

## PART I

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### Adult Guardianship

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## Adult Guardianship and Other Financial Planning Mechanisms for People with Cognitive Impairment in Australia

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### I Introduction

Planning instruments for people with cognitive impairments in Australia reflect both its comparatively early adoption of principles of the least restrictive alternative and the need for personal advance planning devices – such as adult guardianship reforms and recognition of durable powers of attorney in the 1980s<sup>1</sup> – and the more recent embrace of principles of supported decision-making enshrined in the Convention on the Rights of Persons with Disabilities (CRPD).<sup>2</sup>

\* Emeritus Professor of Law, The University of Sydney; Visiting Research Professor, University of Technology Sydney. A revised version of a paper presented at the 'International Symposium on Special Needs Financial Planning', Faculty of Law, The University of Hong Kong, 13–14 October 2017.

<sup>1</sup> T. Carney, 'The Limits and the Social Legacy of Guardianship' (1989) 18 *Federal Law Review* 231; T. Carney and D. Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Sydney: Federation Press, 1997); T. Carney, 'Abuse of Enduring Powers of Attorney: Lessons from the Australian Tribunal Experiment?' (1999) 18 *New Zealand Universities Law Review* 481. One dilemma with enduring powers is that 'formality' preconditions or registration requirements have been found to discourage their use, boosting reliance on riskier informal arrangements, putting both parties at risk: C. Tilse et al., 'Older Peoples Assets: A Contested Site' (2005) 24 *Australasian Journal on Ageing* S51, S52. For gold standard legislation and analysis of how to balance take-up and protection: Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Final Report* (Toronto: Law Commission of Ontario, 2017), available from [www.lco-cdo.org](http://www.lco-cdo.org), pp. 169, 179–183.

<sup>2</sup> Convention on the Rights of Persons with Disabilities, New York, 30 March 2007, in force 3 May 2008, 2015 UNTS 3 (CRPD); T. Carney and F. Beaupert, 'Public and Private Bricolage-Challenges Balancing Law, Services & Civil Society in Advancing CRPD Supported Decision Making' (2013) 36 *University of New South Wales Law Journal* 175. To date, apart from some limited dabbling in South Australia, Victoria has been the only jurisdiction to seriously introduce new 'support' avenues (not conferring proxy decision-making power),

Financial planning for people with cognitive impairment unable to provide for themselves and reliant for their economic and social support on succession planning by their family members was hindered in Australia due to major roadblocks posed by Australia's needs-based income support arrangements, which tightly means-test all payments.<sup>3</sup> As a consequence, it was delayed for almost a quarter of a century after the guardianship and durable power reforms, until special legislation was passed in late 2006 providing limited avenues for skirting those roadblocks.<sup>4</sup> Why the delay? Part of the answer may be that not many families had the wealth to sufficiently fund the establishment of a trust to provide support after their death, that state residential care was adequate enough and that it was not easy to construct a scheme to relieve the income security traps. The traps being those of contributions being deemed to remain the property of the donor as being 'gifts' and for distributions to be counted as income of the disabled beneficiary for the purpose of reducing their rate of disability pension or other social security.

This chapter suggests that most of the explanation for the pace and design of Australian planning instruments can be attributed to the architecture of its welfare state.<sup>5</sup> This is because Australia's welfare state is a rather unique combination of a right to an austere level of social assistance based on needs assessment through tight means-testing but absent any expectation of family support<sup>6</sup>; and acceptance of state responsibility for funding of services for disabled people least able to care for themselves: initially through accessing state/territory-run or

confined so far to appointments made by the person, or health and mental health: Powers of Attorney Act 2014 (Vic), ss. 87–89; Mental Health Act 2014 (Vic), ss. 12–27; Medical Treatment and Planning Act 2016 (Vic), ss. 31–32, although Tribunal appointments are authorised under Part IV of its *Guardianship and Administration Bill 2018* (Vic), awaiting passage at the time of writing; also see Advance Care Directives Act 2013 (SA), s. 10(d); Disability Services Act 1993 (SA) as amended, s. 3A; T. Carney, 'Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?' (2015) 4 *Laws* 37.

