CAPACITY IN VICTORIAN GUARDIANSHIP LAW: OPTIONS FOR REFORM

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The Victorian Guardianship and Administration Act 1986 *(Vic) is currently under review by the Victorian Law Reform Commission. This article investigates the criteria that need to be established before a guardian can be appointed under the current Act, and draws on developments in other jurisdictions and in international law, as well as on expertise at Victoria's Office of the Public Advocate, to argue that these criteria should be amended. In particular, the article argues that the criteria should be more narrowly confined to those situations where an impairment renders an individual unable to make a specific decision, or when the failure to appoint a guardian to make a particular decision would place an individual at an unacceptable risk of harm.*

I INTRODUCTION

In June 2009 the Victorian government asked the Victorian Law Reform Commission to review the *Guardianship and Administration Act 1986* (Vic) (the 'Act'), with a final report due in June 2011. The broad terms of reference include examining: the consistency of the Act with Australia's international obligations; 'the role of guardians … in advancing the represented person's rights and interests and in assisting them to make decisions'; the use of the term 'disability'; and 'the functions, powers and duties of the Public Advocate'.[1] The Victorian Law Reform Commission has released the first substantial piece of work in the review, which is the 'Guardianship Information Paper',[2] and an options paper is expected to be available by the time of this article's publication. The Office of the Public Advocate (Vic) has made a submission in response to the 'Guardianship Information Paper', which incorporates the key conclusion of this article (though

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1 Victorian Law Reform Commission, *Guardianship — Terms of Reference* (23 October 2010) <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Current+Projects/Guardianship/LAWREFORM+-+Guardianship+-+Terms+of+Reference>.

2 Victorian Law Reform Commission, *Guardianship*, Information Paper (2010).

little of the supporting argumentation that exists here).[3] It is worth noting that a review of Queensland's guardianship legislation is also underway and will follow a similar timeframe to Victoria's review.[4]

The purpose of this article is to consider one key part of Victoria's guardianship legislation — the criteria that must be satisfied before a guardianship order can be made. In doing so, the article draws on developments in other jurisdictions and in international law. The article also draws on the expertise of staff at the Office of the Public Advocate ('OPA'), which has been the guardian of last resort since the legislation was enacted. During 2009–10, OPA was the guardian on 1574 occasions,[5] and this article utilises information gained through an internal review process at OPA.[6] From this context I consider the particular capacity criteria in Victoria's guardianship law with a view to recommending changes.

II INTERNATIONAL CONTEXT

The review of Victoria's guardianship laws is happening in the context of significant developments at the international level. Most significant here is the adoption and developing implications of the *Convention on the Rights of Persons with Disabilities* (the 'Convention').[7] Article 12 of the Convention includes the recognition 'that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.[8]

Article 12 further states:

> that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances,

3 See OPA, Submission No 8 to the Victorian Law Reform Commission in Response to the Guardianship Information Paper, *Review of Guardianship Laws*, 7 May 2010. That submission, written by the author of this article, only very briefly rehearses the argument contained in this article: see section 6.

4 See Queensland Law Reform Commission, *Terms of Reference* (17 November 2009) <http://www.qlrc.qld.gov.au/guardianship/reference.htm>.

5 Office of the Public Advocate, *Annual Report 2009–10* (2010) 5.

6 I have gained this information primarily through my involvement in OPA's 'Capacity' working group, in discussions with the Public Advocate, Colleen Pearce, and through comments made at the OPA-wide forums on 7 September 2009 and 15 October 2009. Particular thanks are due here to the Public Advocate and to the members of the working group, including Phil Grano, Mariella Camilleri, Colleen Dixon, Colleen Hirst, Ergun Cakal, Sarah Morgante and Lois Bedson.

7 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/61/611 (entered into force 3 May 2008), which was adopted by the UN General Assembly on 13 December 2006: *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plen mtg, Agenda Item 67(b), UN Doc A/Res/61/106 (13 December 2006).

8 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/61/611 (entered into force 3 May 2008) art 12(2).

> apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.[9]

In order to ensure that the Convention would not be interpreted to be incompatible with current Australian guardianship practices, Australia declared, in signing the Convention, that it understood

> that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards …[10]

There is now a substantial amount of literature that considers the implications of international law developments for the form and interpretation of substitute decision-making capacity criteria.[11] While the full implications of art 12 of the Convention are still the subject of considerable debate, its key role will be to reverse the assumption of incapacity that has often accompanied evidence of disability.[12]

This article proceeds on the understanding that guardianship is not necessarily inconsistent with the Convention. At the same time, the article recognises, and indeed draws on, the view now expressed in international law that guardianship should be limited to situations of absolute necessity, and that the powers of guardians should equally be limited as much as is feasible.

A final point to note here is that there is now a considerable body of international literature devoted to analysing and debating the most appropriate means of testing capacity.[13] This article concentrates on current Victorian legislative criteria, not the means of testing capacity.

9 Ibid art 12(4).

10 See Secretariat for the Convention on the Rights of Persons with Disabilities, *United Nations — enable: Declarations and Reservations* (2010) <http://www.un.org/disabilities/default.asp?id=475>.

