Guardianship Dilemmas and Care of the Aged †

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> One of the most significant concerns of older persons is the potential need for intervention by others in the management of their financial resources and personal affairs. For a variety of reasons, some older persons become unable to manage some, or all, facets of their life. They experience [conditions] . . . which may prevent them from attending to such everyday needs as paying bills, shopping, cleaning or cooking. . . . Too often [legal and social] interventions arrive either too late or too soon, are inappropriate, or create a situation which is more detrimental to the well-being and dignity of the older person than the original problem.[1]

1. *Introduction*

Demographically, Australia is an aging community. The proportion of the population over the age of retirement is projected to rise from 15 per cent (2.5m) to 20 per cent (5.3m) by 2020.[2] The aged have special needs: for income, health care, substitute decision-making and investment/retirement planning. Guardianship is just one of the means of meeting those diverse needs, but it is a two edged sword: it may do harm as well as good; and it may not always be correctly located within the network of services. Guardianship laws have been refurbished in most jurisdictions to serve as one (limited) vehicle in the network of services for meeting the needs of people who lack the capacity to make functional decisions on their own behalf.[3] The number of people in this position is difficult to estimate, given the number of considerations taken into account. One broad estimate is provided by the 1988 Australian Bureau of Statistics *Disabled and Aged Persons Survey.* This disclosed that there are 120,000 people with disabilities who are 60 years of age or over and living in households where they require "assistance with their personal affairs".[4]

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† A paper presented at the conference: "Aged Care: The Challenge of the 90s", 19-20 July 1990, Southern Cross, Melbourne. Research for this paper has been supported by funds from the Victoria Law Foundation, and a generous grant from the Australian Research Council. The views expressed are those of the authors alone.

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1 Hommel, P, *Guardianship and Alternative Legal Interventions: A Compendium for Training and Practice* (1986) SC-1.

2 *Towards a National Retirement Incomes Policy* (1988) 18.

3 Carney, T, "The Limits and the Social Legacy of Guardianship in Australia" (1989) 18 *Fed LR* 231.

4 *Disabled and Aged Persons Survey* (1988) (Cat 4118.0). Since guardianship may also be sought by people living in institutions (accounting for roughly half of all applications: below n28) this would appear to be a very conservative estimate.

The debates which inform the re-casting of the old form of guardianship laws have largely been played out, however new issues loom for resolution. Guardianship in Australia (and elsewhere) is no longer a plenary institution, which replaces all powers of the individual. Instead it is presumptively a partial order. No longer are some medical diagnostic categories singled out for imposition of property guardianship unilaterally on the basis of their status (eg as a compulsory mental patient), or by the Public Trustee on pro-forma medical certification initiated by third parties.[5] Nor is personal guardianship rare and restricted to adjudication by superior courts exercising the ancient jurisdiction of equity as *parens patriae*. Instead, the contemporary form of personal or property guardianship is that of a last resort legal measure, providing partial orders, based on assessments of functional needs which are made by multi-disciplinary Tribunals (or panels advising courts).[6]

Two main strands inform these changes to guardianship. First the new law reflects new attitudes to social policy: the legislative reforms recognise rights for disadvantaged people to participate, to the maximum extent and for as long as feasible, in independent community living; to enjoy the dignity of risk; and to have their values and wishes respected. Disadvantaged people are no longer to be segregated from society (in institutions or otherwise), or to be treated paternally as dependent people whose affairs are to be managed: whether by administrative bodies, professionals, or the courts. Secondly, in Australia particularly, the reforms reflect disillusionment with the capacity of traditional courts in providing accessible, sensitive solutions to the needs of disadvantaged people.[7] Administrative tribunals, with their enhanced capacity to adopt more informal procedures and their ability to bring a wider array of perspectives to bear through their membership, therefore replace courts as the primary decision-makers.

In short, a social and a civil orientation has replaced an insular, paternalistic system, focused on property more than personal development, and reliant on bureaucratic or judicial administration. This paper will consider whether the enhancement of the choice rights of disadvantaged people, the value base which informed these reforms,[8] is a sufficiently comprehensive policy foundation for the longer-term future. It will be concluded that this was an appropriate medium-term objective, but that in the future greater regard must be paid to issues of distributional equity and to the choice of gatekeepers to make decisions about accessing informal networks, welfare services, alternatives to guardianship, and guardianship itself. It will be tentatively suggested that existing guardianship arrangements be modified to produce a more "responsive" legal system, which better accommodates these concerns.

The value base, then, is the starting point for this examination of contemporary guardianship laws.

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5 Carney, T, "Civil and Social Guardianship for Intellectually Handicapped People" (1982) 8 *Monash Univ LR* 199.

6 Hommel, P, Wang, L and Bergman, J, "Trends in Guardianship Reform: Implications for the Medical and Legal Professions" *J of Law, Medicine and Health Policy* (in press)

7 Carney, T, "Client Assessment of Victoria's Guardianship and Administration Board" (1989) 15 *Monash Univ LR* 229.

8 Hommel, above n1 at SC-5, discusses three rationales: (i) autonomy (ii) communal values (iii) beneficence.

2. *Policy Tensions: Past and Future*

2.1 *The achievement of choice rights*

One of the central debates in the development of the contemporary legislation has been to strike an appropriate balance between the ethical values of autonomy (choice) and paternalism (protection).[9] The legislative and common law inheritance was highly paternalistic, both in form and substance: orders were often a by-product of determinations of medical status or condition, and there was no intermediate position short of full transfer of powers to the guardian. Contemporary reforms boosted the choice rights of the affected person through such means as the last resort principle, partial orders, compatibility of personal attributes of guardians, promotion of development of abilities and regular review of orders. Participation in decision-making also enshrined that value. Paternal values were not ousted altogether, in that protection from neglect and exploitation remained as central purposes. However protection was the bed-rock or the second order principle: the community and the general welfare system were cast in the role of frontline guarantors in protecting against neglect. A rough idea of the relative importance Guardianship Boards attach to the two principles can be obtained by examining the broad issues as recorded on the files of the Victorian Board. Promotions of independence and self-reliance was explicitly mentioned in about a third of cases, with protection from neglect mentioned in about a quarter.[10]

2.2 *The claims for equity and sensitive gatekeeping*

The future for guardianship, however, raises a new set of issues: those of social equity and of choice of the gatekeepers best able to promote a social policy in which guardianship is a last-resort on a spectrum of private and public planning options.

First, there is the question of the distributional equity of the new arrangements: in elevating the autonomy value to pre-eminence through such policies as the last resort principle, the social cost of coping with disability may simply be shifted to disadvantaged individuals or their careers (often women). The policies may constitute the "privatisation" of a formerly public sector responsibility for the care and support of the aged,[11] a possibility heightened by the so called "fiscal crisis" of the welfare state. That crisis is said to be fuelled in two ways: on the first flank from the demographic pincer of a declining proportion of people of workforce (taxpaying) age reducing the public revenue base, and on the other flank by the changing composition of "dependent" population as the lower unit costs of caring for children are replaced by the higher unit costs of caring for the aged.[12]

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9 Carney, T and Singer, P, *Legal and Ethical Issues in Guardianship Options for Intellectually Disadvantaged People* (1986).

10 These estimates are drawn from a preliminary analysis of data collected as part of an evaluation of the Victorian and NSW Guardianship Boards, funded by the Victoria Law Foundation, the NSW Family and Community Services Department and the NSW Board. A full Report will be published in late 1990.

11 Gordon, R and Verdun-Jones, S, "The Trials of Mental Health Law: Recent Trends and Developments in Canadian Mental Health Jurisprudence" (1988) 11 *Dalhousie LJ* 833 at 860-863.

12 Gordon, R and Verdun-Jones, S, "Privatisation and Protective Services for the Elderly:

Second, there are questions about the appropriateness of tribunals as gatekeepers in applying the new policies. Reservations about the nature of the gatekeepers pull in different directions: some go to *process*, some to *social efficiency*, and some to *outcomes*.

