CLIENT ASSESSMENT OF VICTORIA'S GUARDIANSHIP BOARD†

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INTRODUCTION

One measure of the success of new social legislation is the regard in which it is held by the people it is designed to serve. This article examines the practical impact of the Guardianship Board, a body established by the new guardianship laws introduced in Victoria (with analogues in other Australian States apart from Western Australia and the ACT).[1] Prior to the enactment of new guardianship regimes, it was necessary to rely on the common law (and statutory) schemes for providing guardianship (usually plenary) of the property (rarely the person) of intellectually disadvantaged people. These had many deficiencies (unduly restricting rights through plenary orders, and placing too much reliance on medical assessments of what are mainly social needs),[2] but a principal defect was that common law guardianship was cumbersome and costly: the law suffered from barriers to access, with a consequent loss of public confidence in the law.

The new "civil guardianship" models sought to overcome this perception in three main ways: by enabling partial orders to be made;[3] by reviving personal guardianships;[4] and, commonly,[5] by also establishing administrative

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[1] *Guardianship and Administration Board Act* 1986 (Vic.); *Intellectually Disabled Citizens Act* 1985 (Qld); *Protected Estates Act* 1983 (NSW), *Disability Services and Guardianship Act* 1987 (NSW); *Mental Health Act* 1963 (Tas) Part lll; *Mental Health Act* 1977 (SA); *Mental Health Act* 1962 and *Supreme Court Act* 1935 (WA); *Adult Guardianship Act* 1988 (NT). Cf. *Dependant Adults Act* 1976 RSA 1980 (Alb); and the *Protection of Personal and Property Rights Act* 1988 (NZ). Subsequently cited as: *Vic:*; *Qld:*; *NSW (PE) 1983*; *NSW (DS) 1987*; *Tas:*; *SA:*; *WA:*; *NT:*; *Alb:*; and *NZ:* respectively. In the ACT the *Lunacy Act* 1898 (NSW) remains in force pending adoption of recommendations of the Australian Law Reform Commission.

[2] T. Carney, "Civil and Social Guardianship for Intellectually Handicapped People" (1982) 8 *Mon. L.R.* 199.

[3] Alberta removed the distinction (and plenary orders) in 1985 (*Dependant Adults Amendment Act* 1985 esp. ss. 2, 11(1)), leaving plenary power to be built up by the court enumerating *all* of the listed possible powers (against a backdrop that only *necessary* powers be granted: ss. 10(1)(2)).

[4] Carney, op.cit. 205–7.

[5] Alberta, New Zealand, NSW and the Northern Territory retain the judicial mode in whole, or part: *Alb*: s. 1(c) [the Surrogate Court of Alberta]; *NZ*: s. 2 [the Family Courts Division of the District Court]; *NSW (DS) 1987*: ss. 8,14,31; *NSW (PE) 1983*: s. 68 [the Protective Division of the Supreme Court exercises certain parallel and overriding

boards, with multi-disciplinary composition, to administer the new laws.[6] In Australia, Western Australia and the ACT are exceptions to this reform pattern.[7] Elsewhere the reform model aims to provide guardianship services to people in ways which are both facilitatory (enabling people to [re]gain greater independence and capacity to live in the community), and benevolent (enhancing rather than restricting individual freedoms and promoting the welfare of disadvantaged people). Once appointed, guardians commonly have dual responsibilities: the "autonomy-enhancing" (but approximate and proxy) task of exercising rights on behalf of the represented person where this proves necessary;[8] and, secondly, the more paternal task of protecting the interests of the represented person.[9]

The viability of the whole scheme, however, turns on the level of acceptance shown by people affected by the new administrative procedures.

