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# Adult guardianship: Human rights or social justice?

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*Adult guardianship in English-speaking countries has its roots firmly planted in the protective parens patriae principle. In the last 20 years, in response to societal changes and international developments, concerns about human rights have fundamentally challenged the historic basis of guardianship. This article argues that social justice offers a better framework than human rights for adult guardianship legislation.*

## INTRODUCTION

Two important questions for any civilised society are “What do we owe to people with disabilities?” and “How are we to live together in peace and harmony?” Adult guardianship is one way that the state fulfils its diverse responsibilities towards people with disabilities who are unable to make their own decisions.

Legislation addresses policy problems of the day in accordance with the thinking of the day. The *Guardianship and Administration Act 1986* (Vic) (the Act) was considered groundbreaking legislation in the 1980s, reflecting significant changes in societal attitudes towards people with disabilities. The Victorian Law Reform Commission is now reviewing the Act and it is timely to reflect on whether the approach of the current legislation should be reconsidered.

This article begins by briefly exploring guardianship prior to the 1980s and the underlying change in approach of the 1986 Act. There have been significant changes in the social context and in the attitudes towards people with disabilities since the 1980s. For many, a human rights approach appears to offer the most suitable framework for the new legislation.

The article argues that a social justice framework provides a better solution than a human rights framework to the policy questions of adult guardianship in 2010. It can also provide better answers to the broader philosophical questions of what society owes to people with disabilities and how social harmony can be achieved. The article is written from the perspective of a guardianship practitioner.

## BACKGROUND

### Protection and separation: Guardianship prior to 1986

The guardianship system in Australia derives from the English system of law and government. The key principle was *parens patriae* (which translates as “parent of the nation”). Under this principle, it is the responsibility of the monarch to care for those who cannot care for themselves, traditionally children and those with disabilities. The *parens patriae* responsibility was later transferred to the courts but now the *parens patriae* responsibility towards adults with disabilities in Australia is largely exercised through the guardianship system.<sup>1</sup> The framework of legislative arrangements prior to the 1986 legislation in Victoria can be described as one of protection, control and separation.

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<sup>1</sup> *Gardner; Re BWV*; [2003] VSC 173 at [99]. Justice Morris upheld the view that the *parens patriae* responsibility regarding guardianship is properly exercised through the guardianship system.



## Protection, participation and rights: Guardianship in the 1980s

The 1980s in Australia and other parts of the Western world was a time when awareness of the individuality and rights of people with disabilities began to emerge. The United Nations took a lead in declaring 1981 the International Year of Disabled Persons (IYDP). The theme of IYDP was “full participation and equality”, defined as “the right of persons with disabilities to take part fully in the life and development of their societies, enjoy living conditions equal to those of other citizens, and have an equal share in improved conditions resulting from socio-economic development”.<sup>2</sup> These sentiments drew on the growing movement towards enabling people with disabilities to live their lives as far as possible in the same way as other persons. In the view of a former Public Advocate of Victoria, the key drivers for change at this time were the “normalisation” perspective, the growing movement against institutional care and consideration of rights.<sup>3</sup>

The current Act in Victoria is based on the *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (the Cocks Report).<sup>4</sup> The report looked at the deficiencies in the existing legislation, and recommended basic principles with which guardianship legislation should conform. It was self-evident to the committee and to the legislators that guardianship was about legal protection. The policy question was how that protection should be provided and the committee recommended safeguards to ensure that people under guardianship were not unnecessarily restricted. The proposed safeguards included providing the least restrictive form of protection, a fair hearing, the presumption of competence, the exclusion of service providers from the role of guardian, an accessible system and guardianship based on need rather than upon a diagnosis of disability.<sup>5</sup>

As well as these procedural legal safeguards and rights, the Act is based on the values of independence and participation. The Act is clearly intended to benefit people with cognitive disabilities<sup>6</sup> and all actions taken under the Act are required to be in the best interests of the person with a disability and to give effect to their wishes wherever possible.<sup>7</sup>

The Act, introduced during the time of “deinstitutionalisation”, was seen as a significant step in the drive to liberate people with disabilities from the oppression of large-scale residential institutions and enable them to take their place as equal, fully participating members of the community. It is still accepted as being ahead of overseas jurisdictions in three main aspects:

- the low-cost accessible service provided through a tribunal rather than the court system;
- the separation of guardianship (personal matters) from administration (money matters); and
- the almost universal use of limited instead of plenary orders.<sup>8</sup>

## HUMAN RIGHTS AND GUARDIANSHIP

### The human rights context

The Victorian Law Reform Commission, currently conducting the review of the Act, is due to report to Parliament in June 2011. Among its terms of reference is:

- 3(c) the need to balance the protection of the interests of an adult with impaired capacity by a guardian or an administrator with the person’s exercise and enjoyment of the human rights, such as the right of freedom of choice, association and movement, including consideration of whether the Act

<sup>2</sup> United Nations, “The International Year of Disabled Persons 1981”, *Enable*, <http://www.un.org/esa/socdev/enable/disidydp.htm> viewed 9 February 2010.