Thus one set of reservations questions the procedural adequacy and fairness of the process.[13] This is a civil rights concern, where traditional legal culture is advanced as the reference point. Another line of argument queries whether the modified legal culture of tribunal processes is still unnecessarily formal. The humane efficiency of the culture of alternative dispute resolution, with its greater capacity for developing *socially integrative* solutions to complex social problems, are advanced as likely benefits. Informal conciliation/mediation is therefore suggested as at least the "front-end" response to applications.[14]

Such discussions naturally lead to wider questions about where guardianship lies in the spectrum of social service responses. This raises a number of possibilities. The narrowest is that a *prime* focus of guardianship should be the *brokerage* role of facilitating the exploration of service networks: thus the American Bar Association (ABA) contends that "courts should maximise coordination and cooperation with social service agencies in order to find alternatives to guardianship or support a limited guardianship".[15] An intermediate position is that an independent advocacy agency, such as Victoria's Office of Public Advocate (OPA), should principally serve this screening/brokerage function. Or, more widely again, that social workers in community agencies might become the first of the "filters" concerned with effecting sound service planning. On the other hand there is also a strong possibility that external agencies might misuse that gatekeeping role by co-opting the Board to the task of assisting in the management of difficult cases which ought to be dealt with by other means.[16]

Other, more radical proposals seek to knit the ethical principle of choice with the social preference for the market (instead of public sector service provision). This position privileges the individual planning choices of individuals: arguing for much more reliance to be placed on validating decisions expressed through durable powers of attorney.[17] This is an important counterpoint; yet, there are doubts about two possible errors. Such approaches certainly reduce the prospects of the error of over-use of

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Some Observations on the Economics of the Aging Process" (1986) 8 *International Journal of Law and Psychiatry* 311 at 322-323.

13 *In Re Moore* (unreported judgment of Gobbo J, Victorian Supreme Court, 19 December 1989)

14 For example, *Disability Services and Guardianship Act* 1987 (NSW) s66(1); Generally, ABA, *Mediation: The Coming of Age* (1988).

15 ABA, *Guardianship: An Agenda for Reform* (1989) 20 (rIV-B). ABA Commissions on the "Mentally Disabled" and "Legal Problems of the Elderly", drawing together the resolutions of the 1988 Wingspread Conference.

16 One possibility in Victoria in cases of family violence against a person with an intellectual disability, will be that their "guardian" or a third party, may seek an intervention order under the *Crimes (Family Violence) Act* 1987 (under amendments effected, from 29 May 1990, by the *Crimes (Family Violence) (Amendment) Act* 1990 s6; 3rd reading: Parliamentary Debates, *Legislative Assembly* 3 April 1990 at 582).

17 For example, Dicks, H and DesRochers, D, *Planning for Future Health Care Decisions; Living wills and durable powers of attorney for health care* (1989).

guardianship when other, less restrictive options are viable; a risk which is well documented.[18] However there is also a risk of benign neglect. As the ABA notes: "in designing alternatives to guardianship and in diverting cases out of guardianship, it is possible that the results of the diversion may be no better and possibly worse than guardianship itself".[19]

But first there is the concern about the adequacy of the information and the processes for judging incompetence.

3. *Assessing Functional Impairment*

The objective of the law is now generally accepted to be that of assisting that group of people in the community who are experiencing serious difficulties in daily living or the management of their property as a consequence of their impaired mental functioning, where measures short of legal involvement cannot meet that need. Conceptually there are three separate constructs: (i) the anatomical/functional abnormality (which the World Health Organisation termed the "impairment");[20] (ii) the functional consequence of that dysfunction (the "disability"); and (iii) the social consequence of that loss of function (the "handicap"). On this basis the focus of contemporary guardianship laws would be on the demonstrated "social handicapping" effect of any conditions. Thus, a brain lesion (the impairment), may or may not cause a hemiballismus (repeated violent movements on the opposite side of the body: the "functional disability"). Moreover, while the employment aspect of the social handicap would be very severe for a person who relies on a steady hand such as a jeweller, it may be manageable for a writer.

This example raises two points. First it demonstrates the necessity to distinguish between the different spheres of social interaction in which the disability may sound. Secondly, it suggests a need for a fourth concept: one which catches only those social handicaps of a sufficient degree of severity, which pose an imminent crisis, and which can be solved only by the law. For the purposes of this discussion we will term this concept an "unmanageable socio-legal crisis".[21]

One superficially attractive way of capturing such sentiments, is through carefully drafted definitional gateways to the new guardianship legislation. This raises several problems, which have been canvassed more fully elsewhere,[22] but which stem from the imprecision of language and the difficulties of ensuring that the practice matches the intent of the Parliament. Another device is to rely on the full airing of the central issues in the course of the hearing, by placing faith in procedural protections. However, as the

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18 *Guardians of the Elderly: An ailing system* (1987).

19 Above n15 at 4.

20 WHO, *International Classification of Impairment, Disabilities and Handicaps* (1980) 11 at 24-31.

21 In practice such a crisis usually follows from one of two events: a change in housing or living situation, or a deterioration in health status. In applications to the Victorian Board, about a fifth related to a change in housing, and a third to a change in health condition. About 5 per cent resulted from the death or incapacity of a career and another 5 per cent followed the inheritance of property. The pattern before the New South Wales Board was similar (Source: above n10).

22 Above n3.

North American experience suggests, determining incapacity remains difficult and prone to error:[23]

> [d]espite the improvement in statutory definitions of incompetency, the use of stricter procedural protections and the reliance on more specific evidence of functional impairment, there is no way to cure the inherent uncertainty in determining incapacity. Evaluating another person's ability to function and understand the consequences of his decisions is an extremely difficult task which requires setting aside one's own subjective values about appropriate or inappropriate behaviour and decisions. Capacity or competence is not tied to chronological age, nor to any other objectively determinable factor.

In recognition of these difficulties, the latest ABA pronouncement prescribes four essential elements: that incapacity be recognised as a legal not a medical concept; that assessments be supported by evidence of functional impairment over time; that there be a finding that the person will suffer substantial harm as a consequence; and that "age, eccentricity poverty or medical diagnosis alone" not qualify.[24] Definitions in this vein mark a departure from the protective paternalism of the therapeutic professions. In place of the working proposition that in cases of doubt it is better to intervene, a new philosophy is substituted. Intervention assessments are to be "based solely on the person's ability to manage the essential functions of daily life, and not on the professional's desire to protect the individual from unwise choices".[25]

The practice in Australia may fall short of full recognition of these sentiments, however. Medical reports still comprise one of the main forms of evidence available to Guardianship Tribunals. Thus the Victorian Board had medical reports available to it in 84 per cent of cases processed in the first two years of operation. In contrast, written "investigation reports" (covering social functioning), were available for only 43 per cent of cases, and financial statements were available in 62 per cent of the final hearings where property administration was being considered. By default then, medical judgments about "capacity to manage" seem to have formed a disproportionate part of the initial evidence available to the Board.

The lodestone here is the protection of liberty from incursions taken in the name of beneficence. But at what price in terms of distributional justice (for the burden of providing informal care/support falls somewhere). And where does this leave the risk of harm from benign neglect? These are the questions discussed below.

4. *Social Equity Considerations*

4.1 Distributional consequences to the community

A principle that the law not be invoked unless there is an "unmanageable socio-legal crisis", plainly advances the autonomy value. Yet it is equally apparent that any cost of such a response will not appear in the ledger book of the guardianship system. Instead costs are re-distributed. They are borne by

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23 Hommel, above n1 at SC-11.
24 *Guardianship: An Agenda for Reform*, above n15 Cr III-A.
25 Hommel, Wang, Bergman, above n6.

the general welfare system, community and family networks, or the individuals themselves.

If the individual bears a cost such as meeting the economic loss of a poor consumer purchase, there are two contradictory interpretations. In defence of such outcomes it is claimed that they are the necessary price of according pride of place to the value of the "dignity of risk". In an imperfect world everyone makes poor (and costly) decisions: wherever feasible, the intellectually disadvantaged person should be entitled to share the fruits and the pain of such autonomous decision-making. On the other hand that cost may be characterised as unjustified neglect or oppression of the individual. To leave people to bear substantial costs of decisions which they were poorly placed to make, would be inhumane and contrary to the advancement of the human rights of persons on which the alternative position rests. The characterisation of particular circumstances, to determine which of these polar extremes is the more appropriate, involves making subjective judgments about the magnitude of the cost of a poor decision and the probability of it eventuating.