APPROACHES TO LAY ASSESSMENT AND THE PRESENT STUDY

1. The Literature

Research on the ways in which members of the public evaluate legal processes is of fairly recent origin. It had its roots in the observation that the *process* by which a dispute is resolved may be more important to people than the substantive merits of the resultant outcome itself.[10] Following the confirmation of this, research turned to why this might be so. One influential hypothesis was that *participation* might be the key: the control over procedures prevailing under adversarial styles of adjudication (weakened or lost under informal/inquisitorial styles) was thought to be valued as: (i) a way of achieving "equitable" if unpalatable results; (ii) as a way of controlling outcomes; or (iii) as a way of ensuring that the person had a fair say.[11]

Many members of the lay public, however, when appearing in a legal forum for the first time, bring with them a criminal law reference point. Thus O'Barr and Conley conclude that, in civil forums, most members of the lay public concentrate on process issues (assuming facts and substance to be self-evident); have expectations that the civil dispute system is state driven (rather than reliant on plaintiff initiatives); and assume that orders are routinely enforced by the state (rather than often becoming mere paper rights).[12]

powers to those of the Board]; *NT*: ss. 9(1), 11(2)(b) [the Local Court on advice from a Guardianship Panel].

[6] E.g. *Vic*: s. 19 [Guardianship and Administration Board]; *S.A.*: s. 20 [Guardianship Board]; *Qld:* s. 16(a)(i) [Intellectually Disabled Citizens Council of Queensland].

[7] T. Carney, "The Limits and the Social Legacy of Guardianship in Australia" (1990) *F.L. Rev.* (forthcoming).

[8] T. Carney, P. Singer, *Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People* (Canberra, A.G.P.S., 1986) 48–49.

[9] The Alberta legislation, for example, enables the guardian to be granted control over "normal day to day decisions . . . including the diet and dress . . .": *Alb*: s. 10(2)(h).

[10] J. Thibaut and L. Walker, *Procedural Justice* (New Jersey, Erbaum, 1975).

[11] W. O'Barr and J. Conley, "Lay Expectations of the Civil Justice System" (1988) 22 *Law and Society Review* 137 at 138.

[12] Id. 139 and 159–160.

Other research has shown that the nature of the setting is significant. Thus Tyler hypothesized that there were likely to be differences in perceptual/evaluative frameworks adopted by people depending on whether there is a "dispute" and whether adjudication took place before a court rather than a tribunal.[13] This was borne out by his research.[14] He pointed out, however, that the studies on the criteria for evaluating legal processes in terms of "fairness" come to divergent results. The original work by Thibaut and Walker looked to *control* over process or over decisions. However Leventhal[15] isolated six relevant factors, which he summarised as those of: "(i) consistency, (ii) the ability to suppress bias, (iii) decision quality or accuracy, (iv) correctability, (v) representation, and (vi) ethicality".[16]

Tyler nevertheless concludes that there is common ground after all. Four dimensions are central in his view: those of "consistency", "accuracy", "bias suppression" and "representation" (or participation).[17] In court settings, Tyler found that the first three of these attracted most prominence, while the expected emphasis on "ethicality" did not materialise,[18] being captured in the extent to which a rights orientation was manifested.[19]

2. Fairness/Participation

In drawing this material together, three further observations must be made.

First, there is the interesting proposition that the criteria applied by the public may not be universal. Instead they may be specific to the context, varying with whether the hearing is perceived to be formal or informal. The suggestion is that, in formal settings, the key considerations in judging the "fairness" of the proceedings are "bias suppression, decision quality, consistency, and representation"; while the informal settings draw attention to "consistency, decision quality, and ethicality".[20] While there is something in this aspect, Tyler's research found a surprising consistency in the way in which people thought of fairness,[21] and discovered that consistency is judged not against like cases, but rather against the benchmark of the degree of endeavour made to be fair.[22]

Secondly, the outcome of the process might also be expected to influence the choice of factors. Thus, hypothesized Tyler, parties who are badly done by "will focus more on issues of bias, consistency, or dishonesty . . . [only] those

[13] T. Tyler, "What is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures" (1988) 22 *Law and Society Review* 103, 104.
[14] Id. 125.
[15] G. Leventhal, "What Should Be Done With Equity Theory?" In K. Gergen, M. Greenberg and R. Willis, (eds) *Social Exchange: Advances in Theory and Research* (New York, Plenum, 1980) 27, 40–46.
[16] Tyler, op.cit. 105 [numbers added for ease of reference].
[17] Id. 106.
[18] Id. 127.
[19] Id. 129–130.
[20] Id. 107.
[21] Id. 125.
[22] Id. 131.

who win can afford the luxury of thinking about issues such as their rights".[23] In this area the most striking finding made by Tyler was that, rather than having an increased sensitivity to possible bias or dishonesty, parties instead looked for explanations in terms of how hard the body had tried to be fair[24] (an explanation which perhaps less directly challenges the legitimacy of the body). Notions of "trust" or confidence in the processes were to the fore.[25] This is a consideration to be borne in mind in this study.