<sup>3</sup> Personal communication: David Green, Victorian Public Advocate, 1995-2000 (September 2009).

<sup>4</sup> *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) (Cocks Report).

<sup>5</sup> Cocks Report, n 4, pp 26-27.

<sup>6</sup> Cocks Report, n 4, p 95.

<sup>7</sup> *Guardianship and Administration Act 1986* (Vic), ss 4(2), 28.

<sup>8</sup> Other Australian States have enacted legislation largely based on the Victorian system. All States have limited guardianship orders, the separation of guardianship and administration, and – except in the Northern Territory and the Australian Capital Territory – the operation of guardianship through a tribunal or board rather than a court.



strikes the right balance between facilitating action in the best interests of an adult with impaired capacity and the person's rights as expressed in the United Nations Convention.<sup>9</sup>

The prominence of human rights considerations in disability discourse is undoubtedly heightened by the *United Nations Convention on the Rights of Persons with Disabilities 2006* (the Convention). In relation to guardianship and human rights, attention has focused almost entirely on Art 12. This Article deals with equal recognition before the law and states that persons with disabilities have “the right to recognition as persons before the law” and that all persons “enjoy legal capacity on an equal basis in all aspects of life”.<sup>10</sup> It also states that “States Parties will take appropriate measures to provide access to the support persons with disabilities may require in exercising their legal capacity”.<sup>11</sup>

The issue of “supported decision making”, expressed in Art 12(3) as “access to support”, has emerged as a central human rights issue and a social, political and ideological challenge to guardianship laws across the world. In the negotiation of the Convention, there was debate between groups that wanted to abolish guardianship and groups that wanted to ensure that guardianship was subject to appropriate safeguards. In the text of the Convention, the word “guardianship” does not appear. Article 12(4) refers simply to measures relating to the “exercise of legal capacity”.

The United Nations handbook on the implementation of the Convention refers to guardianship in negative terms and calls for a shift away from the paradigm of the substitute decision-making mechanism of guardianship to a paradigm in which a person is provided with whatever support is required in order to exercise her or his legal capacity to the greatest extent possible.<sup>12</sup> It is not stated what should happen when the person cannot exercise legal capacity.<sup>13</sup> Guardianship is the “elephant in the room” of Art 12 and the debate continues to rage about whether guardianship is allowable under the Convention.<sup>14</sup> This debate is effectively stymying considered discussion of how the Convention, in its totality, should be implemented in domestic guardianship legislation.

In Victoria, the *Charter of Human Rights and Responsibilities Act 2007* (Vic) (the Charter) protects a range of civil and political rights, freedoms and responsibilities, including freedom of movement, thought, expression and association. The rights articulated are civil and political, not social and economic. Thus there is reference to freedom of movement but not to a minimum standard of health care. The Charter does not place any responsibility on the state to make sure that resources are allocated to enable vulnerable people to live full and dignified lives.<sup>15</sup> The question of incorporating social and economic rights into the Charter was deferred for consideration until two years after the Charter was enacted.

At national level, the *National Human Rights Consultation Report 2009* (Brennan Report) recommended that a *Human Rights Act* should be passed in Australia. The report recommended that social, economic and cultural rights should be listed in the Act together with civil, legal and political

<sup>9</sup> Victorian Law Reform Commission, *Guardianship – Terms of Reference*, <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/law+reform/home/current+projects/guardianship/lawreform+-+guardianship+-+terms+of+reference> viewed 10 August 2010.

<sup>10</sup> *United Nations Convention on the Rights of Persons with Disabilities*, Art 12(1), (2).

<sup>11</sup> *United Nations Convention on the Rights of Persons with Disabilities*, Art 12(3).

<sup>12</sup> Office of the High Commissioner for Human Rights, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (2007) p 90, <http://www.ohchr.org/Documents/Publications/training14en.pdf> viewed 18 February 2010.

<sup>13</sup> The online edition of the handbook (<http://www.un.org/disabilities>) states: “These mechanisms come into effect only when a person is authoritatively determined to be legally incapable of exercising his/her legal capacity.” This sentence has been removed from the subsequent OHCHR publication, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities*, referred to in n 12.

<sup>14</sup> In ratifying the Convention in July 2008, Australia made a declaration that “Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding 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.”

<sup>15</sup> Chesterman J, “The Review of Victoria’s Guardianship Legislation: State Policy Development in an Age of Human Rights” (2010) 69(1) *Australian Journal of Public Administration* 4.



rights but that greater protection of the latter be provided. This is despite the fact that community consultation indicated that Australians consider access to basic amenities, health care and education to be just as important as civil and political rights.<sup>16</sup>

It is understandable therefore, that a key issue in the discussion about guardianship review and reform concerns the place of human rights in the legislation. Which human rights are relevant to guardianship? Should guardianship legislation be framed as human rights legislation? Does guardianship legislation need to be considered more broadly than from a civil and political rights viewpoint? How would a guardian carry out her or his responsibilities under human rights-based legislation and what would the legislation look like?