In the case where those costs are borne by community, friendship or family networks, there are at least two new dimensions to the debate. First there is the issue of whether the responsibility is voluntarily assumed or imposed. It is one thing for a person to seek out or consciously volunteer to accept the challenging (but rewarding) task of assisting the person to deal with the needs of daily living or the management of their affairs, thereby avoiding the involvement (or greater involvement) of the law. It is another to be faced with the "choice" of assuming that responsibility, without prior consultation, by *default* of other social action. Neither family ties per se, nor the high ethical content of the good Samaritan principle, is necessarily as sound a policy base as is the consenting assumption of responsibility.[26] Secondly there is a critical issue of distributional equity (or social power), when, as is commonly the case, the predominant share of responsibility for providing such informal care falls on women: such outcomes simply reinforce gender inequality by privileging provision of formal (paid) care/support, and downgrading informal (unpaid) care.

Finally there are also distributional consequences of locating responsibility with the formal welfare sector. Government or non-government services delivered to disadvantaged persons by mainstream agencies offer two very considerable attractions. First, the service is *generic*: it is provided to the individual along with any other support or development services delivered to other clients of that agency. Secondly, the service stands as part of the network of interlocking services and benefits offered by the welfare state. As such it constitutes one of the core entitlements of that reciprocal relationship between citizen and state: it is an *incident of citizenship*, joining other basic

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26 Goodin has argued that social responsibilities to the "vulnerable" are akin to the special moral duties assumed by family members: "those to whom one is vulnerable and upon whom one depends are morally bound to do what they can to protect one" and "[w]here . . . for whatever reasons, [people] are vulnerable to a group of you, the group as a whole is responsible for protecting their interests": Goodin, R, *Protecting the Vulnerable: A reanalysis of our social responsibilities* (1985) at 189 and 206 respectively. See also Goodin R, "Vulnerabilities and Responsibilities: An Ethical Defence of the Welfare State" (1986) 79 *American Political Science Review* 775 at 785.

political and legal rights.[27] But questions rightly arise when the agencies are called on to cross-subsidise what are arguably state responsibilities, without adequate funding. And there may also be a risk that lines of accountability will become blurred, either because the needs of disadvantaged persons become shrouded in agency discretion, or are absorbed in wider service considerations.

Professionals may also carry a substantial portion of the distributional impact of guardianship: becoming de facto screening agents.

4.2 Distributional consequences to professionals:

Much of the work of Guardianship tribunals is generated by professionals. Thus, about three-quarters of enquiries to the NSW Board in its first six months of operation were from professionals and almost half of the people for whom orders were sought in Victoria were people living in hospitals, nursing homes or other institutional arrangements where professionals would feature very prominently in their circle of contacts.[28]

A preliminary study of the role played by professional social workers employed at a major geriatric facility,[29] in their dealings with the Victorian Guardianship Board, confirmed that there was indeed a very close identity of purpose between the Board and social workers. It had been postulated that social workers would act as "out-riders" to the Board, anticipatorily screening out cases inappropriate for the Board.[30] Because social work practice emphasises conservation of existing relationships and individual potential, and the promotion of individual rights and autonomy,[31] it was expected that most of the cases diverted from the Board would be those which did not harmonise with the "unmanageable socio-legal crisis" policy pre-condition distilled from the legislation, as enunciated by the Board and supported on review:[32] orders would not be made where other, informal arrangements are practical solutions (even if lacking legal backing).[33] In short, the explanation

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27 This conception of the welfare state derives from Marshall, T H and Carney, T, "The Social Security Act: Just another Act or a blueprint for social justice?" (1990) 25 *Aust Journal of Social Issues* 103 at 105-108.

28 Above n10.

29 Carney, T, "Social Workers as Guardians of the Pathways?" (1990) unpublished. The study surveyed 18 social workers employed by a major geriatric hospital in Melbourne (based in Parkville, but operating a spectrum of facilities and specialist clinics at six other locations in metropolitan Melbourne), and catering for approximately 500 in-patients and 500 out-patients at any one time (3,323 in-patients and 36,074 out-patients per annum): *Mount Royal Hospital: 135th Annual Report* (1988) at 20.

30 Roughly one in ten patients are below retiring age, and approximately 10-20 per cent would be said to suffer from significantly depressed mental function.

31 This is a central strand in social work theory: Goldstein, H, *Social Work Practice: A Unitary Approach* (1973) 4-5 (individual development); Haines, J, *Skills and Methods in Social Work* (1975) 3 (development and support); Pincus, A and Minahan, A, *Social Work Practice: Model and Method* (1973) 9 (one of four objects). For wider, structural approaches: Turner, F (ed), *Social Work Treatment: Interlocking Theoretical Approaches* (1986); Taylor, R and Roberts, R (eds), *Theory and Practice of Community Social Work* (1985).

32 *Re M and R and the Guardianship and Administration Board* (1988) 2 VAR 213 at 220. (Administrative Appeals Tribunal).

33 Thus the willingness of a caring, competent relative (or friend) to undertake to be the intermediary in the management, will usually preclude the making of an order, even if the person is totally bed-ridden or rarely (if ever) lucid: id at 218-219; *Re E* (1988) 2 VAR

for an order being sought or not sought would lie in the social circumstances of the person affected.

The study largely confirmed this hypothesis. While up to half (300) patients were theoretically "potential applicants", only 60 or so cases were seriously considered by the Social Work Department[34] as prospective subjects of a guardianship order, with roughly half of this number proceeding with an application.[35] The study found that a perceived need for protection was overwhelmingly the most popular reason given for *seeking* an order.[36] However 16 per cent were said to have proceeded "on advice" from the staff at the Board, while only just over one in ten (13 per cent), were said to have been motivated by the patient's "need for daily care and control".

Twenty cases were reported to have reached an advanced stage, only to be the subject of decisions not to proceed.[37] The most common reason for the application *not* proceeding was that the Board staff advised against it (45 per cent of cases). This was followed, in one third of cases, by a socially-based re-assessment of "need": that the person now had sufficient daily care and protection. A quarter of the cases mentioned other reasons, such as the distress likely to be caused to the applicant,[38] or the view that social options had not been entirely exhausted.

These findings only partially bear out the hypothesis that cases diverted from the Board would differ only in that they would have supportive family or friendship networks lacking in cases going to the Board. The dominant driving force in taking cases to the Board was the protection of income and property against "risk". Cases which did not proceed to the Board, however, reflected considerable deference to the advice tendered informally by the Board itself. Conservation of property against threats of depredation brought many cases *into* the net, while the Board itself seems to have become the doorstop against "unnecessary" applications: effectively delegating gate-keeping to the social workers who sought advice. It remains to be seen, however, whether social workers may ultimately baulk at the extent to which the "liberal" philosophy of the Board emphasises the values of client independence, autonomy and extra-legal solutions, necessarily placing lesser weight on more paternal "welfare" policies (protecting the social interests of people against neglect or organising access to necessary supports).[39] Experienced social workers may conclude that the "welfare" dimension is

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222 at 225.

34 The Department reports 13,442 "patient contacts", 8,539 contacts with relatives, 3,549 community contacts, 758 home visits and 437 follow-up contacts for the year: *Annual Report* above n29 at 20.

35 Personal interviews with Senior Social Worker and Deputy, 15 February 1989.

36 Out of 38 cases where reasons for the application were assigned, 18 (47 per cent) referred to "fear of patient's relatives, or others, taking the patient's money"; the addition of "risk to property" boosted the figure to 66 per cent. The balance of the reasons pale by comparison.

37 Most sought only an administration order (55 per cent), or involved prospective mixed orders (15 per cent; for a total of 70 per cent). Guardianship alone accounted for 25 per cent, with one case (5 per cent) involving consideration of a temporary order.