<sup>3</sup> For details of means testing: T. Carney, *Social Security Law and Policy* (Sydney: Federation Press, 2006), Ch. 6. For the architecture of Australia's welfare state: T. Carney, 'Where Now Australia's Welfare State' (2013) *Diritto Pubblico Comparato ed Europeo* (*Journal of Comparative and European Public Law*) 1353.

<sup>4</sup> T. Carney and P. Keyzer, 'Private Trusts and Succession Planning for the Severely Disabled or Cognitively Impaired in Australia' (2007) 19 *Bond Law Review* 1.

<sup>5</sup> Carney, 'Where Now Australia's Welfare State', n 3.

<sup>6</sup> T. Carney, 'The Future of Welfare Law in a Changing World: Lessons from Australia and Singapore?' (2010) 32 *Sydney Law Review* 199; [2010] *Singapore Journal of Legal Studies* 22.

funded disability services, now the more generous personal packages under the National Disability Insurance Scheme (NDIS).<sup>7</sup>

## II Background

Impairment of cognitive capacity arises in several ways: it may be due to congenital causes (such as intellectual disability); an acquired brain injury from a stroke, accident or other injury; degenerative conditions such as a dementia; or severe mental illness. The planning needs of such groups differ, as indeed do the circumstances and needs of individuals within each category. The standard legal planning toolkit of wills, trusts or powers of attorney offered little by way of effective options,<sup>8</sup> so Parliament stepped in. This had varying success,<sup>9</sup> not least because the needs and capacities of people differ significantly, as now explained.

People with an intellectual disability are likely to accumulate few financial or other resources of their own, being reliant on transfers from family or government, whereas people with dementia frequently will have accumulated assets and savings. People with dementia or even an acquired brain injury may have taken advantage of opportunities to use private planning instruments such as durable powers of attorney to direct their future personal and financial affairs; and even if not, they will have left a 'memory trail' of impressions of informed opinions and value preferences in the minds of family and friends which might be drawn

<sup>7</sup> For an accessible summary of the history and structure of the NDIS scheme, see D. Reddihough et al., 'The National Disability Insurance Scheme: A Time for Real Change in Australia' (2016) 58 *Developmental Medicine & Child Neurology* 66.

<sup>8</sup> Wills and testamentary trusts can give rise to problems such as family provision contests with other siblings, lack of expertise of the trustee, failure of surviving beneficiaries to care for their disabled sibling as expected or conflicts over testamentary wishes. Ordinary powers of attorney, for their part, subsist only while the donor retains capacity and cannot delegate day-to-day health or other 'care' responsibilities over adults: further, T. Carney and P. Keyzer, 'Planning for the Future: Arrangements for the Assistance of People Planning for the Future of People with Impaired Capacity' (2007) 7 *Queensland University of Technology Law and Justice Journal* 255; S. Booth, 'Providing for a Child with an Intellectual Disability' (1996) 34 *Law Society Journal* 63, 63.

<sup>9</sup> Enduring/durable powers of attorney survive loss of donor capacity but are of no assistance where the donor never acquires capacity; adult guardianship laws deal with immediate needs unable to be met in other ways and are not instruments for advance planning against anticipated contingencies; relatives entrusted with 'automatic' statutory powers for health may lack the qualities needed to make wise decisions or the decision may fall outside the more 'routine' care authorised: Carney and Keyzer, 'Planning for the Future', n 8.

on to guide future actions. People with intellectual disabilities, for their part, rarely will have displayed the capacity currently required to execute private advance planning instruments. Consequently, they are more likely to be reliant on public bodies like adult guardianship tribunals and associated legislation to make financial or personal management arrangements.

