with disabilities than the IDPS Act. The earlier Act focussed on developing plans that outlined a range of strategies for meeting a person's support needs.[41] These strategies were typically divided into different life areas, such as work, education and community participation, and would identify services that would assist in meeting the person's needs in those areas. The Department of Human Services would then support the person to access those services.[42] The Disability Act complemented this service focus with one that placed much greater emphasis on supporting families, informal networks and local communities to better respond to the needs and goals of the person with the disability.[43]

3.35 All of these differences reflected changes in approaches to people with disabilities and to the services they use. They represented a shift from seeing people with an intellectual disability as recipients of services to recognising them as citizens of communities—people who are active, participating members of society.

PEOPLE WITH DISABILITIES, GUARDIANSHIP AND RIGHTS

3.36 Allied to the notion that people with disabilities are passive service recipients rather than active participants in the community, is the view that people with disabilities are in need of 'protection'. This notion of 'protection' was a central part of the task set for the Cocks Committee, when asked 'to formulate proposals for legislation to deal with the protection of intellectually handicapped persons'.[44] The Committee was acutely aware of the 'possibility that [guardianship] legislation … can be used to restrict as well as to protect an individual'.[45] For these reasons, the Cocks Committee's report puts a great deal of emphasis on ensuring that guardianship is used only as a last resort and only insofar as it is the least restrictive option available. It said that the legislation should ensure

> *that a guardian is appointed to make decisions only in those areas in which a person cannot make decisions for himself [sic]. A concept of limited guardianship would help to ensure that the protective service is 'tailor-made' to accommodate the strengths and weaknesses of the individual and would be consistent with an important principle which first arose in the educational context (that of the least restrictive alternative).*[46]

3.37 While notions of vulnerability and protection still influence public policies concerning people with disabilities, the human rights perspectives of equality and citizenship of people with disabilities are also influential. These matters are reflected in the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention), discussed later in this chapter.

3.38 This growing emphasis on human rights was evident at the recent first World Congress on Adult Guardianship. A declaration arising from the congress reaffirmed the guiding principles and provisions of the United Nations' Convention, and stressed the importance of matters such as the presumption of capacity, respect for the wishes of the adult with impaired decision-making ability, and a whole suite of human rights that should influence guardianship laws.[47]

A DIFFERENT APPROACH TO THE WAY DISABILITY SERVICES ARE DELIVERED

DEINSTITUTIONALISATION

3.39 Many of Victoria's large-scale institutions for people with intellectual disabilities and mental illness were closing when guardianship legislation was first introduced in 1986. Most of the people who had been living in those large institutions were moving into smaller, community-based services, such as community residential units.

3.40 In 1988, there were 2700 people with intellectual disabilities living in residential institutions, and 685 in shared supported accommodation in the community.[48] By 1998, there were 941 people with an intellectual disability in state-run institutions and 4365 people in shared supported accommodation.[49] By 2008, there were 185 people with an intellectual disability living in Victoria's two remaining institutions, and 4590 people in shared supported accommodation.[50]

3.41 The movement to community-based living produced important changes to the amount of control that an individual service had over a person's life. The 'whole of life' service focus that was part of the institutional model was replaced by a system whereby a person with an intellectual disability would use different services for different needs. The need to diversify service provision became an important driver in the emerging deinstitutionalised service system.[51]

38 *Disability Act 2006* (Vic) s 222.

39 Department of Human Services (Victoria), *Victorian State Disability Plan 2002–2012* (2002) 7.

40 *Disability Act 2006* (Vic) ss 11, 12, 38.

41 *Intellectually Disabled Persons Services Act 1986* (Vic) ss 3, 9, repealed by *Disability Act 2006* (Vic) s 222(1).

42 Auditor General Victoria, *Services for People with an Intellectual Disability* (2000) 40.

43 *Disability Act 2006* (Vic) s 52(2).

44 *Report of the Minister's Committee*, above n 1, 3.