38 One respondent said, the distress "outweighed any mistakes with her money [the client] might make".

39 Above n9 at 3-6, 55-75.

under-valued by the Board, and some may change their behaviour accordingly.[40]

The study also raises some interesting features of the thesis which contends that professions inexorably move to establish "zones of autonomy",[41] controlling or dominating spheres of social activity,[42] such that professional influence is extended beyond its traditional sphere (as through a "medicalisation of society"[43]). Arguably, the explanation for the initial "delegate/brokerage" working relationship between the Board and the social work profession may be that the Board has accorded deference and respect for professional expertise, leading to the forging of a viable power-sharing model which alleviates that potential tension.

According to Teubner, however, the integration of social sciences into the law has "benign effects on the decision-making quality of modern law in terms of justice and utility".[44] Interestingly, he claims that "social science constructs are not only transformed or distorted, *but constituted anew*, [when] they are incorporated into legal discourse".[45] On this interpretation, any increased friction between social work gatekeepers and the Board may stem from the transformation (or "corruption") of professional knowledge and working principles in the hands of the Board, such that professionals working outside lose faith in the judgments handed down. Yet, to date, in line with findings from a related study of the Disability Review Panel,[46] the data do not bear out this interpretation. Rather, it seems that Boards *can* be structured so that some power is effectively *delegated* to the professionals, or ceded to them by *incorporation* (power-sharing).

5. *Administrative Boards As Gatekeepers*

5.1 *Procedural weaknesses of Boards?*

The classical counterpoint to the alleged advantages of informal procedures of tribunals, is that such processes remove procedural protections and negate the rule of law. It is implied that the goals of the law of accuracy, neutrality/ integrity, and participation,[47] are diminished if the adversarial model is diluted, the form in which evidence is taken is relaxed, or where proof (and

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40 Above n25.

41 The medical profession, for example, is said to have established zones of professional "autonomy" of action: Freidson, E, *The Profession of Medicine* (1970) at 71-72; *Professional Dominance: The Social Structure of Medical Care* (1970); Willis, E, *Medical Dominance* (1983).

42 Freidson, E, *Professional Powers* (1986) p5.

43 Aubert, V, "The Rule of Law and the Promotional Function of Law in the Welfare State" in Teubner, G (ed), *Dilemmas of Law in the Welfare State* (1986) 28 at 36. He attributes this to a "harmony" of interests between patients and professionals and to the inappropriateness of direct legal involvement in "creative" processes. The phenomenon though, "may obstruct government policy at the same time as it may relieve the government of responsibility": at 37.

44 Teubner, G, "How the Law Thinks: Toward a Constructivist Epistemology of Law" (1990) *Law and Society Review* (in press).

45 Ibid (emphasis added).

46 Carney, T and Akers, K, "Reviewing Disability Planning" (1989) unpublished paper.

47 See further Rubenstein, L, "Procedural due process and the limits of the adversary system" (1976) 11 *Harvard Civil Rights — Civil Liberties LR* 48 at 96.

the basis for reaching satisfaction) is left in the hands of the body itself, instead of resting as an evidentiary onus on the applicant.[48] Civil rights of the individual are said to be sacrificed in the pursuit of a "user friendly" legal system.

This was the substance of the critique by Gobbo J in the Supreme Court of the procedures adopted by the Board in the case of *Re Moore*. Here the Board had made an administration order, with an almost immediate review date, in the case of an inmate of a retirement home who was approaching her 80s and suffering from short term memory loss due to an "Alzheimer type" condition. An estate of approximately $2m. was administered by a male friend of 20 years standing, who relied on one of several possibly valid enduring powers of attorney made out in his favour, or in one case, in favour of a Trustee Company. The applicant for the order lived in another State, but sought the order allegedly on the basis of family concerns about the attorney-in-fact's role in her affairs.

Gobbo J granted certiorari to quash the order of the Board. Without expressly resting the order on this basis, he suggested that there had probably been a breach of statutory obligation in respect of the form of the notice of the hearing (which did not adequately forewarn the parties of the nature and consequences of the hearing[49]). Instead, certiorari was squarely based on a finding of a denial of natural justice in that: (i) a report prepared by the Office of Public Advocate was not adequately disclosed to the parties;[50] and, (ii) the opportunity to call a material witness (the matron of the nursing home) had been denied.[51] Further to the OPA report, His Honour went on to observe that the report contained much material rising no higher than conjecture, hearsay or suspicion,[52] and that the Board had not quarantined this material (it was presumed to have relied on it in toto), nor had it otherwise located material of sufficient probative value to ground its order.

Some other concerns were voiced; such as the absence of records of what transpired at the hearing; an undue cosiness between the Board and the body frequently relied on to provide independent reports (OPA), which shared the same building as that from which the Board operated; and the "unusual pressures" created by the denial of a request for the re-scheduling of the hearing to the afternoon, and by the lack of meal breaks over its roughly five

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48 This is the thrust of much of the American critique of their Probate Courts and other bodies. Thus the ABA has recently endorsed the recommendations of the "National Guardianship Conference" in calling for full notice, mandatory legal counsel, and full hearing and appeal rights before independent adjudicative bodies: above n15 at 9 (r II-B).

49 This rests principally on giving a strict construction to the obligations imposed in s44(2). (To state the "nature of the proceedings" and the "kind of orders" which may be made.)

50 Transcript at 20: "The report was of such possible significance that if it was to be used at all by the Board it should have been actually provided, desirably before the hearing, or at least in such a way as to afford the relevant persons a meaningful opportunity of evaluating and responding to the report or if thought fit objecting to the whole or parts of the report." (emphasis added).

51 Transcript at 25-26.

52 "[Although] there was necessarily only limited time to investigate matters [detailed in the report] even granting this, there was much in the way of unsupported suspicion and little if anything in the shape of hard proof. It contained no material demonstrating that the plaintiff's affairs had in fact been mismanaged either by her or [the attorney-in-fact].": Transcript at 18.

hour duration.[53] While these observations reinforce elements of "traditional legal culture", Gobbo J did endorse a key aspect of "modified" or "tribunal" culture, in rejecting the contentions that the Board may not cross-examine parties, and that questions may only be cast in a non-leading form.[54]

The argument about the rule of law is more subtle. Heavy caseloads,[55] limited resources and management skills, and limitations of tenure for Board members, are said to combine to displace the principle of independence of the law from the executive.[56] Rather than according a human face to legal culture, it is contended that Tribunals in effect substitute administrative culture for legal culture. That is, the values of equity of treatment of cases, efficient use of scarce resources of time and material assets, and other bureaucratic imperatives, are thought to hold too much sway. The net effect is that the three functions quarantined from each other under the separation of powers (legislative, executive, and judicial) are conflated: the outcome ("administration") is despotic, diffuse, unpredictable, and partisan.[57] In striving to create a legal system which is more responsive to citizens and more literate in inter-disciplinary dialogue, it is claimed that legal values have been ousted rather than blended.

This is a critique which is hard to pin down. At its widest it connotes a rejection of a role for law in the distributional functions of the welfare state,[58] but this is surely no longer sustainable,[59] in which case it is perfectly legitimate to elevate the goals of comparative equity and efficiency.[60] Nor can a departure from the orthodoxies of the adversarial system be decisive. Accuracy of decision-making, for instance, may be *enhanced* through assistance provided by an adjunct agency (such as OPA) associated with the Tribunal,[61] though it is true that a more active role of the decisionmaker may feed a *perception* of favouring one side of the issues, thus detracting from neutrality, and diminishing the legitimacy of the body.[62]

Legitimacy, however, is not solely (or mainly) a product of decision-making styles and procedures. As Rawls has observed, all that is required is "a process reasonably designed to ascertain truth, in ways consistent with

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53 Transcript at 25. The last breached the ABA standard that adjudicative "should take into account the needs of elderly and disabled respondents in scheduling guardianship hearings": *Guardianship: An Agenda for Reform*, above n15 at 19 (rIV-A)

54 Transcript at 24.

55 In the first year of operation the Victorian Board devoted an average of 46 minutes to the hearing of each case: *Guardianship and Administration Board Annual Report 1988-1989* (1989) 9.

56 This reflects Weber's distinction between arbitrary/gratuitous government ("administration" of persons by persons) and government by the rule of law (adjudication): for example, Friedman, K, *Legitimation of Social Rights and the Western Welfare State: A Weberian Perspective* (1981).