Finally, and in similar vein, regard should be paid to his related hypothesis: namely that "disputes, because they involve contending factions, will lead citizens to place greater weight on whether they have had an opportunity to state their case, on bias (ie favouring one party over others), and on consistency".[26] Because the Victorian Board deals *only* with "present crises",[27] it is to be anticipated, if there is merit in the thesis, that parties appearing before the Board would attach increased weight to these factors, as suggested here. Since the literature establishes the centrality of representation/participation in dispute situations[28], and since the Victorian Board prides itself on its achievements in this area,[29] this is another factor worth exploring here.

3. The Current Study

This present study examines the practical impact of the Guardianship Board as it operates in Victoria. It is exploratory in nature: it does not seek to address the variety of themes summarised above. Rather, it adopts the "accessibility/fairness" of the legal processes of the Victorian Board as one benchmark, and the policy objectives of the legislation as a second criterion. Consistent with this, the findings are presented under headings which raise the following themes: (a) The "novelty/familiarity of the Board and its processes; (b) The "expectations" held of Board hearings; (c) The rating of opportunities for client participation in Board hearings; (d) The policy focus of hearings (rights vs welfare); and, (e) Client ratings of the outcomes of the hearings by the Board (promotion or otherwise of "best interests").

Before turning to this material, however, the next section will outline the nature of the caseload handled by the new Board, and describe the methodology adopted in the study. After setting out the findings, the article discusses the implications of the findings for the nature and limits of law. Some tentative conclusions are then drawn about the efficacy of the new legislation in meeting the needs of the group it purports to serve.

[23] Id. 109.
[24] Id. 127.
[25] Id. 129.
[26] Id. 108–9.
[27] *Re M* (1988) 2 V.A.R. 213 at 220 (On review the decision of the Board not to appoint a guardian was affirmed, even though the person was 75 years of age, totally bed-ridden, unable to attend to her physical needs, and with an attention span of a few seconds and little grasp of the outside world. However, because her interests were well catered for by a caring relative, there was no present need (or "crisis").) Also *Re E* (1988) 2 V.A.R. 222, 225.
[28] Tyler, op.cit. 132.
[29] Infra. fnn. 48, 54.

THE SCALE OF OPERATIONS OF THE VICTORIAN BOARD

1. The Volume and Composition of Cases

The Victorian Board commenced to deal with applications in July 1987. In the 50 weeks to June 30 1988, 1941 applications were lodged and 1,772 orders made (91.3% of requests). If applications for emergency orders are included, something under one in ten (8.8%) of these were for guardianship alone, and over one third (36.9%) were for administration orders. The balance (54.3%) were for mixed orders.[30] Due to what the Board perceived to be a lack of appreciation by the public that guardianship deals with the person rather than with property, too many people wrongly sought mixed orders or "guardianship" orders (when their real needs were for property guardianship):[31] the true picture, the Board believes, is more accurately reflected in the fact that, after amendment of applications, one quarter of orders are for personal guardianship and three quarters are administration orders (rather than the 36% : 64% ratio in the applications figures).[32]

The breakdown of orders made by the Board shows that 442 (24.9%) were for personal guardianship and 1330 (75.1%) were administration orders. Plenary guardianships were extremely rare, accounting for "under 20 cases" (or 1% of orders).[33] Emergency orders accounted for 27% of personal guardianships and 8.3% of administration orders.

While the statutory Office of Public Advocate was appointed as guardian in 50.9% of personal guardianships (inflated by hospitalised patients lacking friends and that disputed cases by definition may rule out relatives), relatives are still selected wherever possible (47% of cases) — with non-relatives accounting for the remaining 2 per cent.[34] When the Board selects a property guardian ("administrator") it prefers the expertise and independence of the Office of State Trustees (the successor to the Public Trustee, a body accorded weak "presumptive favouritism" under the Act in more complex cases[35]) in over two-thirds of cases (67%).[36] However private individuals (as distinct from professional accountants, lawyers, etc) are selected in 30% of cases. Personal guardianship is presumptively to be entrusted to an individual rather than to the statutory office of Public Advocate (the guardian of last resort).[37]