To further complicate the story, however, lived lives may contradict the best-laid plans. For instance, adult guardianship was revived and modernised in Australia in the 1980s in the expectation that its main caseload would be intellectually impaired former residents of congregate care institutions returning to community care under deinstitutionalisation measures,<sup>10</sup> but the overwhelming majority of the caseload turned out to be the frail aged,<sup>11</sup> with tribunals catering to just an estimated 2 per cent of the population of people with severe or profound cognitive impairments on the basis of Victorian modelling.<sup>12</sup> The same is true even for workhorse provisions such as durable powers of attorney (notable for low take-up<sup>13</sup>), representative payee (or other ‘nominee’) provisions, and

<sup>10</sup> For a good review of the parallel deinstitutionalisation of residential mental health institutions, see P. Gooding, ‘From Deinstitutionalisation to Consumer Empowerment: Mental Health Policy, Neoliberal Restructuring and the Closure of the ‘Big Bins’ in Victoria’ (2016) 25 *Health Sociology Review* 33.

<sup>11</sup> Victorian Law Reform Commission, *Guardianship: Final Report* (Report No. 24, 2012), pp. 34–38.

<sup>12</sup> *Ibid.*, p. 37. Likewise Hong Kong’s adoption of the law and administrative culture of adult guardianship laws from the Australian State of New South Wales attracted approximately one-tenth of the anticipated demand (based on per-capita projections from NSW), an outcome thought to be a product of greater cultural expectations of family rather than external care: M. Schyvens, ‘Presentation’ (Paper presented at the Second International Conference on Capacity; International Congress of Psychogeriatricians, Berlin, 13 October 2015), available from [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au), p. 5; L. Ho and R. Lee, ‘Introducing the Special Needs Trust to Hong Kong’ (2017) 23 *Trusts & Trustees* 1111 (just 280 applications filed in 2014–2015). Japan also has a low take-up: see Chapter 3 (203,551 in 2017, or approximately one-sixth of the expected 1 per cent of the population).

<sup>13</sup> Hong Kong’s experience with enduring powers is emblematic, with only 55 registered in the first 15 years due to the barrier of almost ‘wills level’ formalities, and only 383 in a population of 7.5 million (0.005 per cent) in the first three years after formalities were eased somewhat: see Chapter 13; likewise in Singapore, even though registration is at the point of activation: see Chapter 8 (8,478 in a population of 5.7 million, or 0.15 per cent). By comparison, in England and Wales in 2016–2017, 635,540 durable powers were registered, bringing the total since 2009–2010 to 2,577,848 for a population of 58.3 million (or 4.42 per cent): see Chapter 5.

even statutory ‘lists’ of authorised proxy decision-makers for health: they too fail fully to cater to the needs of their intended target audiences.<sup>14</sup>

As a result, Australia planning for people with an intellectual impairment relies most heavily not on durable powers or adult guardianship, but on representative payee (payment nominee) provisions to redirect management of their social security payments<sup>15</sup> and any statutory ‘lists’ of authorised proxy decision-makers for health<sup>16</sup> or, for a minority, on a special needs disability trust (in the event their family has sufficient assets able to be set aside).

### A Australia’s Governance and Welfare Context

As a federal system of government, law-making and administrative authority is divided between a national government with the strongest revenue base but constitutional responsibility only over defined matters such as income support (but not welfare, health or disability services as such), and state or territory governments with plenary law-making powers over all matters not allocated to the national government.

<sup>14</sup> For a recent review of differences between Australia, China, Thailand and Japan with regard to legal systems, sociocultural influences and take-up of various measures, see J. Tsoh et al., ‘Comparisons of Guardianship Laws and Surrogate Decision-Making Practices in China, Japan, Thailand and Australia: A Review by the Asia Consortium, International Psychogeriatric Association (IPA) Capacity Taskforce’ (2015) 27 *International Psychogeriatrics* 1029 (citing that only 21 durable powers of appointment cases were reported for Hong Kong in the first decade from introduction of the laws in 1997, compared to nearly 19,500 in a single year (2006) in England and Wales: *ibid.*, pp. 1035–1036); also L. Willmott et al., ‘Guardianship and Health Decisions in China and Australia: A Comparative Analysis’ (2017) 12 *Asian Journal of Comparative Law* 371.

<sup>15</sup> Further: Carney, ‘Supported Decision-Making for People with Cognitive Impairments’, n 2; T. Carney, ‘Supporting People with Cognitive Disability with Decision-Making: Any Australian Law Reform Contributions?’ (2015) 2 *Research and Practice in Intellectual and Developmental Disabilities* 6.