57 Id at 4-5.

58 Tay, A, "Law, the Citizen and the State" in Kamenka, E, Brown, R and Tay, A (eds), *Law and Society: The Crisis in Legal Ideals* (1978) 4.

59 See generally: Carney, T, *Law at the Margins: Towards Social Participation* (in press).

60 Cf Wilenski, P, *Public Power and Public Administration* (1986) ch2 (democracy, equity and efficiency).

61 Above n47 at 82.

62 Eggleston, R, "What is Wrong with the Adversary System" (1975) 49 *ALJ* 428 at 429; Connolly, P, "The Adversary System — Is It Any Longer Appropriate?" (1975) 49 *ALJ* 439 at 439-440.

other ends of the legal system . . .".[63] Legitimacy is principally a product of the "vision of how this aspect of society is to be ordered", a vision enunciated (within the interstices of the statutory mandate) as a middle ground compromise to justify the decisions of the body.[64] And, while research confirms that process contributes to legitimacy,[65] in more informal settings the determinants include "consistency, decision quality and ethicality",[66] where the degree to which bodies encourage participation and endeavour to be fair appears to be a major ingredient in engendering the necessary sense of "trust and confidence".[67]

On balance, then, the departures from the traditional style of judicial decision-making, though not without risk of an excess of zeal to render the body "user friendly", do not constitute a serious defect in the Board model, but rather constitute one of its (milder) strengths. The counterpoint to the critique based on departure from legal culture, though, is the contention that the half way house of the tribunal is unnecessarily invoked. To promote a more balanced social policy mix, alternative forms of dispute resolution are advocated as the initial response to requests for guardianship.

5.2 Conciliation and mediation screening?

Mediation has recently been tried as a front-end response to guardianship. Thus, in New South Wales the Guardianship Board is enjoined that it "shall not make a decision in respect of an application . . . until it has brought, or used its best endeavours to bring, the parties to a settlement".[68] Across the Tasman, in New Zealand, where the Family Court exercises the jurisdiction, there is a court-auspiced but optional "pre-hearing" conference, which may be convened in the discretion of the judge whenever a request is made by any party.[69] This is not an option elsewhere, where the legislation is silent. This is because, apart from superior courts exercising prerogative powers and jurisdictions, the powers and procedures of courts and tribunals are exclusively the creature of statute. Substitution of mediation or conciliation settlements for other orders provided for under the legislation, must be fully grounded in a legislative mandate to be found in the Act: there is no inherent discretion to pursue such processes in the absence of legislation.[70]

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63 Rawls, J, *A Theory of Justice* (1972) 239.

64 Webber, J, "The Mediation of Ideology: How Conciliation Boards, Through the Mediation of Particular Disputes, Fashioned a Vision of Labour's place within Canadian Society" (1989) 7 *Law in Context* 1-23.

65 Thibaut, J and Walker, L, *Procedural Justice* (1975).

66 Tyler, T, "What is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures" (1988) 22 *Law and Society Review* 103 at 107.

67 Id at 129.

68 *Disability Services Act* 1987 (NSW) s66(1). Proceedings take place in private (s66(2)) and material from what is termed the "conciliation hearing" is not admissible elsewhere other than with the consent of all the parties: s66(3).

69 *Protection of Personal and Property Rights Act* 1988 (NZ) s66. Conferences, presided over by a judge (s68(1)), aim to "identify the problem" and "reach agreement between the parties . . . on a solution to the problem" (s67), which solution may canvass any or all of the powers available at a full hearing (s70(1)), and — if the affected party "understand the nature and foresees the consequences" of the settlement (s70(2) — it may then be formally embodied in a consent order: s70(3).

70 *Chapman v Morris* (1986) 10 Fam LR 1046 (Olney J, WA Sup Ct) (A case where a Children's Court had resorted to conciliation of a child protection application, and where

The momentum in favour of conciliation or mediation as a preferred initial reaction to requests to invoke guardianship laws, has several sources. In the first instance it is part of the campaign in favour of "alternate dispute resolution".[71] Second, in North America at least, it forms part of a "self-help" initiative taken by organisations representing the interests of older persons, as part of an agenda to promote the maintenance by older people of an active and valued role in community affairs following retirement from the workforce.[72] Thirdly, it is a reaction to the concern that guardianships might be too lightly granted (or withheld): the fear being that guardianships may parallel experience with "deinstitutionalisation", in that people may be returned to (or be left in) communities which are ill-equipped to meet the service, support or habilitation needs of the individuals concerned.[73] The "least restrictive" principle of guardianship laws, then, may obscure the reality that service needs remain unmet due to inadequate levels of resourcing or a lack of commitment from the community.

Mediation is one of several kinds of informal dispute resolution, including: "arbitration, mediation, small claims courts, community [neighbourhood] justice centres . . . and internal institutional grievance mechanisms".[74] Mediation (and diversion), although largely untested,[75] are said to be advantageous in that outcomes are better, fairer and closer to the real interests of parties. It is claimed that they are more efficient and less costly; and that they can better accommodate diversity (so-called polycentric or multifaceted issues). It is also said that parties can participate more fully and obtain greater control over their lives, to the exclusion of professionals and the state.[76]

Critics of alternative dispute resolution however, charge that it extends the "social control" role of the state: it papers over conflicts and weakens procedural controls which equalize power imbalances between parties. The risk of bias or prejudice is also said to be magnified, especially when sensitive interpersonal issues are at stake.[77] Efficiency gains may also be a mirage,[78]

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there was no statement of factual findings to underpin the decision).

71 See *Mediation: The Coming of Age* above n14 at 15 (where it is noted that the potential is largely untested, and that there are contra-indications: such as inequalities of power).

72 For example, "There is general agreement that mediation may be an appropriate and useful mechanism for some questions of guardianship and conservatorship": Hoffman, R, "Mediation and Older Americans: consider the possibilities", unpublished paper, American Society on Aging Conference, March 1988 at 3; "'Mission Statement' for Task Force on Mediation and Older Americans".

73 Scull, A, *Decarceration: community treatment and the deviant — a radical view* (2nd edn, 1984); Scull, A, "Mental Patients and The Community: A Critical Note" (1986) 9 *International Journal of Law and Psychiatry* 383 at 392).

74 Delgado, R, Dunn, C, Brown, P, Lee, H and Hubbert, D, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" [1985] *Wisconsin LR* 1359 at 1363.

75 The Center for Social Gerontology, and the Michigan Office of Services to the Aging has a two year (1989-1990) project to pilot the effect of social assessments, and pre-hearing mediation of suitable cases, both in terms of the impact on the quality of processes and outcomes for cases mediated, as well as on guardianship hearings, where these occur. Unfortunately, for domestic reasons, the focus of the research has shifted towards an examination of the role of State employed "care managers" in limiting nursing home and residential admissions.

76 Menkel-Meadow, C, "For and Against Settlement: uses and abuses of the mandatory settlement conference" (1985) 33 *Univ of California Los Angeles LR* 485 at 486-7; Delgado, above n74 at 1366-67.

and the outcomes may not have greater "legitimacy".[79] There is also a prospect of "an *increase* in state involvement in family disputes; or, at the least, a shift from one form of government intervention to another".[80]

The NSW and NZ models fit Robert's definition of mediation properly so called (a neutral third party promotes settlement by providing information, or laying down ground rules).[81] But he is staunchly opposed to mediation auspiced by courts (or tribunals), for two reasons. First because it "sap[s] the vitality" of mediation, negating the mediator's "neutral posture" and their "identification with the values of joint decision-making, agreement and compromise".[82] Secondly, he views as "potentially alarming" the "opportunities for coercion [of parties] in the absence of safeguards . . . attending adjudication".[83]

Certainly, mediation of guardianship cases has its attractions. Mediation can more readily accommodate personal, cultural or situational diversity of circumstances. Settlements can be tailor-made to individual circumstances. Secondly, outcomes may be held in higher regard by affected parties. They may be more closely in tune with their assessments of the justice and merits of the case; parties also gain a sense of ownership of the solution devised, which may increase the prospects of compliance when compared to a more distant solution imposed by the courts. Finally, parties do participate more fully and thus gain a greater degree of control over their lives, to the exclusion of professionals and the state — in short, it is a more truly participatory or democratic outcome.[84]