[30] Victoria, *Annual Report 1987–1988 Guardianship and Administration Board* Melbourne: n.p., 1988, 10. [subsequently cited as: *Annual Report*].
[31] Id. 10–11.
[32] Id. 16.
[33] Id. 15.
[34] Id. 13.
[35] The *Guardianship and Administration Board Act* 1986 (Vic.) requires that regard be paid to whether the "person has sufficient expertise to administer the estate . . .": s. 47(1)(c)(iv).
[36] *Annual Report* (supra fn. 30), 18. The Board gives the impression that this figure may be artificially inflated because much of its work has involved cases of formerly institutionalised patients who lack relatives or friends: id. 13–15 [dealing with *personal* guardianships].
[37] Section 23(4). [So also *NT*: s. 14 (the Minister assumes this responsibility).]

2. The Survey

The pilot survey of the Board covered 10 hearings conducted between 29 August and 19 September, 1988. Data was collected from participants in three ways. First through a telephone interview held approximately 7 days prior to the hearing. This was designed to isolate the expectations of parties, their level of knowledge about the Board, and any perceived barriers to access. Seventeen individuals were included in this phase. The second set of data was drawn from semi-structured observations of the hearing itself. Ten hearings were covered at this stage. The final set of data was drawn from follow-up telephone interviews held approximately 10 days after the hearing, together with information contained in responses to a mailed questionnaire distributed to parties after the hearing had concluded. Twenty-three individuals, from nine hearings, were covered. All parties covered in the pre-hearing interview were re-contacted except for one case (3 people) where the decision had been reserved.[38] The proportion of property orders in the sample reflected the experience of the Board in relation to *applications* received.[39] Other attributes of the orders covered by the sample also matched the work of the Board.[40]

The backgrounds of the parties covered in the survey sample also mimic the known characteristics of the population from which it was drawn. Thus only one case involved legal representation. This is in line with the Board's estimate of less than 10% overall.[41] By contrast, social workers attend in roughly 40% of cases; and in the sample four cases involved social workers. Again (due to the expense) doctors rarely attend Board hearings: and certainly none attended in the cases sampled. Other professional resource personnel caught in the sample included an accountant, two officials from the Office of State Trustees and, on one occasion each, the manager of a facility for intellectually disadvantaged people, and the Office of Public Advocate (which has statutory responsibilities under the Act[42]). Most participants however did not fall into the professional resource category: 70% of the pre-hearing group and 60% of the "de-briefing" follow-up group[43] were ordinary people, drawn from a variety of unskilled or skilled backgrounds.[44] The sample, then, is sufficiently

[38] The nine fresh subjects (in addition to the 14 "originals") comprised people who turned up at the hearing without prior notice.

[39] The ten hearings (including the reserved case) broke down into six applications for appointment of property administrators (four cases) or personal guardians plus administrators (two cases).

[40] This is borne out by the proportion of "statutory review" cases (the Act requires that existing property administration orders be reviewed by the Board). In the sample, 40% of hearings were reviews of existing orders; this compares to 500 reviews out of 1455 property matters overall (34%): *Annual Report* (supra fn. 30), 34.

[41] Id. 27.

[42] Section 16(1)(a) [guardian of last resort], (b) [applicant for an order], (c) [intervening party before the Board], (d) [author of reports to the Board], (f) [person entitled to make representations, including to the Board].

[43] Professional resource people were more prone to be in attendance at a hearing without prior notice.

[44] In the sample, technician, public service, teaching and managerial levels were all represented. However "home based people" (the retired and those identifying as "home duties") were the most numerous (26% of the post-hearing group).

representative to support tentative findings about the operation of the Board.

THE FINDINGS

1. A Novel or a Familiar Body?

One measure of the accessibility of a legal forum is the degree to which the expectations of parties are borne out by subsequent experience. In this study it was hypothesized that the reactions of parties might be influenced by whether the hearing constituted that person's first contact with a court or tribunal (as was the case for most respondents).[45] It was expected that people attending the Board for the first time would carry this baggage of expectations stemming from their exposure to the prior court hearing(s), but that such experience would normally reduce the stress associated with a Board appearance. This was confirmed by the study.