11 See, eg, Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34 *Syracuse Journal of International Law and Commerce* 429; Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-Making for People Lacking Capacity* (2010) 40–7; Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Working Paper No 64 (2008) 27–33.

12 See Dhanda, above n 11, 433.

13 See, eg, Frank Chen and George Grossberg, 'Issues Involved in Assessing Capacity' (1997) 76 *New Directions for Mental Health Services* 71; Gareth S Owen et al, 'Mental Capacity and Decisional Autonomy: An Interdisciplinary Challenge' (2009) 52 *Inquiry: An Interdisciplinary Journal of Philosophy* 79; Malcolm Parker, 'Judging Capacity: Paternalism and the Risk-Related Standard' (2004) 11 *Journal of Law and Medicine* 482; Kelly Purser, Eilis Magner and Jeanne Madison, 'Competency and Capacity: The Legal and Medical Interface' (2009) 16 *Journal of Law and Medicine* 789; Jennifer Moye et al, 'A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship' (2007) 47 *The Gerontologist* 591; Karen Sullivan, 'Neuropsychological Assessment of Mental Capacity' (2004) 14 *Neuropsychology Review* 131.

III SITUATION IN VICTORIA

The *Guardianship and Administration Act 1986* (Vic) provides that a guardianship order can be made by the Victorian Civil and Administrative Tribunal ('VCAT') in respect of a person who:

> (a) is a person with a disability; and
>
> (b) is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances; and
>
> (c) is in need of a guardian …[14]

Victoria's guardianship legislation thus links three aspects together in setting out the criteria for guardianship orders: the existence of a disability; the inability to 'make reasonable judgements'; and the 'need' of the person to have a guardian. An overriding provision states that VCAT cannot make a guardianship order 'unless it is satisfied that the order would be in the best interests of the person in respect of whom the application is made'.[15]

A guardianship order can be limited or it can be a plenary. A guardian under a plenary order is said to have 'all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person [were] his or her child'.[16]

I will examine each of the above three guardianship criteria in turn in this section. Before that, however, I will briefly examine the manner in which current legal understandings of capacity challenge, in some ways, the development and operation of appropriate guardianship laws.

A *Capacity and Guardianship*

Legal capacity, as a general proposition, is decision-specific. That is, a person at any given point in time may have capacity to do one thing and not another. In its most famous statement about capacity, the High Court held in its *Gibbons v Wright*[17] decision that:

> The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.[18]

14 *Guardianship and Administration Act 1986* (Vic) s 22(1).
15 Ibid s 22(3).
16 Ibid ss 22(1), 24(1).
17 (1954) 91 CLR 423.
18 Ibid 437.

There are two key challenges that this 'decision-specific' principle of capacity presents to the determination of capacity in guardianship cases. First, where capacity criteria are generic (as they are in Victoria) and not specific to particular decisions that need to be made, a result can be that a person's limited capacity in one area may result in a guardianship order that overrides a represented person's ability to make decisions in areas where they may have capacity.

For instance, a person's inability to manage their finances and make health decisions may lead to a plenary guardianship order that overrides their ability to choose where to live. Yet the person may in this case actually have capacity to make that particular decision. They may be able to weigh up the options confronting them and express a preference with which they would be satisfied. I will return to this point later in the article.

Second, when capacity is fluctuating — as is not uncommon in people with dementia or mental ill-health, for instance — guardianship can operate to preclude the making of decisions where, because of some improvement or up-stage in the person's condition after the guardianship order has been made, the represented person may technically have capacity. A person may, in a time of an acute mental health crisis for instance, be the subject of a guardianship order, and yet following treatment may regain capacity.[19]

This point was illustrated in one recent Victorian Supreme Court case, where one of the questions for determination was whether a represented person had testamentary capacity. In this case a man with a brain tumour was subject to a temporary guardianship order (which was later extended). Four days later he married, and the following month an Administrator was appointed. Two days after the appointment the man made a will in which he left his possessions to his new wife. Following the man's death his will was challenged by one of his daughters. A key question in the case was the relevance of the proceedings under the guardianship legislation to the man's testamentary capacity.[20]

In dismissing the daughter's application, the Supreme Court found that 'a represented person has a right, like any other member of the community, to make a Will. The validity of that Will depends upon the person's testamentary capacity at the time of the making of the Will.'[21] The relevant provisions of the guardianship legislation, the Court found, could not be said to strip the power to make a will from a represented person.[22]

As John Forrest J reasoned:

> The test laid down by the [*Guardianship and Administration Act*] … does not involve the same application of principle as the test for testamentary capacity. An administration order is made at a fixed point of time. Mental

19 On this topic, see Chen and Grossberg, above n 13, 81. See also Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Working Paper No 68 (2009) vol 1, 16–17.

20 *Edwards v Edwards* (2009) 25 VR 40, [3]–[6].