In the two jurisdictions examined here, the responsibilities of the presiding member of the Board/judge may adequately deflect the more powerful of these criticisms. It should largely eliminate the risk of coercion flowing from an absence of procedural safeguards,[85] since the standard procedural protections will be applied as the traditional check on power imbalances (or the overbearing of weak individuals). In NZ particularly, people are protected against the risk of accepting orders they do not comprehend, or which they lack the capacity (psychological, financial or otherwise) to contest. And the procedures should be fairly sensitive, in both instances, to the risk of prejudice or bias manifesting itself, particularly when more sensitive issues are at stake (such as sexual conduct).[86]

But will these controls prevent an expansion of the net of state control exercised over the family?[87] Does it not render questionable the economic efficiency gains?[88] And does not the link with the adjudicative body take

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77 Delgado, above n74 at 1391-1403.
78 Menkel-Meadow, above n76 at 493-95.
79 Mediation may enhance legitimacy because the settlement is not imposed. Yet it may undermine the ability set legal standards in difficult areas: id at 599-502.
80 Roberts, S, "Mediation in Family Disputes" (1983) 46 *Mod LR* 537 at 541.
81 Id at 542-547.
82 Roberts, above n80 at 555.
83 Id at 557.
84 Menkel-Meadow, above n76 at 486-7; Delgado, above n74 at 1366-1367.
85 Id at 557.
86 Delgado, above n74 at 1391-1403.
87 Roberts, above n80 at 541.
88 Menkel-Meadow, above n76 at 493-95.

away the neutral posture of the mediator (through identification with the state authority of a court), and contradict the ethos of shared decision-making and compromise, central to its success?[89] On the present state of knowledge this appears not to be the case: mediation appears to have a positive place, but on tightly controlled terms. These are: that mediators are trained, that there is someone to provide at least lay support and representation for the affected person, that there is a guarantee of the voluntariness of the process, and some external checking and validation of the fairness of the contents of the mediation agreement.[90]

On balance, it would appear that the evidence favours cautious extension of this experiment with alternative dispute resolution formats, including a comparative assessment between such processes and the pre-hearing work of bodies like OPA. If mediation has a (qualified) role to play, perhaps private planning has an even greater place.

5.3 *Private planning as a preferred model?*

One of the most comprehensive blueprints for the re-shaping of guardianship laws to become a last resort, when private planning fails, is the set of standards prepared by The Centre for Social Gerontology (TCSG) in Michigan.[91] This document notes both a rising demand for guardianship type services and worrying evidence of perfunctory decision-making and poor quality of guardianship provision and monitoring, particularly that derived from the comprehensive insight investigation conducted by American Associated Press.[92] It suggests that the pressures stem from a number of sources, including moves for government to accept greater responsibility for the welfare of the aged, an aging population, trends to deinstitutionalisation, enactment of legislation in some States mandating reporting of "elder abuse", and nursing home administrators taking out insurance against doubt about future health care consent decisions, by making the obtaining of an order a pre-condition to admission.[93]

In America, a high ethical principle (promotion of choice rights) has joined with this "counsel of despair" about the inadequacies of the current system of guardianship adjudication, to serve as a powerful justification for reliance on private planning measures. Among the private measures promoted in the TCSG Standards document were protective services,[94] money management services (including direct deposit, automatic banking and bill management),[95] living wills and such measures as enduring powers of attorney,[96] or

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89 Roberts, above n80 at 555.

90 The criteria draw on those suggested by the Center of Social Gerontology, Michigan.

91 House of Representatives Select Committee on Aging, Sub-committee on Housing and Consumer Interests, *Surrogate Decisionmaking for Adults: Model Standards to Ensure Quality Guardianship and Representative Payeeship Services* (1989). (Subsequently Model Standards).

92 The weaknesses detected by AAP are summarised in: House of Representatives Select Committee on Aging, Sub-committee on Health and Long-term Care, *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace* (1988).

93 *Model Standards*, above n91, Part One, at 4-9.

94 Defined as a "coordinated, interdisciplinary system of state or community supplied social and health services provided to those in need with their consent" (and including homemaker services, repair services, meals, visiting aides etc): id at 17.

95 Public utilities might also have special programs to accommodate disadvantaged clients

private trust arrangements.[97] Other possibilities include joint property regimes[98] and "representative payee" payments of social security to a third party.[99] Finally there are the "informal family arrangements" commended by Gobbo J.[100] These last two will be considered in turn.

(a) Low level bureaucratic electives

Representative payeeship, although apparently raising only mundane bureaucratic issues, squarely poses the issue of the balance between benign neglect and respect for rights of choice. Considerable concern has been expressed about the operation of representative payee provisions of social security legislation (warrantee provisions in Australia[101]) which allow re-direction of pension entitlements to third parties. In America one in ten of all social security beneficiaries, and a quarter of those receiving Supplementary Social Security payments, have those payments redirected.[102] Complaints include that too little investigation is made of the qualities/ motives of payees, that conflict of interest situations may remain unattended to, and that there is a general lack of accountability.[103] The TCSG Standards document proposes that the same rigorous standards to promote choice of quality agents, planning for autonomy and accountability monitoring should govern not only guardianship per se but also representative payee systems covering more than five people.

This concedes that the Federal Department endeavours to avoid abuse, but that these protections are necessarily reduced by the high volume nature of the work and the lack of resources to devote to monitoring. Even so, the

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who inadvertently overlook paying accounts: Hommel, above n1 at SC-19.

96 Id at 17-19. For a local example of a "health enduring power of attorney", *Medical Treatment (Enduring Power of Attorney) Act* 1990 (Vic) (The Act specifies that an ordinary "enduring power of attorney does not authorise the making of decisions about "medical treatment": s11). Powers of attorney may contain conditions limiting their scope, or defining the events which crystalise ("springing power") or terminate the power: Hommel, above n1 at SC-28-SC-33.

97 Trusts may be discretionary or non-discretionary, funded or un-funded at the outset, and may or may not be revocable: Hommel, above n1 at SC-47-SC-50. Frolik, L, "Discretionary Trusts for a Disabled Beneficiary: A solution or a trap for the unwary?" (1985) 46 *Univ of Pittsburgh LR* 335 at 337-344; Carney, T, "Social Security and Welfare Services for Retarded People: the state of the art" (1979) 12 *Melb Univ LR* 19. In Australia the definitions of "income" has been widened, and that of "assets" clarified, somewhat reducing the attraction of trusts in maximising social security entitlements: *Social Security Act* 1947 (Cth) s3(1) "income" and *Melbourne v Secretary DSS* (1987) 78 ALR 431. An "asset" however, depends on finding that the disabled person has a vested equitable interest under the trust: s3(1) "property" and *Re Christian* (1987) 7 AAR 45.

98 The possibilities include joint tenancy (with inherent survivorship benefiting the co-owner who lives longest), tenancy in common, and joint bank accounts: Hommel, above n1 at SC-20-SC-21.

99 Hommel, above n1 at SC-3.

100 Below n109.

101 *Social Security Act* 1947 (Cth) s161(2) [unlike the US provisions (below n102) , the legislation currently provides no guideline for the exercise of the power (though a "best interests" test commands administrative support)].

102 Komlos-Hrobsky, P, "Representative Payee Issues in the Social Security and Supplementary Security Income Programs" (1989) 23 *Clearinghouse Review* 412 at 412. Australian data are less precise, but Departmental estimates put the nominee and group payee figure at not less than 8 per cent: private communication.

103 Id at 417.

Social Security Administration's procedures are more than merely cursory. Under the main income support program, for instance, details are required to be supplied in a form of application, on the basis of which it is possible to screen possible appointees on such factors as:[104]

> [T]he relationship between the payee and the beneficiary; the amount of interest shown by the payee in the circumstances of the beneficiary; the legal authority which the proposed payee possesses . . .; whether the payee has the custody [cares for] the beneficiary; and, finally, whether the payee is capable of handling the duties of a represented payee. As a guide in selecting a representative payee, the Social Security Administration has promulgated regulations establishing and ranking preferred categories of payees. However these preferences and rankings are flexible and need not be strictly followed if to do so would not be in the best interests of the beneficiary.