The relationship between prior court experience[46] and the level of pre-hearing apprehension is shown in Table A below.

Table A
Apprehension Levels by Prior Court Experience

Level of Apprehension	No Prior Court Experience	Prior Court Experience	Total
Comfortable or reasonably so	2	5	7
Worried/very worried	3	1	4
Total	5	6	N=11

The trend in this Table is for prior court exposure to be beneficial, in that participants with this background are less likely to be unduly apprehensive. Fear of the unknown is clearly a stronger force than is the memory of negative experiences from a prior court appearance.

The second measure of the impact of the "novelty" of the Board is in terms of the success of the Board in putting people at ease (thereby encouraging participation and a sense of fairness). Needless to say, the study found that apprehensive reactions, while by no means an inevitable companion of lack of prior experience before the Board, were confined to that group. No one with

[45] Interestingly only 29% of the pre-hearing group had not had at least one prior attendance at court. Given the older age of people attending, this is not surprising. However this is quite the reverse of the experience with prior attendance before the Board: only 29% had appeared previously at the Board.

[46] Professional resource people (lawyers and social workers, etc) have been removed on the ground of prior training/orientation (so also four cases involving parties with a prior attendance at the Board).

prior experience of the Board was apprehensive. Similarly, as shown in Table B, people without prior experience of the Board were most likely to develop a (revised) positive attitude towards the Board.

Table B
Parties' Post-Hearing Feeling by Prior Board Experience

Prior Board Appearances	Post-Hearing Feelings	
	Positive	Neutral/Negative
No prior appearance	8	2
Prior appearance(s)	5	3

As would be expected of Board procedures which genuinely place people at ease, the most dramatic shift in attitude took place in the group who were *most* nervous prior to the hearing.[47]

These findings are not un-expected. The Board itself seeks to minimise barriers to access (including factors which, while not precluding attendance, increase tension or lead to confusion), and to overcome any sources of disorientation of parties, commenting that "many parties, particularly professionals, have expressed anxiety about their unfamiliarity with the procedures of the Board".[48]

Such problems can arguably best be minimized by forwarding explanatory material to the parties prior to the hearing. Or the hearing could be further geared to putting parties at ease, and to informing them about procedures, at the outset. Either way, there would appear to be a strong case for taking such steps. As Table C below discloses, only one in four of the parties without prior contact with the Board knew what to expect when the hearing commenced.

Table C
Knowledge of Board Procedures by Prior Board Experience

Prior Experience of Board	Expectations of Board Hearing		Total
	No knowledge	Knows what to expect	
No prior appearance	9	3	12
Prior appearance(s)	–	5	5
Total	9	8	N = 17

[47] The three "highly apprehensive" parties expressed themselves to be "extremely pleased" with proceedings; the intermediate group — those who were somewhat discomforted or apprehensive prior to the hearing — were "pleased" with proceedings; and the seven respondents who took hearings in their stride, while also generally pleased, also included one or two people who made more qualified post-hearing assessments.

[48] *Annual Report* (supra. fn. 30), 23.

The need for orientation is not confined to the small group lacking prior experience with the law. Certainly, people with prior experience of a court hearing are less in need of orientation. However, almost half of those with experience are none the wiser about what to expect than are their cleanskin counterparts.[49]

2. Expectations of Board Hearings

A second measure of the success of the new Board is the degree of congruence between the real purpose of a forthcoming hearing and the perceptions held by parties. As would be expected, the knowledge deficits identified above were not confined to flawed understandings of how the hearing would proceed. Parties lacking prior exposure to the Board (or a court) or relevant professional experience (in social work or law) had a poor grasp of the issues likely to be canvassed before the Board. On a four point scale, seven non-professionals were rated in the top two brackets, with six falling into the lower reaches, where the comprehension of the issues was badly flawed (indeed, five received the lowest rating).[50]

Perhaps more critical to success than having a sound grasp of the issues to be canvassed at the forthcoming hearing, is an understanding on the part of prospective participants of the multi-disciplinary composition of the Board and of the fact that it is by no means exclusively confined to legal issues of the character which people associate (if erroneously) with courts. Respondents were therefore invited to indicate what part they believed legal issues would play in the forthcoming hearing. Tables D and E below summarize the findings by prior Board or court experience.