45 Ibid 25.

46 Ibid 25–6.

47 World Congress on Adult Guardianship Law 2010, *Yokohama Declaration*, Yokohama, Japan, 4 October 2010.

48 *Services for People with an Intellectual Disability*, above n 42, 21.

49 Ibid.

50 *Inquiry into Supported Accommodation*, above n 37, 80–1.

51 *Intellectually Disabled Persons Services Act 1986* (Vic) s 5(i), repealed by *Disability Act 2006* (Vic) s 222(1).

Chapter 3 A Changing Environment

3.42 These profound changes to living arrangements and service provision meant that a single institutional service no longer exercised day-to-day decision-making control over the lives of most people with an intellectual disability. People with disabilities were now more likely to be interacting with local shops and services in the same way as other members of the community.

SERVICE REORIENTATION

3.43 Following the commencement of the State Plan, and consistent with its changed view of people with disabilities and community, disability services and supports began to take on another change of direction in the 2000s. The service system changed from one dominated largely by government, which either funded or directly provided services, to one that was principally concerned with individual package funding.[52] This approach saw funds allocated, either directly or notionally, to the person with the disability, who could then use those funds in flexible ways to meet their needs, either by 'buying' disability services, or through other channels, such as buying in extra support within their ordinary community networks. This enabled people with a disability to access services and supports within their ordinary personal, family, neighbourhood and community networks, rather than rely on a more formal disability service system.

3.44 The number of people receiving individual support packages from the Department of Human Services' Disability Services program has grown from 6920 in the 2003–04 financial year to a projected target of 14 803 for the 2010–11 financial year.[53]

THE ROLE OF INFORMAL ARRANGEMENTS

3.45 The G&A Act provides that VCAT must consider arrangements less restrictive of a person's freedom of decision and action before appointing a guardian or an administrator.[54] In practice, VCAT is highly unlikely to find there is a need to appoint a guardian or administrator if informal arrangements, such as family members making decisions on behalf of a person with a disability, appear to be operating effectively.[55]

3.46 Community responses to our information paper suggested that this sometimes means that service providers play a 'de facto' substitute decision-making role.[56] Some community responses also noted an increased concern with risk management in the service and banking systems.[57] There appears to be a growing unwillingness in some service sectors to rely on informal arrangements that are not legally binding. We discuss informal arrangements in detail in Chapter 15.

A CHANGING LEGAL CLIMATE

UNITED NATIONS' CONVENTION

3.47 Australia is a state party to a number of international conventions that are relevant to protecting and promoting human rights, including the rights of people with disabilities.

3.48 When Australia ratifies these international conventions, it accepts an obligation in good faith to enable enjoyment of various human rights in its domestic laws.[58]

3.49 The United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention) is of particular relevance to people with disabilities.

3.50 The Convention is the most comprehensive international human rights agreement about the rights of people with disabilities. It is one of the nine core human rights treaties of the United Nations. The Convention protects and promotes a broad range of civil, political, economic, cultural and social rights for people with disabilities, almost all of which are directly or indirectly relevant to guardianship laws.

3.51 The Convention was adopted by the General Assembly of the United Nations on 13 December 2006, following a five year drafting process. This process was unique in the history of United Nations' conventions, in that it involved extensive participation of non-government organisations, with approximately 800 representatives of disability organisations across the world attending the final drafting session.[59]

3.52 Although many of the rights protected by the Convention were already protected by other United Nations human rights treaties, such as the *International Covenant on Civil and Political Rights*[60] and the *International Covenant on Economic, Social and Cultural Rights*,[61] these conventions make few specific references to the rights of people with disabilities.[62] A disability-specific convention was seen as necessary to increase the visibility of people with disabilities as holders of human rights, to provide more targeted statements and protections relevant to people with disabilities, and to improve research and monitoring of the status of people with disabilities.[63] It has been described as 'the first international instrument which looks at people with disabilities from the perspective of human rights and not from a perspective of medical or social politics'.[64]

3.53 The Convention was ratified by Australia on 17 July 2008. On 21 August 2009, Australia ratified the Convention's Optional Protocol, which allows individual citizens to make a complaint to the Committee on the Rights of Persons with Disabilities about violations of the Convention by states parties. The Committee oversees the implementation of the Convention.