### Applying human rights to guardianship

How could a human rights framework be applied to guardianship? The only systematic work on this question has been done by the Mental Disability Advocacy Center (MDAC) in Budapest, Hungary. MDAC is an influential human rights organisation that has worked extensively in Eastern Europe, exposing widespread abuses of guardianship in those countries. It was prominent in the negotiation of the Convention. It has written reports on guardianship in eight countries, has successfully taken cases to the European Court of Human Rights and has advocated before the United Nations Human Rights Committee in relation to Russian guardianship law. It was also prominent in the organisation of the United Nations Committee on the Rights of Persons with Disabilities Day of Discussion in October 2009.<sup>17</sup> Its approach and methodology are highly regarded in the guardianship field worldwide.

In its reports, MDAC focuses on those aspects of guardianship that involve the arbitrary removal of human rights from those under guardianship. It has formulated 29 indicators against which legislation in each country is assessed. According to MDAC, these indicators “capture basic safeguards necessary for a person-centred guardianship system that respects human rights. They provide a snapshot of what a guardianship system based on human rights should look like”.<sup>18</sup> These safeguards are reflected in the wording of Art 12(4) and (5) of the Convention.

The indicators are set out in the Appendix to this article, along with the current author’s interpretation of the nature of the indicator and whether Victorian legislation currently complies with the indicators. Of the 29 indicators, 19 are about procedural protections and legal safeguards and seven are about broader civil and political freedoms, although there can be some argument about whether particular indicators should be categorised as legal safeguards or civil rights. Of the remaining three, one is about the principles upon which a guardianship system should be based; one requires that less restrictive alternatives to guardianship are available and have been exhausted before a guardian is appointed; and one requires the guardian to seek the least restrictive living arrangements, endeavouring to allow the adult to live in the community.

If we look at Victoria, the guardianship system, by this author’s analysis, currently meets 23 of the 29 indicators although some of the indicators are met through practice standards rather than through legislative requirements. It does not meet the first indicator, that “the legislative purpose or preamble to the law encompasses respect for the human rights, dignity and fundamental freedom of people with mental disabilities”. There is no preamble to the current Victorian legislation and the stated purpose is “to enable persons with a disability to have a guardian or administrator appointed when they need a guardian or administrator”.<sup>19</sup> The other two unmet indicators relate to legal

<sup>16</sup> “Big Question is Whether Government will Adopt Human Rights Act”, *Canberra Times* (10 December 2009), <http://www.acthra.anu.edu.au> viewed 9 February 2010.

<sup>17</sup> For further information see [www.mdac.org](http://www.mdac.org) viewed 9 February 2010.

<sup>18</sup> Mental Disability Advocacy Center, *Guardianship and Human Rights in Russia* (2007) p 15.

<sup>19</sup> *Guardianship and Administration Act 1986* (Vic), s 1.



representation and the detention of a person in order to assess their functional capacity. Three indicators are partly met. The current Act does not directly provide for the periodic review of a guardian's decisions (as opposed to a review of the order itself) or for a formal complaints process. Arguably, it also falls short on providing less restrictive alternatives to guardianship such as supported decision-making although the Act does require the tribunal to consider whether the needs of the person could be met by other means less restrictive of the person's freedom of decision and action.<sup>20</sup>

If all these indicators were to be met, could we confidently say that we have a guardianship system based on human rights? Could we also say that we have a guardianship system that meets its responsibilities to people with disabilities? For the following reasons, we would have to say that we could not.

MDAC's human rights indicators are overwhelmingly about civil, political and legal freedoms and safeguards with a strong emphasis on procedural justice in the appointment of guardians. There is only slight reference to social and economic rights even though these are also provided for in the Convention in Arts 24, 25, 26, 27, 28 and 30. The work of MDAC in the negotiation of the Convention and its implementation has also focused on Art 12 that deals with legal capacity. Given the prominence of MDAC in the field of human rights and guardianship, it is important to consider why this is so.

It may be because civil and political freedoms and safeguards have traditionally been at the forefront of human rights. It may be that procedural and legal safeguards are more amenable to incorporation into legislation and to legal review than are social and economic rights. It may also be that MDAC is working in countries where the abuse of human rights is widespread and so greatest attention is paid to what are considered the basic freedoms.<sup>21</sup> Or it may be that guardianship, of all the issues concerning people with disabilities, is viewed through the human rights lens as being about civil, political and legal safeguards because it deals with issues of capacity and legal decision-making. Whatever the reason, the association of guardianship with civil and political rights and freedom is strongly embedded in the human rights perspective on guardianship. Attempting to change, or even broaden, that perspective on guardianship would be extremely difficult and is unlikely to be successful.

The same perspective on guardianship and human rights is demonstrated in the terms of reference of the Victorian Law Reform Commission's review of guardianship legislation, which are also framed in terms of the tension between human rights and other social values. In particular, the protection of the person's interests and action taken in their best interests is juxtaposed with their human rights of freedom of movement and freedom of decision and rights within the (United Nations) Convention. Protection is counter-posed with human rights in the reference as though protection is antithetical to human rights.<sup>22</sup>

### **(SOCIAL) JUSTICE AND GUARDIANSHIP**

Justice is, by definition, a social or interpersonal matter and so the addition of "social" to the term is to some extent unnecessary. The purpose of talking about social justice in the context of guardianship legislation is to distinguish it from retributive or correctional justice.