Moreover, representative payees are provided with a detailed brochure setting out the fiduciary and other obligations owed to the person for whom they act,[105] and an annual report is also called for.[106]

By contrast, the Australian administration lays down no such procedural steps. To compound the position, decisions to appoint a warrantee are not reviewable in Australia.[107] A review of the rights of residents of nursing homes and hostels recently recommended that any "group payment cheque" paid to an institution for its residents, be confined to the amounts permitted to be recouped to pay fees, with the balance preserved for payment direct into accounts accessible only to each individual or their representative.[108] It is also understood that the Department is considering amending the provision to harmonise it with any state guardianship orders which may exist. However these proposals would still fall short of the American model, with all its limitations.

On one view such arrangements, subject to incorporation of at least the level of regularity imposed in the US scheme, constitute one of the alternatives to formal guardianship:[109] they are a cheap and relatively efficacious way of providing security of management of the primary source of income received by many ordinary people. Yet there is a federal complication, however. Writing about the representative payee issue, Komlos-Hrobsky, asks:[110]

> whether there should be a federal payee system at all. The social and ethical judgments involved are difficult and it probably makes no sense to have two levels of government struggling with the same problems. On the other hand, advocates in States where these functions are ill performed may be grateful for federal intervention, however half-hearted and inept.

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104 Hommel, above n1 at SC-55 and see the form of application (SSA-11-BK (1-86)): id at 39-42.

105 Id at PG-46-49.

106 Form SSA-623-F3 (3-86): Id at PG-50-52.

107 *Social Security Act* 1947 (Cth) s182(5)(b) (rendering unreviewable the whole of s161, which generally speaking deals with incidental issues concerning the "manner" of payment of entitlements).

108 Ronalds, C, *Residents' Rights in Nursing Homes and Hostels: Final Report* (1989) 50-51.

109 See Hommel, above n1 at SC-53-SC-58.

110 Komlos-Hrobsky, above n102.

The division of responsibility weakens the case for retention of the arrangement, while adding a short-term benefit in those states where guardianship schemes are below par. Since in Australia this is largely confined to Queensland, Western Australia and Tasmania, with reforms imminent in the first two, that bonus will soon dissipate.

(b) Informal family arrangements

If mundane bureaucratic procedures are open to challenge, questions may equally be posed about the informal arrangements which are made outside the framework of the law or the bureaucracy. Certainly one can agree with the sentiment that, generally speaking, informal arrangements are sound and preferable. As Gobbo J, observed in *Moore*:[111]

> [T]here may well be hundreds of cases of elderly persons suffering from some form of senility whose affairs are looked after by caring relatives with whom they live who might be described as ad hoc administrators. It would seem absurd that all the paraphernalia of Board intervention, reviews, regular filing of accounts and other bureaucratic controls would have to be imposed on all such family or like arrangements.

The challenge to this position arises from two directions. First, the erosion of the traditional networks of families and friends, under the press of two income families and geographic mobility/dispersal, removes or weakens natural checks and balances. It is not realistic to rely unduly on an over-taxed institution.[112] Secondly, it is recognised that family members may be a source of exploitation or neglect in some cases.[113]

This was the point made by Hommel, in urging that care be taken to ensure that reliance on informal supports (or social services) be genuinely "voluntary" in order to overcome the risks of intimidation, coercion or exploitation.[114] One way by which this might be achieved is through community education, strong agency advocacy/empowerment programs, citizen advocacy, and active scrutiny by bodies like OPA. However, social isolation and a cultural attitude of presumed incapacity, renders the aged liable to be missed by such measures, irrespective of their vigour. This is the greatest (unresolved) challenge confronting policy-makers.

6. *Towards Resolution*

The remaining issue is to determine how these questions impact on the choices between the competing "cultures" for structuring responses to the needs of the aged. The question is the extent to which a "modified legal" culture of tribunal guardianship should be supplemented or substituted by "alternative professional cultures" (mediation, or professional screening), "administrative culture" (protections via warrantee systems), or be left to "private culture" (family arrangements). This will be addressed in two ways. First a paradigm of the different types of decision-making and their outcomes will be postulated. Secondly, theoretical debates will be considered.

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111 *Re Moore*, above n13 at transcript 28-29.

112 Cf *Guardianship: An Agenda for Reform*, above n15 at 29.

113 Monahan, J, "Empirical Analyses of Civil Commitment: Critique and Context" (1977) *Law and Society Review* 619 at 624.

114 Hommel, above n1 at SC-16-17.

6.1 An analytic paradigm

The earlier discussion confirms the importance of distinctions between private law (the resolution of conflicts between private citizens) and public law (the distributive/regulatory functions performed by the state). Orthodox courts may lend themselves best to the resolution of private law disputes (and the protection of individual civil rights), while the public law functions of the welfare state may be better dealt with through tribunals, mediation or professional welfare delivery.

It has been shown that commentators, and the Victorian Board itself, are reluctant to have administrative tribunals assume the *direct* task of resolving "rights to service" issues. On the other hand the NSW and NZ equivalent bodies are obliged to engage in mediation functions, a prime purpose of which has been hypothesized to be to effect distributional outcomes in the welfare sphere *indirectly*. When operating in this vein, public law institutions may become allies of the "distributive" functions of the welfare state rather than simply an instrument for securing civil rights.

However, just as the different private law instruments may set out to achieve one object only to unintentionally achieve another (for example, informal resolution of disputes by tribunals may boost professional power/control), so also in the public sector. Thus the managerial aspirations of a body like the Guardianship Board may largely involve privileging or adding "voice" to certain claims.[115]

Schematically these distinctions may be summed up in the paradigm on the following page.

One distinction in the table is that between the rights orientation of "private" law concepts (the first three lines in the table) as against the "distributive" aims of public law in the welfare state (the last three lines). It suggests that the private law model of "traditional legal culture" with its focus on individual rights as a means of enhancing individual autonomy, carries the risk of alienating customers by the inaccessible nature of the body. If, as the *Moore* case rather implies, tribunals ought to pursue all the traditional goals but in a more informal setting, it is possible (as line two of the table suggests), that the unintended outcome would be to privilege the voice of professional participants. Finally, in the private law vein, is the unstructured (but in-house) conciliation mode: one which it is suggested carries a heavy risk of exacerbating inequalities of power. While this is the model which Robert's feared,[116] it was not one replicated in the processes discussed here.

The public law grouping (the bottom 3 lines), have in common the pursuit, as explicit aims, of allocative, regulatory or managerial purposes: the dialogue is the Weberian language of equity, rule-conformity and efficiency (rather than independent, individual "justice"). It is suggested in the paradigm that courts are not able to accommodate allocative culture. Tribunals are thought to have a place, with their explicit aim being "regulatory" and their unintended outcome sometimes being that their capacity to do so opens up the

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115 Rosenblatt, R, "Health Care Reform and Administrative Law: A Structural Approach" (1978) 88 *Yale LJ* 243 at 333.

116 Above notes 80-81 and accompanying text above.

Issue	Forum	Focus	Intended	Actual
Private	Courts	Rights	Independ.	Alienation
Private	Tribunal	Rights	Informal	Professional Voice
Private	Conciliation	Rights	In-house adj.	Inequality
Public	Courts	Rights	NA	NA
Public	Tribunal	Distributive	Regulate	Commodify
Public	Mediation	Distributive	Managerial	Consumer Voice

prospects for this potential to be "commodified", allowing trade bargains to be struck where the Board withholds an order on the basis that a compact reached in the course of the hearing is honoured. Finally, it is suggested that tribunal auspiced mediation, despite an apparent "managerial" slant, can serve a positive force in adding "voice" to the interests of disempowered groups.

However the discussion cannot be confined to the choice between the traditional culture of the courts and the modified culture of tribunals. It is apparent that a partnership might be struck between the latter and the "alternative professional cultures" of mediation. But where does "administrative culture" fit in? And what is the role for informal "social market culture"?