21 Ibid [62].

22 Ibid [61].

> illness can wax and wane. Indubitably, at times a represented person may have sufficient soundness of mind to be able to execute a Will with appropriate testamentary capacity, albeit that at an earlier or later point of time such capacity had dissipated.[23]

The significance of this case is that it illustrates that guardianship legislation often amounts to a blunt protective instrument that risks limiting people's freedoms more than is necessary. Here, the fact that the testator was a represented person did not invalidate his will. From a law reform point of view, the case suggests that any review of guardianship laws should look to identify as narrowly as possible the areas in which a represented person can be said to have lost decision-making ability. I will return to this point after considering the way the current capacity criteria are interpreted.

B *'Is a Person with a Disability'*

Three kinds of criteria are regularly utilised to test capacity and are typically referred to as: functionality (the ability to reason to make a specific decision); status (where the presence of a condition such as a particular disease, or some other status, such as childhood, will signal incapacity); and outcome (where the result of the thought process is examined against societal expectations).[24] As a recent Queensland Law Reform Commission discussion paper notes, many jurisdictions merge two of these tests.[25] The United Kingdom's *Mental Capacity Act 2005* (UK), for instance, provides that:

> a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.[26]

This requires an 'impairment' or 'disturbance' (status) that renders the person 'unable to make a decision for himself' (function).[27] This definition of capacity essentially codified the pre-existing common law, though with an explicit emphasis on functional ability in relation to particular matters. As one member of the House of Commons acknowledged during the legislation's passage through Parliament, 'the emphasis of the functional definition adopted in the Bill is that capacity may be retained for some everyday matters, while it may not run to major decisions …'[28]

23 Ibid [56].

24 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation*, above n 11, 118–22.

25 Ibid 120.

26 *Mental Capacity Act 2005* (UK) c 9, s 2(1).

27 Ibid s 3(1).

28 United Kingdom, *Parliamentary Debates*, House of Commons, 11 October 2004, vol 425, col 35 (Tim Boswell). See also Timothy Nicholson, William Cutter and Matthew Hotopf, 'Assessing Mental Capacity: The Mental Capacity Act' (2008) 336 *British Medical Journal* 322.

The requirement in Victoria's legislation that a person must have a disability before being able to be subject to a guardianship order constitutes a 'status' element of Victoria's guardianship criteria. A 'disability' is defined as an 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.[29]

One instinct, which is informed by a rights-based approach to capacity, is to label this criterion as unfairly discriminatory. The argument here is simply stated: a person with a disability is liable to be the subject of a guardianship order (where the other criteria are met), whereas a person without a disability cannot be subject to a guardianship order. The *Convention on the Rights of Persons with Disabilities* provides that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.[30] The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), meanwhile, guarantees equality 'before the law' and 'equal protection of the law without discrimination', which is defined to include (through reference to the *Equal Opportunity Act*) discrimination on the basis of 'impairment'.[31] Does the guardianship law's requirement that there be a disability not contravene these provisions? Two people can act identically and make the same decisions, yet only the person with a disability will be liable to be subject to a guardianship order.

Such a scenario presented itself in a case at OPA. A man for many years had engaged in what might commonly be referred to as risky behaviour with alcohol and sex. This behaviour merely continued after the onset of a cognitive impairment. Yet the existence of this impairment enabled his behaviour to be restricted through the making of a guardianship order. Was he unfairly discriminated against because of his disability?

The response to this gets to the heart of the theory of guardianship and asks quite simply whether a guardianship order is a positive outcome for the person in question. Undoubtedly, and by definition, the ability of a guardian under a guardianship order to substitute his or her judgement for that of the represented person entails a loss of certain freedoms for that person. And if one were to determine that, on the whole, guardianship was a negative outcome for the person, then the argument about unfair discrimination would be irrefutable. But if guardianship is seen as a positive outcome for the person, then guardianship will not constitute unfair discrimination.[32] In this vein, guardianship can be seen either as an instance of differential treatment (necessary adaptation) whereby the person with a disability is assisted (by guardianship) to be placed in a similar position to that of people without a disability, or it could be considered a 'special measure', wherein positive discrimination (in favour of people with disabilities) is undertaken in order to raise the status of that previously oppressed group.

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

30 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/61/611 (entered into force 3 May 2008) art 12.

31 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 3, 8; *Equal Opportunity Act 1995* (Vic) s 6.

32 See also John Chesterman, 'The Review of Victoria's Guardianship Legislation: State Policy Development in an Age of Human Rights' (2010) 69 *Australian Journal of Public Administration* 61.

It is worth noting here that guardianship could not be seen as positive discrimination where a guardianship order were made simply to protect society from a person, rather than being made to promote that person's interests. I will discuss shortly one case where this very issue was considered.

There exists, however, an overriding reason for retaining the criterion of disability, though I would suggest this word should be replaced by the word 'impairment', which is less stigma-laden and already has currency through its use in equal opportunity legislation.[33] The decision whether or not to make a guardianship order is an exercise that requires recognition of autonomy to be balanced with the desire to protect. If guardianship orders were not premised on the existence of a decision-making impairment, then there would be no need for the tribunal to ascertain the reasons for decision-making difficulties, or to receive expert clinical advice in this regard. Instead, the focus would shift onto examining the outcomes of a person's decisions (or lack of decisions). This would constitute a subtle shift away from a functional to an outcomes approach. A guardian, at least in those cases where there was no proven impairment, would tend to be appointed on the evidence of a person's poor decisions, not on the evidence of the person's inability to make decisions.