When guardians get together to discuss their work, many of the matters they discuss are about morals and ethics. What is the right thing to do in this situation? How can I make a meaningful difference in the life of my client? What can I do and which decisions should I make to promote my client's personal and social wellbeing and her relationships with others? How can I make sure that my client gets the help and assistance he or she deserves as an equal member of the community? What constitutes a good life for my client? These are essentially moral and social justice questions.

Justice includes the responsibility to care for the dignity of the human person and the search for the common good. The idea of human dignity is usually taken to include the idea of equal worth with

<sup>20</sup> *Guardianship and Administration Act 1986* (Vic), s 22(2)(a).

<sup>21</sup> The freedoms identified by MDAC are mainly negative freedoms, in particular freedom from state interference.

<sup>22</sup> Chesterman, n 15 at 4.



all people deserving of equal respect. Up to this point, human rights and social justice are in agreement. However, social justice goes further in considering how inequality can be embedded in the systemic treatment of, and attitudes towards, people with characteristics such as gender or disability over which the person has no control. It pursues the issue of what support various individuals are entitled to so that dignity and equality are respected and asks what legal and political arrangements are required to ensure inequalities are redressed. It also asks the question of how people are to think about each other across the divisions that a legacy of injustice has created.<sup>23</sup>

Social justice is also concerned with the fair distribution of the benefits and burdens of our common existence and with ideas of social cooperation and harmony. It includes a strong sense, which is not always present in human rights discourse, of discerning what is morally right in a particular situation. Social justice can address the issue of protection, which is central to guardianship and is the basis of the current legislation. A just society, by definition, cares for and protects all its members, according to their needs and circumstances. From a social justice perspective, the purpose of, and the only justification for, guardianship is to make a meaningful, beneficial difference in the life of a person with a disability.<sup>24</sup>

Recent works by Sen<sup>25</sup> and Sandel<sup>26</sup> address the issues around how the dominant intellectual tradition of the late 20th century, the efficient market that promised fairness and freedom, has failed and been discredited. Sandel argues that the dominant theories of justice, utilitarianism and freedom of choice, which are associated with market theory, have failed and that any real debate about the common good has been abandoned, leaving an ethical vacuum and an inability of those outraged by injustice to find a voice or a platform.

Debates about theories of justice have traditionally centred on whether they begin with virtue or with freedom of choice. While much public discourse is ostensibly about promoting utility and respecting individual freedom, Sandel contends that there is a strong underlying conviction in the community that justice involves virtue as well as choice: "Thinking about justice seems inescapably to engage us in thinking about the best way to live."<sup>27</sup> He calls for ethics to return to public debate and daily life and for attention to be paid to how people can live an ethical life of mutual responsibility and respect.

In the area of disability in general and guardianship in particular, this author suggests that such debates *are* occurring, especially among practising professionals in the field. However, the concerns about justice are often being articulated in the language of human rights. Talk of human rights has displaced talk of social justice. In exploring how social justice differs from human rights, it must first be acknowledged that there are many characteristics common to both frameworks. Both are concerned with the dignity of the human person and about the structures of society that enable people to live together in peace and harmony. They share the goal of human flourishing and the creation of a just civil society. It would be a mistake to see them as contradictory.

The clearest difference between the frameworks can be seen in their emphasis. In a social justice framework, a major focus is on the person in community, on the relationships between people, and the interaction between individuals, community groups and the state. Social justice aims at building strong communities with a maximum degree of reciprocal care, concern and cooperation. The other major focus is on the responsibility of the state and society towards its citizens. Rather than emphasising individual rights and freedom from interference by the state, the social justice approach is based on the state's active responsibility to meet the needs of its members.

<sup>23</sup> Nussbaum M, *Sex and Social Justice* (Oxford University Press, New York, 1999) p 5.

<sup>24</sup> Under Victorian legislation, guardians must take orders back to the Victorian Civil and Administrative Tribunal, with a recommendation that they be revoked, if they are unable to make and implement decisions that will benefit the represented person.

<sup>25</sup> Sen A, *The Idea of Justice* (Belknap Press, Massachusetts, 2009).

<sup>26</sup> Sandel M, *Justice: What's The Right Thing to Do?* (Farrar Straus Geroux, New York, 2009).

<sup>27</sup> Sandel, n 26, p 10.



There is a stigma emerging in relation to adult guardianship that, in this author's view, is directly associated with viewing it as an individual rights issue. From a social justice perspective, guardianship is not seen simply as a negative restriction on liberty to be avoided at all costs but rather as one means of enhancing and improving opportunities for people with disabilities. Indeed, the *United Nations Declaration on the Rights of Mentally Retarded Persons 1971* included "the right to a qualified guardian when this is required to protect his well-being and interests".<sup>28</sup> The current call by the United Nations under the Convention for a new paradigm where people with disabilities are supported to exercise their legal capacity rather looking to guardianship in some circumstances is an absolutist position that does not allow for the positive possibilities of guardianship.