6.2 Reconciling distribution with legality

It has been argued elsewhere[117] that there is a paradoxical relationship between the allocative purpose of welfare, and the justice functions of the law. The social rights sought to be secured by welfare cannot be divorced from bureaucracy and re-married with judicial culture.[118] A Weberian framework though, is one possible explanatory model for resolving this paradox within the context of the choice of "cultures". It provides one way in which rights issues may be secured *within* administrative culture.

The Board: The "constitutional" or "rights" orientation of the Guardianship Board counters three of the least attractive aspects of "administration". First, the autonomy of the Board preserves it from being corrupted into administrative norms and values (the separation of functions restricts administration to its benign usage as "organisation"); secondly, the promulgation of norms and standards for the grant of guardianship injects the requisite element of "legalisation" which is usually missing in pure administrative structures; and, finally, the generous availability of rights of appeal provides the

117 Carney, above n59.
118 Friedman, above n56 at 5.

"judicialisation" which is said to be the third hallmark of a constitutional theory of administration.[119]

That is not to say that there are not very strong influences favouring the conflation of administrative and judicial functions: such as the pressure to suffuse administrative review tribunals with the culture and values of the administration.[120] The new welfare and associated "managerial" accountability responsibilities of the Board, then, might be thought to give dominant sway to "administrative" culture, arguably returning to the arbitrary "particularised citizen-sovereign relationship" which pre-dated the enunciation of the supremacy of the principle of the "rule of law", as a check on the whims of the administration.[121] Certainly such a result would undermine the legitimacy of the welfare state.[122] Inevitably there is some tension between allocative and rights perspectives. However there is little by way of substantial evidence to suggest that the proposed (very limited) allocative role of the Boards (in protecting people against denial of access to services where this leads to *serious* neglect), would flout this precept. Indeed reliance on a "mediation arm" of the Boards for the discharge of that mandate, should enhance the secondary role of the Boards in cementing bargains about the organisation of services for the people who take issues before it.

Professional gatekeepers: Simon's analysis of deficiencies of income security law and administration,[123] led him to advocate greater reliance on professional gatekeepers. He contends that welfare reform has fragmented and de-skilled the tasks of front-line administrators.[124] His concern is that such reforms involve social work ceding influence to law and management perspectives.[125] Adapting his income security proposals to the current debate would call for three reforms: more diffuse guides to decision-making (standards not rules); decentralised administration; and the bringing to bear of "some of the attributes of skill, education, and status associated with professionalism".[126] In a nutshell, these three are the attributes and benefits of the scheme of "de facto delegated screening" functions found to have been accepted by social workers in Victoria (where mediation is not available).

Bureaucratic processes: The Simon analysis also points to the major weaknesses of the warrantee system: it is rigidly bureaucratic, efficient and uncaring. As he suggests, two responses should be considered in such cases. Either professional social workers inside or outside the Department should carry these decisions, and/or the decisions should be opened to review and appeal.

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119 Id at 7-8, 88-95.
120 Id at 12.
121 Id at 20.
122 Id at 23.
123 Simon, W, "Legality, Bureaucracy, and Class in the Welfare System" (1983) 92 *Yale LJ* 1198.
124 Id at 1199. (Procedural regularity and the enunciation of clear "rules" has been harnessed with the drive for fiscal restraint, efficiency and technological monitoring: at 1200, 1201-1219, 1225).
125 Id at 1198-1199; Social work methods were associated with incursions into privacy, paternalist manipulation of clients, sentimentality and loose administration: at 1215.
126 Id at 1200.

A choice?: While this preliminary paper is not the place to choose between the mediation and the professional screening modes, it is at least clear that both are worthy of further consideration. Certainly there are serious distributional and allocative decisions at stake in this area. The risk of imposition and abuse should the Board stand alone, as a traditional "adjudicative" body concerned exclusively with the preservation of property and civil rights, seems to be well established. Whether these mechanisms, or other devices will inject the requisite "responsive law" flavour, remains to be seen, however.

7. *Conclusion*

The social and civil cast given to guardianship laws by contemporary reforms is, it has been suggested, an appropriate set of initial responses which have largely served to achieve the objectives of fostering participation, exercise of choice rights and the enjoyment by disabled people of the dignity of risk. However the current system has largely ignored two issues. First the question of distributional equity has been glossed over, with the consequence that family members and community networks or organisations are often poorly supported in meeting their obligations to the person for whom they are caring. Secondly, inadequate attention has been paid to the selection of gatekeepers, (and gatekeeping mechanisms such as bureaucratic re-assignment of pension payments), which make decisions about accessing informal networks, welfare services, alternatives to guardianship, and guardianship itself.

Consistent with arguments developed elsewhere,[127] it is tentatively suggested that in order to better accommodate these concerns existing guardianship arrangements should be modified to produce a more "responsive" legal system. This would mainly involve creating the *space*, and the *environments* in which other social systems and relationships may flourish. It would not entertain total *withdrawal* of the law, for this would invite unequal power relationships. Therefore, neither standard bureaucratic decision-making (and administrative review), nor an un-regulated private market, readily harmonises with the new aims. Equity of outcomes (namely whether or not participation is achieved) becomes as much the criterion for success as does the more usual test of "equity of treatment" by the decision-maker (namely uniform processes and entitlements). Equality in "brokerage" settings (where access to personalised packages of services is negotiated) becomes more important than guarantees of equality transmitted through the uniform content and application of procedural or substantive rules of law.

But there are risks to be protected against: new welfare must not become a repressive (or more repressive) vehicle for promoting social conformity, basic civil rights must still be rigorously protected;[128] participants must be genuinely empowered, through advocacy and educative strategies.[129] The model should seek to secure reciprocal entitlements to participation

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127 Carney, above n59 at ch10.

128 Morris, G, "The Use of Guardianships to Achieve — or to Avoid — the Least Restrictive Alternative" (1980) 3 *Int of Law and Psychiatry* 97.

129 Herr, S, "Legal Advocacy for the Mentally Handicapped" (1980) 3 *Int Journal of Law and Psychiatry* 61; Milner, N, "The Symbols and Meanings of Advocacy" (1986) 8 *Int Journal of Law and Psychiatry* 1.

("distributive rights"),[130] by a method which lies somewhat towards the margins of the domain of law. But it is *abuse* of power, not inequality of power per se, which must be eliminated.[131] And (contrary to Teubner) there are two prime characteristics of such (legally supplemented) systems which are adopted here: their *responsiveness* to social needs[132] and their ability to provide *security* of (reciprocal) citizen-state expectations.[133]

One possible objection is that these strategies are privatisation in disguise.[134] The social system of redistribution therefore cannot be cast loose from the public sector, to be subsumed by the efficiency principle of the marketplace. It cannot defensibly be divorced from principles of "need" or "equality of access/participation".[135] Responsive laws, though, are not privatisation in disguise, but a superior means of effecting distribution of social goods in accordance with principles of equity, the satisfaction of need, and the promotion of social participation of individuals and a sense of reciprocal obligation by both individuals and the state. In other words: securing rights of "citizenship".

This, then, may be the way forward for the law in the care of the small number of "socially fragile" aged, who require legal intervention because they confront an imminent social crisis which is incapable of being protected against through reliance on informal caring networks provided by family or friends.

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130 Preuss, U, "The Concept of Rights and the Welfare State" in Teubner, G, (ed) *Dilemmas of Law in the Welfare State* (1986) 151 at 163.

131 Teubner, G, "After Legal Instrumentalism? Strategic Models of Post-Regulatory Law". Id 299 at 318. Kettler, D, "Legal Reconstitution of the Welfare State: A Latent Social Democratic Legacy" (1987) 21 *Law and Society Review* 9 at 38.

132 Not their "reflexivity" (self-referential self-regulation): Teubner, G, "After Legal Instrumentalism? Strategic Models of Post-Regulatory Law", in Teubner, G, (ed) above n130 at 302. For a short critique: Kettler, id at 40.

133 Kettler, above n131 at 16.

134 Blumstein, J, "Court Action, Agency Reaction: The Hill-Burton Act as a Case Study" (1984) 69 *Iowa LR* 1227 at 1231.

135 Rosenblatt, R, "Rationing "Normal" Health Care Through Market Mechanisms: A Response to Professor Blumstein" (1982) 60 *Texas LR* 919 at 920.