To be sure, this would also be a valid criticism where disability remained a guardianship criterion but where the disability in question was unrelated to cognitive functioning and was unrelated to the reason for there being a guardianship application.

With that point in mind, there is good reason now to reformulate the disability criterion and word it in such a way that the disability is relevant to decision-making. At the moment, the disability needs to be linked to the inability 'to make reasonable judgements', rather than being linked to any particular decision that actually needs to be made. This means, technically, that a person with a disability may be able to decide where to live, and yet may still be subject to a guardianship order which vests decisions about accommodation in a substitute decision-maker, simply because the person's disability clouds their general ability to make decisions.

I will look more at the need for 'decision-specific' criteria in the next section, when I consider the 'reasonable judgements' criterion, but the point to make here is that the retention of 'disability' — preferably replaced by the word 'impairment' — needs to be linked to an inability to make the decision that has led to the guardianship application.

Thus the 'inability to make a decision' would need to be defined, and in doing so I would draw here on a standard combination of factors that exists in the UK *Mental Capacity Act 2005*, which incorporates an inability: to understand germane information; to hold that information in mind; to balance it with competing information; and to communicate a decision.[34]

33 *Equal Opportunity Act 1995* (Vic) ss 4(1), 6(b).

34 *Mental Capacity Act 2005* (UK) c 9, s 3(1).

Whilst these criteria for measuring a person's 'inability to make a decision' are objective ones, a key benefit of making guardianship criteria decision-specific is that guardianship orders will only be made, I will suggest shortly, where decisions are needed, or where serious risks exist. Two people may have similar disabilities but guardianship will be decided in the context of the actual lives of those individuals. If one person has social supports that do not place him or her at serious risk and that do not generate the need for a particular decision to be made, then he or she will not be subject to a guardianship order. This has particular implications for the nascent international movement towards supported decision-making arrangements, which promises less reliance on formal guardianship structures.

C *'Is Unable ... to Make Reasonable Judgements'*

Before a guardianship order can be made, VCAT needs to be convinced that the person 'is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances'.[35]

An initial point to consider here is whether the ability to make reasonable judgements is particular to the position of the person (and subjective in that sense), or is of a more generic nature. This might be seen as the difference between the ability to make reasonable judgements per se, and the ability to do so in the context of a particular person's life.

In considering a case involving the appointment of an administrator, Deputy President Billings of VCAT put it this way:

> The question is this: is it necessary to measure the person's capacity against his or her actual property and affairs, however extensive, complex or demanding they may be (the subjective test), or should it be measured against an objective standard such as 'the ordinary routine affairs of man'?[36]

Deputy President Billings went on to hold that the Tribunal should consider 'the person's capacity in relation to his or her actual estate and not "ordinary routine affairs"'.[37]

This element of the capacity criteria is interpreted, then, as the person's ability to make reasonable judgements in the context of their particular life. But this does not necessarily mean that their decisions are assessed against the decisions that the 'reasonable person' in their shoes would make. As I shall suggest in the next section, this is because this criterion does not test decisions or judgements per se, but the ability to make them.

35 *Guardianship and Administration Act 1986* (Vic) s 22(1)(b).

36 *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [53] (Deputy President Billings).

37 Ibid [55].

1 *Is the 'Reasonable Judgements' Criterion a Test of Outcomes or Functions?*

The requirement in the Victorian legislation that a person be 'unable … to make reasonable judgements' appears at first glance to constitute an 'outcome' element in Victoria's capacity criteria. One might presume that the way to assess whether a person is able 'to make reasonable judgements' is to examine the judgements the person has made, and assess whether they are reasonable.

However, the experience of OPA is that this element of the capacity criteria is not actually outcome-focused. This is because the specific words of this element are that the person '*is unable* by reason of the disability to make reasonable judgments'.[38] The present tense use of 'is unable', rather than a phrase such as 'has not been able', and the tying in of 'disability', shifts the focus to the person's current functioning abilities, rather than placing the emphasis on the details or outcomes of their previous decision-making processes.

This is a subtle distinction, but it can be illustrated with a brief example. Assume a criterion in a test of capacity was that 'the person is unable by reason of a disability to run 100 metres in under 15 seconds'. If I were in a wheelchair and unable to walk, the assessment of whether I satisfied this criterion would not actually be outcome-focused. It would not rely on evidence that I had attempted to stand and cover the distance. Instead the assessment would rely on my current functionality, and would extrapolate from that about my ability to meet the criterion. It would draw on evidence of my inability to walk, and would conclude that the criterion had been met.

Thus the phrase 'is unable by reason of the disability to make reasonable judgments' is actually more a test of functioning than it first appears, and the experience of OPA's Advocate Guardians is certainly that functionality, rather than an assessment of the reasonableness of a person's previous decisions, is the focus of evidence in tribunal hearings.