Table D
Parties' Expectations of the Legal Content by Prior Board Appearance

Prior Experience of Board	**Pre-Hearing Expectation of Legal Content**				
	Legal	**Non-Legal**	**Mixed**	**Did Not Know**	**Total**
No prior appearance	7	–	–	5	12
Prior appearance(s)	–	1	3	1	5
Total	7 (41%)	1 (6%)	3 (18%)	6 (35%)	N = 17 (100%)

[49] Four out of five of the cleanskin group did not know what to expect, but equally five of the twelve respondents with prior experience of courts made the same response.

[50] This result was not markedly affected by the level of prior experience. Professionals grasped the nature of proceedings more quickly once they had experienced them first hand. However, prior court experience was quite neutral once professionals were taken out of the sample. Of seven with a better than average grasp of what to expect, four had prior court experience; yet of the remaining five cases, all with the lowest comprehension rating, three had prior court experience.

Table E
Parties' Expectations of Legal Content
by Prior Court Appearance

Prior Experience of Courts	Pre-Hearing Expectation of Legal Content				Total
	Legal	Non-Legal	Mixed	Did Not Know	
No prior experience	2	1	–	2	5
Prior experience(s)	5	–	3	4	12
Total	7	1	3	6	N = 17

One third of the sample did not feel confident enough to express a view about the legal content of the forthcoming hearing. Almost half of the people making their first appearance before the Board were in this position (together with one person who was apparently none the wiser despite a prior attendance).[51] Equally, however, it would, at first sight, appear that there is a significant group of people who assume that one legal forum is like another, irrespective of its title. Thus, while none of the respondents anticipating a "legally oriented" hearing had prior experience before the Board, 70% had at least one prior court appearance. However this matches the experience across the sample (parties with prior court experience were *not* over-represented among those anticipating a legally oriented Board hearing): the explanations for expecting a legally oriented hearing therefore lie elsewhere.[52]

In short there are two main reactions. The more cautious group state that they have no idea what to expect in terms of the legal content of the hearing; a caution apparently not affected by prior experience of a court hearing. Another group, however, assumes that the processes of the Board will replicate those of a court hearing. This finding is consistent with the theory that parties carry a narrow paradigm of the "law" (though not necessarily a "criminal" paradigm).

3. Representation/Participation in Board Hearings

The success of a body in realising a charter of creating a participatory, "fair" forum for the adjudication of issues, is not to be judged solely on the attitudes held by parties prior to the hearing. As mentioned already, the composition of the Board, and its procedures, are supposed to encourage participation and to facilitate the reaching of the real merits of the application. Thus the Board is to "act according to equity and good conscience without regard to technicalities or legal forms" and is not bound to proceed in

[51] An identical ratio was found for the group with prior court experience. This suggests that at least the more cautious people do not extrapolate from experiences in a court to assume identical treatment of issues by a Board.

[52] However less than one in five correctly identified the "mixed" character of hearings before the Board. Those who did so all had prior court experience (perhaps predisposing them to be "uncertain"), but this had been overridden by knowledge gained from a prior appearance before the Board itself.

a "formal manner".[53] The Board itself has attached heavy weight to this aspect of its work, devoting a separate section of the Annual Report to progress on this front.[54] The degree to which these aspirations are realized was therefore explored in the post-hearing sample (comprising 23 parties).

From the data collected it is apparent that most parties were impressed by the attitude of the Board: almost three-quarters (72%) were entirely positive or had partly positive assessments. Only a little more than one in ten (13%) had an entirely negative view; with 28% having entirely or partially negative assessments. Prior knowledge of the Board had little bearing on this; however some association is shown with prior court experience: nearly three-quarters (71%) of those with mixed assessments had previously appeared in court, while only 23% of those with unalloyed positive reactions were in this position. This perhaps suggests that previous contact with the courts may set expectations which are contradicted by the approach (otherwise helpful and outgoing) taken by the Board.

Turning to the specific attributes which attracted favourable ratings, over half (7 in 13) commented on the "friendly", "sympathetic", "helpful" or "pleasant" atmosphere engendered by Board members. Over a third (4 of the 13) isolated the objectivity, professional or "impressive" features of the hearing. In other words, consistent with the literature surveyed earlier, it was the quality of the *processes* of the Board, rather than its congenial atmosphere, which proved attractive. (The balance, two retired people, simply had a positive, but unspecific, assessment).