<sup>16</sup> Such provisions ‘list’ and establish a ‘hierarchy’ of close relatives, spouses, etc. who are automatically authorised in advance to consent to basic medical or dental care of a person otherwise unable to give their own consent outside an emergency, under provisions such as Part 5E of the Guardianship Act 1987 (NSW), or s 55(3) of the Victorian Medical Treatment Planning and Decisions Act 2016 and the former Part 9 of the Victorian Guardianship and Administration Act 1986: further, B. White, L. Willmott and S. Then, ‘Adults Who Lack Capacity: Substitute Decision-Making’ in B. White, F. McDonald and L. Willmott (eds.), *Health Law in Australia*, 3rd edn (Sydney: Thompson Reuters Lawbook Co, 2018) 207, 261–265; Victorian Law Reform Commission, *Guardianship: Final Report*, n 11, pp. 276–301.

As a consequence of the federal distribution of governance authority, the lion's share of responsibility lies with States and Territories: they make the laws about adult guardianship, durable powers of attorney and statutory 'lists' of authorised proxy decision-makers for health, as well as carrying a major responsibility for funding and delivery of disability services (now shared for NDIS clients); all of which differ between jurisdictions. Representative payee (nominee) appointments are available under national social security legislation (either to simply deal with correspondence or to administer payments), as also under the NDIS (recently enacted under the insurance and other powers of the national government). Special disability trusts to alleviate some of the social security pitfalls of their use are also national.

So our narrative necessarily begins with adult guardianship.

### *B Modernising Adult Guardianship and Safeguards from the 1980s*

Australia's adult guardianship model offers accessible, cost-free tribunal hearings about whether there are workable alternatives to avoid the need to appoint a substitute decision-maker as financial manager or a guardian of personal affairs (such as where to live or healthcare)<sup>17</sup>; though, as explained later, it is not fully CRPD compliant and retains an outdated best-interest test in place of modern preferences for being guided by the 'will and preferences' of the person. Prior to the enactment of the new model, guardianship relied on rarely used and costly superior court applications (the equitable jurisdiction to appoint a 'committee' of the estate or person traceable back to the thirteenth century), automatic financial appointments consequent on acquisition of the status of involuntary patient, or in some jurisdictions, medical certification processes.<sup>18</sup> Ontario, with a similar inheritance, took a different (and less adequate) reform path, but has recently favoured the Australian tribunal model.<sup>19</sup>

Hearings under the new guardianship model are informal. Procedures are flexible and inquisitorial (proactive) in style, and legal representation, while permitted, is not essential. Decision-makers are drawn from

<sup>17</sup> Carney, 'Supported Decision-Making for People with Cognitive Impairments', n 2.

<sup>18</sup> For details, T. Carney, 'Civil and Social Guardianship for Intellectually Handicapped People' (1982) 8 *Monash University Law Review* 199. The Canadian province of Ontario still relies heavily on such status and statutory guardianship avenues: Law Commission of Ontario, *Legal Capacity, Decision-Making and Guardianship: Final Report*, n 1, pp. 253–254, 259–260, 268–274.

<sup>19</sup> *Ibid.*, pp. 215–229.



various professional backgrounds, and case-management and conciliation turns away some of the unnecessary applications,<sup>20</sup> while tribunal staff or pre-hearing procedures gather information on cases going on to a hearing. Applications are decided in accordance with principles such as those of intervention as a last resort and in the least restrictive manner,<sup>21</sup> the wishes of the person subject to the application must be ascertained and considered, and any orders must be periodically reviewed.<sup>22</sup>

Critically significant is the strong presumption towards appointing a human being as a financial administrator (managing assets and finances) and/or guardian of the person (dealing with issues such as where a person lives, services received or their social interaction), and the preferencing of members of the family or others who know the person. The two orders are quite separate, are only made where informal arrangements currently are not working (not in anticipation of future problems) and, if both are made, may be held by the same or by different people (e.g. where one family member is more competent with finances while another is better able to read the person's personal guardianship needs, such as for personal care). Only when no such person is suitable will a bureaucratic agency be appointed in the form of the Public Trustee or Public Guardian. Financial administrators are not limited in the size or complexity of affairs administered, but highly taxing or complex portfolios are often placed in the hands of the Public Trustee or equivalent. Personal guardians cannot be authorised to make some very sensitive decisions, such as writing a will or voting, but otherwise can deal with most matters as assigned (commonly to deal with needs such as admission to residential aged care, or a medical issue). Orders are often time-limited and confined to stipulated matters (partial orders), though financial orders are usually plenary. The tribunal is complemented by a 'watchdog' and advocacy agency, the Office of the Public Advocate