3.54 The Convention's overall purpose is to

> *promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*
>
> *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*[65]

3.55 It is built upon broad principles that include concepts such as respect for dignity and autonomy, non-discrimination and the right to full and active participation in society.[66]

3.56 It further stresses the notion of participation by noting states' obligations to ensure equal access to different aspects of community life,[67] and to recognise the right of people with disabilities to enjoy legal capacity on an equal basis with other people.[68]

3.57 These matters, which have significant implications for how we develop new guardianship laws, are discussed in more detail later in this paper. The relevance of these Articles to the general principles underpinning those laws is discussed in Chapter 5, and the specific relevance of Article 12 to the recognition of supported decision-making arrangements is discussed in Chapter 7.

3.58 Overall, the Convention seeks to shift attitudes about people with a disability beyond protection to maximising participation in all aspects of life. It requires states to focus on inclusion and participation, rather than mere protection. Protection remains important, however, when assisting people with a disability to participate in society as much as possible.

52 Department of Human Services (Victoria), *Supports for People* (14 July 2010) <http://www.dhs.vic.gov.au/disability/supports_for_people>.

53 Email from Department of Human Services, Disability Services Division, to Victorian Law Reform Commission, 13 September 2010.

54 *Guardianship and Administration Act 1986* (Vic) ss 4(2)(a), 22(2)(a), 46(2)(a).

55 Phil Grano, 'Guardianship, Administration and Substitute Decision-Making' in Springvale Legal Service, *Lawyer's Practice Manual Victoria* (loose-leaf) [8.2.201].

56 See, eg, Submission IP 3 (Stephanie Mortimer) 1–2.

57 For example, consultations with Australian Bankers' Association (18 March 2010); Julian Gardner (26 March 2010).

58 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980): 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

59 Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2006–07) 34 *Syracuse Journal of International Law and Commerce* 563, 588.

60 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

61 *International Covenant on Economic, Cultural and Social Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

62 Lawson, above n 59, 575–6.

63 Ibid 583–5.

64 Volker Lipp, 'Autonomy and Guardianship—Foes or Friends?' (paper presented at World Congress on Adult Guardianship, Yokohama, 2 October 2010).

65 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1.

66 Ibid art 3.

67 Ibid art 9.

68 Ibid art 12.

Chapter 3 A Changing Environment

VICTORIAN CHARTER

3.59 Victoria is one of two Australian jurisdictions to have a charter of rights.[69] The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) establishes a legislative framework for the protection and promotion of human rights in Victoria. It gives statutory recognition to 20 civil and political rights and freedoms primarily derived from the *International Covenant on Civil and Political Rights* (ICCPR).[70] The Charter came into full operation on 1 January 2008.[71]

3.60 The Charter establishes a 'dialogue model' of human rights protection whereby the government, courts and parliament are assigned specific roles to ensure that human rights are protected and promoted in Victoria. The Charter says that new Victorian laws should, as far as possible, be consistent with human rights[72] and that existing laws should be interpreted so that they are compatible with the Charter.[73]

3.61 Some of the rights protected by the Charter that are particularly relevant to the way Victoria shapes and implements its guardianship laws include:

- the right to recognition as a person before the law[74]
- equal protection before the law and protection from discrimination[75]
- protection from cruel, inhuman, degrading treatment or punishment including medical and scientific experimentation or treatment without consent[76]
- freedom of movement and the right of a person to choose where they live[77]
- the right to privacy[78]
- protection of religious practices and cultural enjoyment[79]
- protection against the removal of a person's property without lawful reason[80]
- the right to liberty and security, including freedom from detention without lawful reason[81]
- the right to have a proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.[82]