When the Board was less successful in fostering a sense of congenial participation, factors such as alienation appear to be at work.[55] One explanation for defensiveness and dissatisfaction, was found to stem from client disagreements with the philosophy of the legislation.[56] The difference of opinion was with the legislature rather than the procedures of the Board itself. Others took exception to one (or more) of the Board members.[57]

[53] The Board is not bound by rules or practice on the reception of evidence. It may be given orally or in writing (or a mixture) and may, if needed, be given on oath or affirmation. The rules of natural justice apply, however: s. 10(1),(3),(4); *Re Moore* (unreported decision, Victorian Supreme Court, 19 Dec. 1989, Gobbo J.).

[54] *Annual Report* (supra fn. 30), Part IV. Geography, financial cost, time cost, psychological cost, communication and knowledge are all recognised by the Board as possible contributors to impaired access: id. 21.

[55] Thus one respondent (himself a public servant) complained that the Board was 'bureaucratic', while another felt it was 'remote' and that members 'spoke too much'. Another member of the group took strong exception to the 'condescending' attitude perceived from one Board member.

[56] One of these differed with the Board on a question of policy: taking exception to the notion that greater independence be encouraged for the represented person. Another commended the objectivity of the Board, but felt that more ought to have been brought out concerning the circumstances applicable *before* the represented person suffered a disabling accident.

[57] In one case only one member was said to be sympathetic (the rest 'treated it as a job'); in another one member put the person 'under pressure'; in two cases the lack of prominence of the member(s) was commented on; and in another the person disagreed with the suggestion that the represented person might live in a flat (the respondent felt that the person could not survive independently). The data did not support the hypothesis that in such cases the Board on these occasions lacked a cohesive, team-work approach to running the hearing.

Observations of the hearings, for their part, suggest that the Board already goes to considerable lengths to make hearings accessible. One measure of this is the assessed attitude of the members of the Board towards non-professional parties and the represented person (where present). Thus in half of the cases, discussion took place between the Board and these two groups concerning the behaviour and capacity of the represented person, accommodation and daily living arrangements, the handling of finances, social activity and so on. The atmosphere was warm and non-threatening. The chair attempted to explain to the represented person the nature of the hearing in all five cases where the represented person was present[58] and an attempt was usually also made to put any layperson in the picture.[59]

This friendly and non-technical approach was sustained in most dealings, even when the subject matter concerned financial or property management,[60] unless the party to the discussion was centrally in issue — such as where that person was the proposed administrator (as was the case in four instances) and doubts were held about possible exploitation of the represented person.[61] With the represented person, very informal means of communication were at times adopted.[62] So also with non-professionals generally.[63] The parties, in their post-hearing questionnaires, confirmed these impressions.[64] However, slightly lower approval ratings were recorded for the explanations in "simple English" (81%) and in explaining core terms like "guardianship" or basic medical terms.[65]

Participation was highly valued, particularly, it would seem, by the professionals (such as social workers or the advocates from the Office of Public Advocate). Thus one of the social work respondents wrote that one of the good points about the hearing was:

> "The represented person was asked for her opinion. The Board seemed to be genuinely interested in the represented person's observation and wishes. Others at the hearing had a chance to voice their opinions"

[58] Cases *Re 'A'*; *Re 'B'*; *Re 'C'*; *Re 'D'*; *Re 'E'* [case letters arbitrarily assigned to preserve privacy].

[59] This did not, however, always succeed: Thus in *Re 'J'*, the respondent adopted a very negative and belligerent attitude, partly due to differences over basic policy approaches — this created an impenetrable barrier.

[60] As in case *Re 'D'*.

[61] This accounted for "firm and almost aggressive" questioning in the case of *Re 'E'*. This is to be contrasted with a "restrained and almost apologetic" attitude to a belligerent party in another case, where that party was not centrally in issue: *Re 'F'*.

[62] Such as references by the chair in two cases to the represented person as "the star of the show" (*Re 'D'*, *Re 'A'*) or by asking questions about football to establish a rapport (as in the last of these cases).

[63] Though attempts to translate technical terms or the consequences of orders did not, to an observer, always fully succeed.