<sup>20</sup> C. Thurstans, 'ADR in VCAT's Guardianship and Residential Tenancies Lists: Room for improvement?' (2016) 27 *Australasian Dispute Resolution Journal* 125.

<sup>21</sup> See, for example, Guardianship and Administration Act 2000 (Qld), ss. 11 (application of 'general principles' in Schedule 1), 12. Among the principles laid out in schedule 1 are the presumption of capacity (cl. 1), participation in community life and encouragement of self-reliance (cl. 5–6) and that of 'maximum participation and minimal limitations' (cl. 7).

<sup>22</sup> T. Carney and D. Tait, *Balanced Accountability: An Evaluation of the Victorian Guardianship and Administrative Board* (Melbourne: Office of Public Advocate, 1991); Carney and Tait, *The Adult Guardianship Experiment*, n 1; T. Carney and D. Tait, 'Adult Guardianship: Narrative Readings in the "Shadow" of the Law?' (1998) 21 *International Journal of Law and Psychiatry* 147.

(OPA), which in Victoria has jurisdiction over any vulnerable citizen, whether or not subject to an order.<sup>23</sup>

The guardianship tribunals reform model was rapidly copied from Victoria by other Australian jurisdictions,<sup>24</sup> while the complementary watchdog and advocacy bodies took various forms (in NSW and some other jurisdictions responsible only for those under an order). Adapted from an Alberta equivalent<sup>25</sup> and clothed with ombudsman-like powers,<sup>26</sup> Victoria's OPA, for instance, is a highly regarded proactive body for tackling individual or systemic concerns of people with cognitive impairments.<sup>27</sup> However, pressures of rising demand, limited budgets and risk adverse service cultures, together with lack of conformity to CRPD supported decision-making, have contributed to some rethinking of the 1980s guardianship model and its associated institutions,<sup>28</sup> along with calls for greater harmonisation across the federation.<sup>29</sup>

Writing in 2012 about caseload trends revealed by its commissioned modelling into future demands on the Victorian guardianship system, the Victorian Law Reform Commission observed that '[p]eople with dementia, people with mental illness and people with acquired brain injury are now the major users of legislation designed initially with the needs of people with intellectual disabilities primarily in mind. People with dementia are likely to be the major users of guardianship laws over the next 20 years'.<sup>30</sup> The 'equality' principle of Article 12 of the CRPD,

<sup>23</sup> For its origins, see Victoria Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (Melbourne: Government Press, 1982), available from [http://u.b5z.net/i/u/10196230/f/LISA\\_Cocks\\_Report\\_on\\_Guardianship\\_1982.pdf](http://u.b5z.net/i/u/10196230/f/LISA_Cocks_Report_on_Guardianship_1982.pdf).

<sup>24</sup> Victorian Law Reform Commission, *Guardianship: Final Report*, n 11.

<sup>25</sup> Victoria Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons*, n 23.

<sup>26</sup> A. Abraham, 'Making Sense of the Muddle: The Ombudsman and Administrative Justice, 2002–2011' (2012) 34 *Journal of Social Welfare and Family Law* 91.

<sup>27</sup> M. Feigan, 'The Victorian Office of the Public Advocate: A First History 1986–2007', PhD thesis, La Trobe University (2011).

<sup>28</sup> J. 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.

<sup>29</sup> J. Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26.

<sup>30</sup> Victorian Law Reform Commission, *Guardianship: Final Report*, n 11, p. 34, para. [4.16]. The Commission cited 2010–2011 figures showing one-third of people with an order had dementia (33 per cent) followed by acquired brain injury (18 per cent), mental illness (17