3.62 The Charter applies to the actions of government departments and public authorities, but not to private individuals or groups.[83] The Charter makes it

> *unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right.*[84]

3.63 A public authority that acts in a way that is incompatible with a Charter right cannot be sued for that conduct alone. However, the breach of the Charter may be used as an additional ground in a non-Charter cause of action relating to the other unlawful conduct of the authority.[85] In other words, a breach of the Charter does not give rise to a freestanding cause of action, but may be used as part of an existing cause of action.[86] There is no entitlement for damages for breach of the Charter.[87]

3.64 While the actions of the Public Advocate are directly subject to the Charter, including when the Public Advocate is acting as guardian of last resort for a represented person, the actions of a private guardian are not. Similarly, the Charter does not apply to private administrators, but does apply to State Trustees.

3.65 The Charter binds VCAT in relation to the general administration of the Guardianship List and otherwise binds VCAT to the extent that it has certain functions under the Charter.[88] The Charter right to a fair hearing applies to VCAT when making decisions under the G&A Act.[89]

3.66 The Charter expanded the rights of the Victorian Ombudsman to include 'the power to enquire into or investigate whether any administrative action is incompatible with the Charter'.[90]

3.67 The Charter acknowledges that human rights, in general, are not absolute, but

> *may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.*[91]

3.68 When determining whether any limitations on rights are reasonable, the relevant factors to consider include:

- the nature of the right
- the importance of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- whether there is a less restrictive way to achieve the purpose of the limitation
- any other relevant factors.[92]

THE IMPLICATIONS FOR GUARDIANSHIP

3.69 The changing demographic, policy, service and legal environments briefly described in this chapter must be considered when designing new guardianship laws that will serve the needs of the Victorian community well into the future. In particular, the growing emphasis upon promoting the equal participation of people with disabilities in all aspects of life has profound implications for guardianship legislation.

CAPACITY

3.70 The difficult concept of 'capacity' lies at the centre of Victoria's guardianship laws. 'Capacity' is used throughout the law as a shorthand term to refer to a level of cognitive ability that is required before a person can make a decision that is recognised as being legally valid or can lawfully participate in various activities. For example, a contract is generally unenforceable if one of the parties had insufficient decision-making capacity to understand what they were agreeing to.[93] In addition, a person cannot marry if they are unable to understand the marriage agreement, and it is unlawful to have a sexual relationship with a person who lacks the capacity to consent to it.[94]

3.71 The numerous legal rules concerning capacity have developed over time and without coordination. While there is no uniform test for legal capacity, the level of cognitive ability required to satisfy a court that a person has capacity has generally been low. Each area of law has developed its own tests for deciding when a person is unable to participate in an activity on the same terms as other people because they lack capacity. Usually, concerns about fairness and protection of vulnerable people underpin legal rules concerning capacity.

3.72 The medical understanding of capacity has evolved over time, from being seen as something that exists, or is absent, globally, to a recognition that capacity is a state that can vary from one time to another and from one decision to another. Understood in this way, the assessment of capacity has become more sophisticated and specific in order to identify with some precision the particular decisions a person is unable to make.[95]

69 The other is the ACT. See the *Human Rights Act 2004* (ACT).

70 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1967); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1.

71 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2.

72 Ibid s 28 requires that a statement of compatibility must be prepared in respect of any new Bill that is introduced into the Victorian Parliament, outlining the Bill's compatibility or incompatibility with human rights.

73 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2) says that '[i]nternational law and the judgments of domestic courts and tribunals relevant to a human right must be considered in interpreting a statutory provision'.

74 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(1).

75 Ibid ss 8(2)–(4).

76 Ibid s 10.

77 Ibid s 12.

78 Ibid s 13.

79 Ibid s 19.

80 Ibid s 20.

81 Ibid s 21.

82 Ibid s 24.

83 Ibid s 6.

84 Ibid s 38(1).

85 Ibid s 39(1); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.

86 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.