That is not to say that outcomes play no part in the process. Evidence of prior 'unreasonable' exercises of judgement is routinely introduced as evidence of a person's incapacity. The point, however, is that this aspect of the test tends to focus on the current inability (as evidenced by many things, including past decisions) rather than being based simply on the outcomes of past decisions.

An outcome-focused criterion would be objectionable for the reasons already stated: it would shift the focus from the ability to reason onto an assessment of particular decisions. But even though the 'reasonable judgements' test is not as outcome-focused as it first may appear, this criterion is still not ideal. The use of the word 'reasonable' does suggest that at some level the reasonableness of a person's decisions will determine their guardianship status, and this is at odds with the principle that it is a person's functional abilities that should determine whether they are subject to a guardianship order, not their actual decisions.

38 *Guardianship and Administration Act 1986* (Vic) s 22(1)(b) (emphasis added).

D *'Is in Need of a Guardian'*

The final criterion that must be satisfied before a guardianship order can be made is that the person in question 'is in need of a guardian'.[39]

In assessing the 'need' for a guardian, the *Guardianship and Administration Act 1986* (Vic) requires VCAT to take into account:

> (a) whether the needs of the person … could be met by other means less restrictive of the person's freedom of decision and action; and
>
> (ab) the wishes of the proposed represented person, so far as they can be ascertained; and
>
> (b) the wishes of any nearest relatives or other family members of the proposed represented person; and
>
> (c) the desirability of preserving existing family relationships.[40]

These considerations are required also for the appointment of an administrator, with the exception that the wishes of relatives and the desire to preserve 'existing family relationships' are not required to be taken into account in making an administration order.[41]

In addition, another provision in the Act requires it to be interpreted in such a way as to ensure that 'the wishes of a person with a disability are wherever possible given effect to'.[42] When considering the status of personal wishes in 2007, Deputy President Billings found that 'while clearly intending that the person's wishes be given effect to wherever possible, the Victorian Parliament did not intend that the person's wishes would be the paramount consideration'.[43]

Having 'need' as a criterion for the appointment of a guardian appears initially in some ways curious. The question of whether a guardian is appointed is, in part, thus answered by asking whether they need one. In effect, this criterion allows VCAT the discretion not to appoint a guardian even if the other criteria have been satisfied. As the Cocks report, which provided a blueprint for subsequent legislation, argued in 1982: '[t]he fact that a developmentally disabled adult is unable to care for himself and to make reasonable judgements in respect of all or any of the matters relating to his person does not of itself mean that he is in need of guardianship'.[44]

OPA's view of the 'need' provision has been that it places on VCAT the obligation only to appoint a guardian when a decision is needed, rather than when the person is believed more generally to require a guardian. While this is not the way VCAT

39 Ibid s 22(1)(c).

40 Ibid s 22(2).

41 Ibid s 46.

42 Ibid s 4(2)(c).

43 *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [77] (Deputy President Billings).

44 Cocks Committee, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 75. See also *Edwards v Edwards* (2009) 25 VR 40, [41].

members have uniformly interpreted the provision, a key argument in this article is that OPA's interpretation ought to guide a re-formulated statement about this in new legislation.

Of quite recent relevance here to the assessment of 'need' is Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic), which requires 'any less restrictive means reasonably available' to be considered before any human right is limited.[45] The guardianship legislation directly incorporates this requirement by stating that the legislation should be interpreted, and power under it should be exercised, in such a way that 'the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted'.[46] The compatibility of this provision with the making of plenary guardianship orders is debatable, and it is worth noting that the legislation specifically requires only that any limited guardianship order, not a plenary order, be as 'least restrictive of that person's freedom of decision and action as is possible in the circumstances'.[47]

Nevertheless, the 'least restrictive' direction reinforces the idea that the legislation should be used only when necessary, rather than in all cases where the other criteria have been satisfied. As the Supreme Court of Victoria held in 2009, the least restrictive requirement, and the obligation to consider the person's wishes, are 'unusual' and demonstrate 'the need to interpret the [Act] in a way which will interfere as little as possible with the rights of the represented person'.[48] This was consistent with an earlier judgement of the Supreme Court in *Moore v Guardianship and Administration Board*. Forrest J quoted with approval the comments of Gobbo J in that 1990 case, who said: 'it must be a very rare case that will see an order made against the wishes of a represented person'.[49]

The requirement for there to be the 'need' for a guardianship order received detailed consideration in the *AC* case in 2009. There, an application for a guardianship order had been made by the Department of Human Services in relation to a man who was being released from prison and who, it was feared, still constituted a danger to society. Though there was some uncertainty about the man's capacity, Deputy President Billings decided that he did lack 'capacity to make reasonable decisions concerning the precise matters under consideration'.[50] But Deputy President Billings nonetheless declined to make a guardianship order:

> Looking at the circumstances now and in the reasonably foreseeable future, I am of the view that there is no need for a guardian to make a decision for AC to accept or reject accommodation with supports and services. Notwithstanding his diminished capacity, he has made the decision for himself and, it seems clear to me, he has done so in his own best interests. I am aware of the considered expert opinion as to the risk that he may at some time in future expose other persons to serious harm, but I do

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

46 *Guardianship and Administration Act 1986* (Vic) s 4(2)(a).