The question of how social justice ideals can be incorporated into legislation is different from, but no more difficult, than the question of how human rights ideals should be incorporated into legislation. In reality, there is probably more consensus about the sort of justice our society wants than there is in the debates surrounding human rights.<sup>29</sup>

## COMPARING THE HUMAN RIGHTS AND SOCIAL JUSTICE FRAMEWORKS

### In relation to guardianship

There are several arguments in favour of conceptualising guardianship legislation as human rights legislation. The language of rights emphasises the idea of an urgent claim based on justice: if a person has a right to something, then they are entitled to receive it. Further, if something is a human right, it is essential, important and universal, not trivial, relative or simply desirable. The concept of human rights also challenges the notion that rights are granted in a spirit of beneficence by the powerful to the weak. Instead, people have human rights by virtue of being born human. Finally, the human rights framework provides a mechanism and a moral argument for people to assert and claim their rights from the state.<sup>30</sup>

However, there are also problems with placing guardianship into a human rights framework. If we look at guardianship solely as a human rights issue, we will spend too much of our time arguing about how to make sure that people keep out of guardianship in the first place because it will always be seen as removing a "right". We will spend too little time talking about what a guardian should be doing when a guardianship order is made. Characterising guardianship as a rights issue inevitably casts it as a negative, to be avoided wherever possible. Carney and Tait have described a strange "Alice in Wonderland" world of guardianship:

At the heart of the jurisdiction is a contradiction. The ideology of freedom is linked to a set of legal tools to restrict freedom through the appointment of substitutes. Guardianship laws use a modern rhetoric of personal rights promoting autonomy, fostering independence, and assisting citizens to participate in social life. And yet the main task of guardianship forums is to strip citizens of rights, entrust proxies with the exercise of legal decision-making, and sometimes authorise incarceration through physical and chemical means. The strange paradox of using coercive forms to achieve emancipator purposes raises practical questions about what could possibly constitute successful intervention in this Alice in Wonderland world?<sup>31</sup>

The contradictory aspects of the jurisdiction emerge most forcefully when we attempt to fit guardianship into a human rights framework. It does not fit neatly and keeps spilling messily over the sides. Human rights traditionally operate mainly in the public sphere but guardianship crosses between the public and private spheres of life where notions of rights are less clear-cut. Guardianship deals with matters that cannot necessarily be conceptualised in terms of rights or entitlements. Sometimes

<sup>28</sup> *United Nations Declaration on the Rights of Mentally Retarded Persons 1971*, Art 5.

<sup>29</sup> Campbell T, "Can the Law Deliver Social Justice?" [2001] *University of Western Sydney Law Review* 4.

<sup>30</sup> Nussbaum M, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, Massachusetts, 2006) p 290.

<sup>31</sup> Carney T and Tait D, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, Sydney, 1997) p 47.



the matters have not been agreed upon as human rights, sometimes they cannot be claimed in any realistic way. Either way, the debate tends to centre on definitional questions and which rights should be given prominence in guardianship.

In support of the human rights perspective, it can be argued that the work of guardianship is about the balancing of rights: often the balance between freedom of decision and action and various social and economic rights. This has some merit. However, a human rights framework provides little guidance to a guardian about how a person's rights should be balanced. It does not address the vexed issue of how the dominance of civil, legal and procedural rights over social and economic rights can be corrected. Nor does it deal with the issues of fairness, social inclusion, care and cooperation that are at the heart of the social justice approach. Instead, there is an assumption that a human rights approach will somehow "trickle out" and deal with these issues by imbuing a culture of rights in society. Questions about the purpose and actual practice of guardianship are neglected.

In this author's view therefore, good guardianship is about more than human rights, even if rights are defined as widely as possible and include social, economic and cultural rights equally with civil, political and legal rights. It is also about the qualities of care and compassion. It is about the relationship between a person and their guardian, the relationship between a person and other members of the community and the inclusion of the person within a strong, welcoming community. The guardian must be an advocate for the person so that they may flourish and live in safety and security as far as possible. Much more is expected from a guardian than being a disinterested decision-maker protecting, promoting and balancing a range of personal rights and freedoms.

### **In relation to social and community work**

The work of Ife<sup>32</sup> provides an important, balanced perspective on human rights in the social and community context. In his most recent book,<sup>33</sup> Ife supports human rights as providing a proper base for social policy, legislation and welfare practice. However, he stresses the importance of conceiving of human rights as including a bottom-up process involving individuals, community and a range of professionals in a community development approach and considers that a radical reformulation of human rights is required. He observes that the dominant legal approach to human rights and the legal narrative is one of the most powerful narratives of modern Western society. Grounded in modernity, "it seeks to apply a single set of rules to everyone in a consistent predictable way ... and sees this as evidently desirable". Ife comments that "lawyers are often seen as the 'natural' human rights practitioners, and [that] human rights have been understood as being defined and enacted through the legal process".<sup>34</sup> He sees such an approach as fundamentally incompatible with the more post-modern concepts that underpin social and community work.