87 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

88 *Kracke v Mental Health Review Board* [2009] VCAT 646, [263], [282].

89 Ibid [851].

90 *Ombudsman Act 1973* (Vic) s 13(1A); *Charter of Human Rights and Responsibilities Act 2006* (Vic) sch 2.

91 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

92 Ibid.

93 *Gibbons v Wright* (1954) 91 CLR 423; *Matthews v Baxter* (1873) LR 9 Exch 132.

94 *Crimes Act 1958* (Vic) s 36(e).

95 See Peteris Darzins et al, 'What is Capacity?' in Dr Peteris Darzins et al (eds), *Who Can Decide?—The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 4–5.

Chapter 3 A Changing Environment

3.73 It is clearly beyond the scope of this reference to review and reform the numerous instances where the law stipulates that capacity is a pre-requisite to participation. It is possible, however, to design a range of guardianship mechanisms that permit people who have impaired decision-making capacity to overcome 'capacity disqualifications' by enabling them to participate to the greatest extent possible in decisions that affect them. These mechanisms should reflect the fact that people with impaired decision-making capacity have different levels of capacity and different decision-making needs.

3.74 Guardianship law currently draws a convenient, but scientifically unsupportable, bright line between those people who have legal capacity and those who do not. At present, the law only has one response to the needs of people with impaired decision-making capacity—the appointment a substitute decision maker to make decisions on that person's behalf.

3.75 The Convention encourages a more sophisticated response to impaired decision-making capacity. Article 12 of the Convention envisages a spectrum of measures to support people to participate in those activities where legal capacity is required. Some people will need only a small amount of assistance, while others may need substitute decision making. In the following chapters we describe possible new decision-making mechanisms that seek to implement the principles of the Convention.

THE ROLE OF GUARDIANS AND ADMINISTRATORS

3.76 In view of the many changes in our community since the 1980s, it is also timely to rethink the relationship between substitute decision makers and represented persons, in particular the responsibilities of guardians and administrators. This matter is considered at some length in Chapter 17.

A NEW FOCUS FOR GUARDIANSHIP

3.77 The Commission believes that new guardianship laws could emphasise participation in decision making whenever possible while retaining their emphasis upon protection of vulnerable people. New guardianship laws could:

- be viewed as positive laws that promote participation in the life of the community rather than laws that are restrictive
- promote a clear, statutory presumption of capacity
- favour use of supported decision-making arrangements where possible and use of substitute decision-making arrangements only when supported arrangements are not feasible
- require any decision-making appointee to make the decision the person would have made themselves unless it is unknown or likely to cause serious harm
- encourage people to make personal appointments
- enable people to make supported appointments that may become substitute appointments over time
- operate as one integrated scheme when dealing with personal and tribunal appointments.

3.78 The Commission also believes that guardianship law should be as simple and as accessible as possible. The experience of the past two decades demonstrates that people tend not to use guardianship laws when they are complex and unnecessarily legalistic.

CHALLENGES FOR THE NEW SYSTEM—SUMMARY

3.79 The greatest challenge in designing new guardianship laws is to develop a coherent body of legal rules that responds to the needs of all people with impaired decision-making capacity and does so in a way that enhances, rather than restricts, their rights. This is challenging because it involves creating a system that enhances participation for people with:

- different levels of impairment to their decision-making capacity and with levels of impairment that fluctuate
- decision-making impairments that have different causes, are of different duration and have different likelihood of alleviation
- different decision-making needs
- different levels of support within the community.

3.80 In addition, a new system needs to be one that:

- is able to meet the needs of a growing number of people likely to be experiencing decision-making incapacity
- enables people with impaired decision-making capacity to participate to the greatest extent possible in the same sorts of relationships, transactions and processes as other members of society
- facilitates the participation of people with impaired decision-making capacity in the life of the community.