47 Ibid s 22(5).

48 *Edwards v Edwards* (2009) 25 VR 40, [26].

49 Ibid, quoting *Moore v Guardianship & Administration Board* [1990] VR 902, 917 (Gobbo J).

50 *AC (Guardianship)* [2009] VCAT 753 (8 May 2009) [1]–[5], [37] (Deputy President Billings).

> not accept that I should now more or less disregard AC's own decision to remain under supervision …
>
> As … the [Act] makes clear, that Act is for AC's benefit: in effect there is to be, to the extent possible, an emphasis on exploring less restrictive options, promoting AC's best interests and giving effect to his wishes.[51]

Deputy President Billings' reluctance to make a guardianship order here has not always been shared by VCAT members in other guardianship decisions, and OPA takes the view that the criterion of 'need' requires more specific expression in new legislation in the manner suggested at the end of this article.

In addition, bearing in mind that the obligation to respect a person's wishes is legislatively tied to the assessment of need, it would be prudent to have elsewhere in new legislation a statement requiring the proposed represented person's wishes to be taken into account (in addition to the appearance of this principle in the 'Objects' section of the Act). The easiest way to do this would simply be to state a list of principles which VCAT must address before making a guardianship order, and I make a suggestion along these lines at the end of this article.

E *Best Interests*

One overriding aspect of the guardianship legislation is the provision that states that VCAT cannot make a guardianship order 'unless it is satisfied that the order would be in the best interests of the person in respect of whom the application is made'.[52]

The phrase 'best interests' has come to acquire a meaning that is almost contrary to the original intentions behind its usage. Its frequent use in child welfare legislation, in particular, has seen it acquire quite paternalist connotations. It is inevitable, perhaps, that the regular usage of the principle of 'best interests' to override a person's expression of their wishes would mean that the phrase has come to be a euphemism for overriding someone's free will.[53] For this reason alone, it would be good to replace it.

Not unrelated to this is the point mentioned earlier, that the power of a guardian under a plenary guardianship order is said to equate to the power of a parent over a child.[54] There are a number of reasons why it is inappropriate for a guardianship relationship to be said to resemble that of a parent and child any longer. Presumably, the analogy here is with the relationship of a parent and a child under the age of 18 years (not an adult child). At the very least, this characterisation is now seen as offensive to those people who are under guardianship orders. In addition, this characterisation can be quite uninstructive. For instance, if a guardian is making a decision (such as an accommodation decision, or an access to persons decision) that will impact on the ability of the represented person to explore their

51 Ibid [39], [41].

52 *Guardianship and Administration Act 1986* (Vic) s 22(3).

53 See, eg, John Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237.

54 *Guardianship and Administration Act 1986* (Vic) s 24(1).

sexuality, the considerations entertained by the guardian will, one would expect, be quite different to the considerations taken into account by a parent in regard to a 10-year-old child.[55]

Another relevant factor here is the assessment of risk in the making of guardianship orders.[56] At present, the word 'risk' only appears in the legislation in relation to medical treatment. But risk is routinely factored into guardianship orders under the general principle of ensuring that the 'best interests' of the person are met. This enables VCAT, in determining a guardianship application, to consider the risk of harm to the person if a guardianship order is not made.[57]

The danger that accompanies the currently broad guardianship criteria is that equally broad risk factors can be entertained in guardianship applications. An oft-repeated phrase used by those applying for guardianship orders in relation to people with dementia (which is well-known to Advocate Guardians at OPA) is that such people 'may leave their kettle on and burn their house down'. Such a generic understanding of risk, in an increasingly risk averse society, will inevitably operate to diminish the ability of a person to gain the support needed to continue to live independently.[58]

That is not to suggest that risk is not an important feature of any guardianship order. But a positive change here would be to ensure that any risk entertained by VCAT in considering a guardianship order is intimately tied to the particular decision needing to be made. The ACT and Queensland both have provisions which can usefully be drawn upon in this regard, as I shall suggest shortly.

IV OTHER AUSTRALIAN JURISDICTIONS

In looking at ways to improve Victoria's guardianship criteria, it is worth considering the criteria that other jurisdictions in Australia set for guardianship orders. These jurisdictions can be broadly grouped into three tiers.[59]

55 For a recent case that outlines the limits of a plenary guardian's powers, see *RB (Guardianship)* [2010] VCAT 532 (12 May 2010) (Harbison J).

56 This is not to be confused with the concept of 'risk-relevant' or 'risk-relative' capacity, a concept that draws on the degree of risk involved in a decision to determine a person's capacity to make it. On this topic, see Parker, above n 13, 482–91; Jonathan Herring, 'Losing It? Losing What? The Law and Dementia' (2009) 21 *Child and Family Law Quarterly* 3, 9.

57 This is a common feature of guardianship cases, but see, for instance, *MD (Guardianship)* [2005] VCAT 2597 (9 December 2005) (Deputy President Billings), which reports an interim guardianship order being made in relation to MD on the basis of the general risk to MD that would exist were the order not made.