When viewed from this perspective, guardianship provides us with a striking example of the tensions between a legal and a community development approach, which are similar to the tensions between a human rights approach and a social justice approach to guardianship. Guardianship is established under legislation and its primary processes are legal processes. Guardians are appointed by a legal tribunal and accountable to that tribunal. At the same time, when a guardian comes to making decisions on behalf of a represented person, he or she is working in a community context with the more fluid realities of a real person's life, family and community circumstances where consistency and predictability are frequently absent.

Ife observes that while human rights are often used as a synonym for social justice, this can devalue some important aspects of a social justice perspective. A major concern of social justice writers has been structural social disadvantage in such areas as class, gender, ethnicity and disability.

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<sup>32</sup> Professor Jim Ife is from a social work background and is Emeritus Professor of Human Rights Education at Curtin University, Western Australia.

<sup>33</sup> Ife J, *Human Rights from Below: Achieving Rights through Community Development* (Cambridge University Press, Port Melbourne, 2010).

<sup>34</sup> Ife, n 33, p 48.



A human rights discourse can marginalise these structural considerations as it tends to treat all people as one; it is a discourse of human unity rather than human diversity.<sup>35</sup>

### In relation to structural issues

In relation to structural issues, Carney<sup>36</sup> has pointed to the emergence of neo-liberal forms of governance that operate by means of a contract between the individual and the state or service provider on the basis of individual responsibility and mutual obligation.<sup>37</sup> He also notes the strong preference in current public policy for various forms of enduring powers of attorney as a means whereby people can make their own provision for a time in the future when they may become incompetent and thereby avoid the need for guardianship.<sup>38</sup> At a theoretical level, the social theorist Foucault would view these developments as examples of “responsibilisation”. In his theory of governmentality, Foucault identified the increasing shifting of responsibility to the individual, meaning that government and authority are able to transfer uncertainty and risk to the individual and thus avoid responsibility while still maintaining control. Foucault argued that this is particularly taking place in the social areas of health, unemployment and homelessness.<sup>39</sup>

The approach of transferring responsibility to the individual draws credibility from and borrows from the thinking on individual human rights, autonomy and self-determination. There is a real risk that human rights may become associated too closely with economic and social frameworks that stress those dimensions of human rights that suit other agendas. This does nothing to answer the questions “What does society owe to people with disabilities?” and “How are we to live together in peace and harmony?”

### The capabilities approach: A possible synthesis?

In seeking to answer these questions, the work of Nussbaum is very helpful. In her capabilities approach to justice, she identifies 10 basic capabilities (or entitlements) that involve the actual ability or opportunity to do or be something. In acknowledging that not all people with disabilities will be able to achieve all of these, she suggests that guardianship can be a way of facilitating the person’s access to the central capabilities.<sup>40</sup> In the capabilities approach, Nussbaum begins not from the basis of mutual advantage, as does Rawls’ theory of justice, but from the basis that human beings cooperate from a range of motives, including a love of justice and moral compassion for those who have less than they need to lead decent and dignified lives.<sup>41</sup> The approach treats justice and inclusiveness as ends of intrinsic value and sees people as essentially social beings held together by altruistic ties and seeking a “good” that is essentially social.<sup>42</sup> While Nussbaum describes her capabilities as a species of human rights approach, it is an approach that is far ahead of the current thinking about human rights and is, perhaps, a good example of where human rights and social justice can fit together.

There is no question that guardianship legislation must accord with human rights and be exercised in accordance with human rights principles, international Conventions and domestic charters.

<sup>35</sup> Ife, n 33, p 82.

<sup>36</sup> Professor Terry Carney is Professor of Law at Sydney University and has written extensively on all aspects of guardianship.

<sup>37</sup> Carney T, “Challenges to the Australian Guardianship and Administration Mode” (2003) 2 *Elder Law Review* 11, <http://www.austlii.edu.au/au/journals/ElderLawRw/2003/8.html> viewed 10 August 2010.

<sup>38</sup> This position was put by the Victorian Equal Opportunity and Human Rights Commission as a means of promoting human rights in its submission to the *Victorian Parliament Inquiry on Powers of Attorney* (2009), <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/POA52 - VEOHRC.pdf> viewed 10 August 2010.

<sup>39</sup> Barnett N, “Local Government, New Labour and Active Welfare: A Case of ‘Self Responsibilisation’?” (2003) 18(3) *Public Policy and Administration* 25.

<sup>40</sup> Nussbaum, n 30, p 199.

<sup>41</sup> Nussbaum, n 30, p 156.

<sup>42</sup> Nussbaum, n 30, p 158.



However, human rights can only take us part of the way and its dominance and manner of interpretation at the current time may even undermine other important personal, social and community aspects of guardianship. We need to look more broadly for a framework to shape guardianship and the important responsibilities we have towards people with disabilities. A guardianship framework based in social justice overcomes some of the limitations of the human rights perspective while still incorporating its essential values.