58 See, eg, David Green, 'Risk and Social Work Practice' (2007) 60 *Australian Social Work* 395, 406 and passim.

59 For a recent inter-jurisdictional analysis see Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation*, above n 11, 110 et seq. On the question of inter-jurisdictional differences, it is worth noting that the *Older People and the Law* inquiry conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs sought in its 2007 report 'a nationally consistent approach to the assessment of capacity': House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 91.

In Tier 1 are New South Wales and South Australia, which provide basic criteria and quite wide discretion in this regard. New South Wales' legislation enables an order to be made in relation to 'a person who, because of a disability, is totally or partially incapable of managing his or her person'.[60] This phrase, when used in relation to the appointment of a financial manager, has been interpreted to require an inability to deal with 'ordinary routine affairs' along with a risk that disadvantage in relation to these affairs, or loss of assets, will accompany this inability.[61] South Australian legislation requires 'mental incapacity' to be shown, which is defined as the 'inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs' where this is caused by problems with the functioning of 'the brain or mind' or the inability to communicate.[62]

Tier 2 criteria bring in the concept of the proposed represented person having difficulty making 'reasonable judgements'. Victoria is in this group, as is Tasmania, whose guardianship criteria are the same as Victoria's.[63] The Northern Territory is in this group, and enables guardianship orders to be made where a person has 'an intellectual disability' and 'is in need of an adult guardian'.[64] 'Intellectual disability' is defined as incorporating an apparent inability 'to make reasonable judgements or informed decisions relevant to daily living'.[65] Western Australia also falls into this category. Its legislation enables guardianship to be a measure that not only protects the person in question, but, somewhat more controversially, society more generally. Western Australian legislation enables a guardian to be appointed where a person is 'incapable of looking after his own health and safety', and is either 'unable to make reasonable judgements in respect of matters relating to his person' or is 'in need of oversight, care or control in the interests of his own health and safety or for the protection of others'.[66]

The most 'advanced' guardianship criteria, in Tier 3, come from Queensland and the Australian Capital Territory, where guardianship orders are only possible when particular decisions need to be made or when immediate risks are apparent. Queensland legislation enables a guardian to be appointed where the person 'has impaired capacity for the matter'.[67] 'Capacity' in this context is defined as meaning the ability to understand 'the nature and effect of decisions about the matter', the ability to 'freely and voluntarily [make] decisions about the matter' and the ability to communicate decisions.[68] A guardian can be appointed if:

60 *Guardianship Act 1987* (NSW) ss 3, 14.

61 See *Pamela Anne Collis BHT Elyshia Leanne Collis* [2009] NSWSC 852 (26 August 2009) [13].

62 *Guardianship and Administration Act 1993* (SA) ss 3, 29.

63 *Guardianship and Administration Act 1995* (Tas) s 20.

64 *Adult Guardianship Act 1988* (NT) s 15(1).

65 Ibid s 3.

66 *Guardianship and Administration Act 1990* (WA) ss 4, 43. A guardian can only be appointed where the person 'is in need of a guardian'. For a recent statement about the need to take into account the views of the proposed represented person in this process, see *G v K* [2007] WASC 319 (21 December 2007), which remitted a matter back to Western Australia's State Administrative Tribunal partly as a result of a failure in this regard.

67 *Guardianship and Administration Act 2000* (Qld) s 12(1)(a).

68 Ibid sch 4.

> there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property …[69]

A final criterion, expressed in the negative, is that a guardian should be appointed where failure to do so would mean that 'the adult's needs will not be adequately met' or their 'interests will not be adequately protected'.[70]

The ACT legislation is very similar to Queensland's, although 'impaired decision-making ability' is defined in the ACT legislation as involving 'a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness'.[71] The inability to communicate is notably left off that list.

V A WAY FORWARD FOR VICTORIA

The reasons for preferring the guardianship criteria of the Tier 3 jurisdictions are primarily that this will limit as far as possible the scenario whereby a person is unnecessarily subject to a guardianship order. The proposal is that new legislation should specify that a guardian may only be appointed when there is a pressing need.

The fact that capacity is regarded as being decision-specific makes it tempting to argue that VCAT should enable guardians only to make the particular decision which has given rise to the order. But this would be impractical. For instance, this would require a guardian who was appointed to make a decision regarding access to health services, to return to VCAT whenever a decision was to be made regarding access to a particular health service provider. This would lead to a revolving door effect at VCAT and would, in effect, virtually see VCAT come to play the role of guardian. This is clearly undesirable.

At the same time, it is important that new guardianship legislation limits, as far as is feasible, the particular powers of guardians so that individuals remain free to make their own decisions wherever possible.

Bearing all of this in mind, the proposal is that guardianship orders should be restricted as tightly as possible to the decision that is needed and to ancillary related decisions.[72] In other words, a guardianship order should only be made when a particular decision is needed (or where there is a pressing risk), and the order should specify as narrowly as possible the kinds of decisions — such as accommodation

69 Ibid s 12(1)(b).

70 Ibid s 12(1)(c). For a recent example of a case where these decision-specific capacity criteria were interpreted and applied, see *CSY* [2010] QCAT 49 (22 February 2010) (Senior Member Endicott). In this context, it is interesting to note here that the tribunal's conclusion was broader than it needed to be, when it found 'that CSY has impaired capacity for decision making about his personal and financial matters': at [29]. See also *Aziz v Prestige Property Services P/L* [2007] QSC 265 (12 September 2007) [26] et seq, for a discussion of what constitutes capacity in relation to particular decisions. See also Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation*, above n 11, 107–8.

71 *Guardianship and Management of Property Act 1991* (ACT) ss 5, 7.

72 See OPA, Submission No 8 to the Victorian Law Reform Commission, above n 3, [6.15].

or access to health services — covered by the order. Currently guardianship orders can be constrained like this, but the combined effect of the broad capacity criteria and particularly the lack of specificity around the 'need' criterion, encourages guardianship orders to be made preventatively. At present it is not uncommon for extra powers to be 'tacked on' to guardianship orders as a precautionary measure, or indeed for guardianship orders to be sought preventatively. For instance, parents of a child who is just reaching 18 years of age may seek a plenary guardianship order in relation to the child solely as a protective mechanism, without there being any pressing need for a guardian to be appointed. This proposal seeks to ensure that guardianship is not utilised like this.

That still leaves the problem of guardianship orders enabling guardianship decisions to be made over matters in relation to which a person may at any point in time have capacity. A person may, for instance, have fluctuating capacity, or may turn out to have capacity over lower level decisions within the areas covered by the guardianship order.

There is no getting around this problem, short of requiring VCAT to determine the person's capacity at the moment every guardianship decision is made (which, as I say, would inevitably see VCAT come to play the role of guardian). But the best approach to limit the impact of this problem is to:

1. Ensure that there is a pressing need for an order. This can be done by stating that a guardianship order can only be made where a person does not have capacity regarding a particular decision, and where a decision needs to be made. OPA views this as the preferred understanding of the current 'need' requirement, but clearer drafting would ensure that this interpretation holds sway.
2. Place an obligation on guardians to return to VCAT whenever they have reasonable grounds for believing that a represented person's health or welfare are not benefiting from the continuation of the guardianship order.

Another benefit of narrowly limiting the decisions that can be made under guardianship orders is that it creates more space for the recognition of supported decision-making as a viable alternative to substituted decisions. The move to encourage supported decision-making has ever-growing international support, and the imprimatur now of international law,[73] and the above two requirements are, in part, a recognition of this. Moreover, they will send the clear message that substituted decisions should only be possible in situations where they are absolutely necessary, not simply where they are the easiest solution.

73 See, eg, Secretariat for the Convention on the Rights of Persons with Disabilities, *United Nations — enable: Chapter Six: From Provisions to Practice: Implementing the Convention* (2010) <http://www.un.org/disabilities/default.asp?id=242>.

VI CONCLUSION

For the reasons stated, Victoria's guardianship laws could be improved in the following ways, which would make them similar to the situation in the ACT. The criterion concerning the inability to make reasonable decisions should be jettisoned in favour of a decision-specific focus. The criterion of disability should be replaced with the term 'impairment' and tied to an inability to make decisions. The requirement for VCAT to consider personal wishes should be articulated in a set of principles to which VCAT must give regard, and this set of principles ought to incorporate the principle of promoting 'a person's health and social well-being' instead of their 'best interests'.[74]

In short, OPA is arguing that VCAT should be able to make a guardianship order where a person has an impairment which results in that person being unable to make or give effect to his or her own decision about a particular health or welfare matter, and either:

(a) a decision is required; or

(b) the person's health or welfare is at serious risk with regard to that matter.

The guardianship order should specify as narrowly as feasible the particular type of decisions that the guardian is empowered to make. Before making a guardianship order, VCAT should give heed to the following principles:

- A guardianship order should only be made where this is likely to improve the person's health and social well-being.
- A person's wishes must be considered before making any guardianship order and in the exercise of any guardianship powers.
- A guardianship order should be in place for the shortest time feasible.[75]

Finally, a statutory obligation should exist on guardians to return to VCAT for a review of any guardianship order where the guardian has reasonable grounds for believing that the represented person's health or welfare is not benefiting from the continuation of the order.

VII POSTSCRIPT

Since writing this article the Victorian Law Reform Commission has published its Guardianship Consultation Paper, the second substantial publication in the

74 I am grateful to Barbara Carter, who suggested as an alternative to 'best interests' the promotion of 'a person's health and social well-being'. It is worth noting that in its recent report on powers of attorney, the Victorian Parliament's Law Reform Committee chose to adopt the phrase 'personal and social wellbeing' at OPA's suggestion, in preference to 'best interests': see Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 173.

75 As indicated earlier, this proposal is articulated in OPA, Submission No 8 to the Victorian Law Reform Commission, above n 3, section 6 (the argumentation in the submission supporting the proposal is, however, very brief).

Commission's review of Victoria's guardianship laws. Of particular relevance to this article are the text and associated questions in Chapter 10, pages 182–204. The Commission's final report is now due in December 2011.