### **THE PRACTICE OF GUARDIANSHIP: HUMAN RIGHTS OR SOCIAL JUSTICE?**

Whether distinguishing between human rights and social justice in this way is merely a matter of semantics can be further explored by looking at a case study from the Office of the Public Advocate and thinking about how a human rights approach to guardianship might differ from a social justice approach.

Eva has lived in the same house in the hills outside Melbourne for sixty years. The house is set on the side of the hill, 3 km from the nearest town and has no hot water or heating. Eva has a son in another State whom she has not seen for 20 years. She has several animals that are very important in her life. She adamantly rejects all services except for one meal on weekdays that a café provides by arrangement with the local Council. She allows no one onto her property. Eva's health and personal hygiene are deteriorating rapidly. She is finding it difficult to walk into town and she has had several falls on the steep path up to her house. The local Lions club has offered to make the path safer but Eva has declined the offer. She has been threatened and assaulted in her home and money has been stolen from her but she is deeply suspicious of Police and other authorities and will not accept assistance. She refuses to be assessed by the Aged Care Assessment Service so it is not known whether she has a cognitive disability. There are serious concerns about her health, her quality of life, her safety and the welfare of her animals.

The key question here is "What does society owe to Eva?" and what is the justification for any intervention into her life. From the classic human rights perspective, the first matter to be decided is whether Eva has a cognitive disability that would justify the appointment of a guardian to make decisions on her behalf. Eva must be presumed to have capacity to make her own decisions and her living circumstances cannot be taken as evidence of disability.<sup>43</sup> If it is concluded that Eva has capacity, or there is insufficient evidence that she lacks capacity, there is very little that can be done apart from taking action under local government regulations to ensure that Eva's home meets minimum housing standards (and that her animals are adequately cared for!). Our society is prepared to accept the consequence of Eva living in degraded, unsafe circumstances if she does so based on her own competent decision. Her freedom of decision is paramount under rights-based guardianship legislation.

If a way can be found to assess Eva and she is assessed as having a disability and decision-making incapacity, then the threshold for guardianship has been established. An application for the appointment of a guardian and administrator could then be made and a guardian and administrator appointed if the Victorian Civil and Administrative Tribunal finds that there is no less restrictive means of meeting her needs. Once appointed, a guardian operating under human rights principles would be faced with the question of which of Eva's human rights should be limited in order to promote other rights and objectives, such as her personal health and safety. It is reasonable to expect that a guardian working on strict human rights principles would seek the path of greatest freedom and least restriction for Eva even if this resulted in considerable limitations on her health and wellbeing. The primary goal would be the protection and promotion of her identified human rights.

From a social justice perspective, different but equally difficult questions arise. The key question might be: "What needs to happen so that Eva can live a life of basic human dignity?" The social justice perspective emphasises that Eva is an equal member of the community who deserves to receive the support and assistance that she needs. Thus, a social justice framework applied to community services would be more likely to allow intervention on the basis of necessity. Freedom of decision and

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<sup>43</sup> The *Mental Capacity Act 2005* (UK) goes further than Australian legislation and explicitly states (s 1) that "a person is not to be treated as unable to make a decision merely because he makes an unwise decision".



personal privacy are important but are not the dominating values in this framework. Arguably, a social justice framework may set vulnerability as the threshold for guardianship rather than disability and incapacity as such an approach is disability-neutral. Once appointed, a guardian operating on social justice principles is more likely to make decisions that will promote Eva's social and personal wellbeing and safety and protect her from abuse and exploitation even if this imposes limitations on her freedom and privacy. Human rights considerations and respect for Eva's views would be balanced with other social values. The primary goal of the guardian would be to promote her human dignity and wellbeing.<sup>44</sup>

There are many Evas. Families, local communities and professionals struggle to decide what is the right thing to do and where their responsibilities lie; in other words, to find answers to the question "What does society owe to people with disabilities?" What is the future for Eva? It is most likely that Eva's health will continue to decline and she will become ill or have an accident. If nobody knows, she may die alone and many will say that is what she would have wanted. Alternatively, she may be found and taken to hospital. There will be debates about her capacity and debates about whether she can return home after treatment. If Eva goes home, she may or may not be able to be kept safe. If she goes into residential care, many will say that this will undoubtedly kill her. Experience shows, however, that we cannot predict how a particular person will respond to residential care. Professional assessment of risk will also play a major part in the recommendations put and decisions made, but in the end, the basic question everyone will be trying to answer is "What are our responsibilities towards Eva and what is the right thing for her in this situation?"

## CONCLUSION

The review of the *Guardianship and Administration Act 1986* (Vic) provides an opportunity to consider the questions posed at the beginning of this article: "What does society owe to people with disabilities" and "How can we live together in peace and harmony?" It also provides an opportunity to review the framework of the legislation and consider what framework would best contribute to the kind of civil society in which Victorians wish to live.

The context within which the Act operates has changed since 1986 and the policy problems of 2010 are different. The dominant discourse in the field is now about human rights. While the consideration of human rights is an essential part of guardianship legislation, the human rights framework can operate in a constricting way. The evidence suggests that it encourages legislators to concentrate on rights that can be clearly identified and claimed, generally civil and political rights and legal procedural rights.

Working to achieve these rights, important as they are, can take priority and leave little space or energy to pay attention to the teleological purpose of guardianship or the broader and more diffuse territory of values, principles and relationships that are essential to a just and inclusive society. These matters are better dealt with under a social justice framework since human rights can be more easily accommodated in a social justice framework than social justice considerations can be accommodated in a human rights framework.

A social justice framework for guardianship directly addresses the questions of social cooperation and society's responsibility to people with disabilities in a way that a human rights framework is unable to do. By adopting a social justice framework, we can move closer to achieving a just society that respects and includes people with disabilities.

<sup>44</sup> For legal discussion on the human rights issues around removing vulnerable adults from their homes in the United Kingdom, see Herring J, "Protecting Vulnerable Adults: A Critical Review of Recent Case Law" (2009) 21(4) *Child and Family Law Quarterly* 498.



## APPENDIX

**TABLE 1 Indicators for Guardianship System Based on Human Rights – Mental Disability Advocacy Center, Budapest**

| Indicator   | Type of right | Victorian Act complies? |
|---|---------------|-------------------------|
| 1. The legislative purpose or preamble to the law encompasses respect for human rights, dignity and fundamental freedom of people with disabilities.  | O             | No                      |
| 2. Legislation clearly identifies who may make an application for appointment of a guardian and the foundation needed to support it.  | L             | Yes                     |
| 3. An adult has a right to actual notice of, and to be present and heard at all proceedings related to the application for deprivation of his or her legal capacity and appointment of a guardian.                    | L             | Yes                     |
| 4. An adult has a right to free and effective legal representation throughout guardianship proceedings.   | L             | No#                     |
| 5. An adult may not be detained in order to be subjected to an evaluation of his or her functional capacity.  | C             | No                      |
| 6. An adult has the right and opportunity to present his or her own evidence (including witnesses) and to challenge the opposing evidence.  | L             | Yes                     |
| 7. No adult is deprived of legal capacity without being the subject of an incapacity assessment, conducted by a qualified professional and based on recent, objective information, including an in-person evaluation. | L             | Yes (Practice)          |
| 8. A finding of incapacity requires a demonstrable link between the underlying diagnosis and the alleged inability to make independent decisions.   | L             | Yes                     |
| 9. A finding of incapacity is based upon sufficient evidence and serves the interests of the adult.   | L             | Yes (Practice)          |
| 10. Selection of a guardian is based on objective criteria and the wishes and feelings of the adult are considered.   | L             | Yes                     |
| 11. The guardian should not have a conflict of interest with the adult or the appearance of such a conflict.  | L             | Yes                     |
| 12. An adult has the right to appeal a finding of incapacity and/or the appointment of a guardian.  | L             | Yes                     |
| 13. By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise political rights.   | C             | Yes                     |
| 14. By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to work.  | C             | Yes                     |
| 15. By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to property.  | C             | Yes                     |
| 16. By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to marry, to found a family and to respect of family life.                                    | C             | Yes                     |
| 17. By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to associate.   | C             | Yes                     |
| 18. A person under guardianship is not precluded from making decisions in those areas where he or she has capacity.   | C             | Yes                     |
| 19. An adult subject to guardianship must be consulted about major decisions, and have his or her wishes adhered to wherever possible.  | L             | Yes                     |



TABLE 1 continued

| Indicator   | Type of right | Victorian Act complies? |
|---|---------------|-------------------------|
| 20. The scope of the authority and obligations of the guardian are clearly defined and limited to those areas in which the adult subject to guardianship needs assistance.  | L             | Yes                     |
| 21. A guardian is obliged to promote the interest, welfare and independence of the adult under guardianship by seeking the least restrictive alternatives in living arrangements, endeavouring to allow the adult to live in the community. | O             | Yes                     |
| 22. The guardian must manage the assets of the adult in a manner that benefits the adult under guardianship.  | L             | Yes                     |
| 23. The guardian is obliged to visit and confer with the adult periodically.  | L             | Yes (Practice)          |
| 24. A guardian's decisions are periodically reviewed by an objective body and the guardian is held accountable for all decisions.   | L             | Partly                  |
| 25. A complaint procedure exists that triggers review of guardian's acts or omissions.  | L             | Partly                  |
| 26. Less restrictive alternatives to guardianship are available and are demonstrably exhausted before a guardianship order is imposed.  | O             | Partly                  |
| 27. Guardianships are tailored to the individual needs of the person involved and address the varying degrees of capacity.  | L             | Yes                     |
| 28. Guardianship is periodically reviewed and continues only as long as appropriate.  | L             | Yes                     |
| 29. An adult subject to guardianship has the right to request modifications and/or termination of the guardianship.   | L             | Yes.                    |

# The Australian guardianship system is based on the active participation of the Tribunal in the proceedings, avoiding the need for legal representation in most cases.

Type of right:

L = legal safeguards and procedural protections

C = broader civil and political freedoms

O = other

Compliance:

Yes = complies in Victorian legislation or established practice in Victoria.

No = does not comply.