[64] Introductions made by the Board at the beginning of the hearing were approved by 94%, the general dress and demeanour of the Board, and their final "goodbye", was approved by 87%; and neither these features, not the use of first names or the explanations of medical terms attracted any outright disapproval. (Some "uncertainty" was expressed by older people about the use of first names, and some concerns were expressed about the undue formality of the hearing room.)

[65] As one social worker commented "I do not think the Board did explain legal matters in simple English. Medical terms were not explained. In general I do not think the Board explained 'jargon' well".

An advocate likewise wrote positively about the fact that "the represented person's *own words* were quoted to the Board. The Board was open to the evidence put before it" (emphasis added).[66]

Consistent with the literature, however, other dimensions were highlighted by some respondents, particularly outcomes and opportunities for review. Two quotations, taken from statements made by persons who did not have professional backgrounds, illustrate the different ways in which consideration of outcomes presented. The first person saw the outcome in isolation: "[the good point about the hearing was] the final decision"; the second put it more as an afterthought to very positive remarks about the participatory hearing[67] and positive remarks about "the availability of the Board for review of the represented person's case in the event of changes occurring". This latter combination was more common, bearing out Tyler's observation that "from the citizens' perspective, procedures exist that [are capable] of promot[ing] all aspects of procedural justice *simultaneously*".[68] Some remained critical, however, *despite* a favourable outcome. One respondent, (not a professional) wrote:

> "The only good thing about this hearing is that it enables me to carry on doing what I have been doing for the last few years, which is looking after the represented person's affairs".

A social worker, for her part, highlighted the fact that the hearing:

> "clarified for the represented person's family that the Board was incompetent [i.e. not prepared to enter into] points of practice. That took the heat off me, as the family had been hassling me about the apparent inconsistencies of the previous decisions".

This is also not inconsistent with the research literature.

4. A Rights or a Welfare Hearing?

As foreshadowed earlier, the fidelity of the Board to its statutory objectives, was a second benchmark utilised in this study as the basis for soliciting from clients their assessment of the measure of success by the Board. Because of the highly subjective nature of such a judgment, observational data on this point was also collected by the researchers, and an attempt was made to tease out the relationships between this and the previous measures of "participation/ fairness.

[66] Another respondent (not a professional) wrote of a "well controlled hearing with clear rulings, humour, kindness and readiness to accept for consideration, any viewpoints". Other remarks in this vein from the same quarter, included: "I liked the fact that the represented person's physical and material interests were frankly discussed and attended to"; that "each person was able to voice their opinion and be heard"; and: "the represented person and all other parties were given an opportunity to put their point of view".

[67] Supra fn. 66.

[68] Tyler, op. cit. 131 (emphasis added).

(a) *The Substance of the Hearing*

The most reliable data on the true nature of the hearing (as distinct from the way in which parties might perceive it) was that collected during the hearing observation phase of the study. As expected, social issues such as the capacity of the represented person, were the central issue — presenting as one of the major issues in 70% of cases.[69] Caring or social aspects were also very prominent. Thus accommodation needs surfaced in three cases;[70] expenditure of money on a holiday and the suitability of a non-conformist lifestyle (and an issue of medical consent) respectively in another two cases;[71] and the need to keep contact between a terminally ill wife and ailing husband in another.[72] Family conflict coloured this last and another case,[73] while possible exploitation by a carer was in issue in another.[74]

By contrast, a legal (rather than a social) cast to the hearing was detected less frequently. Certainly seven cases focussed strongly on the quantum, management and disposition of the represented person's property.[75] Yet only one of these involved a major legal question — one concerning the suitability of the Master of the Supreme Court as the long-term manager of a settlement from a motor vehicle accident claim.[76] Unless property questions as such are presumed to be inherently "legal" (or the preserve of lawyers), any impressions by clients of a legal flavour must be attributed[77] either to the legacy of prior experience with legal forums, or to the procedures adopted.

Data collected in the post-hearing phase casts further light on this. First, compared to the pre-hearing expectations (reported in Tables D and E above), there was a dramatic decline in the "uncertain" responses (down from 35% of all responses to 9%). The characterization of events as mainly legal was higher (48% as against 41%) but the "mixed" classification was down (from 18% to 13%). The major beneficiary then is the "non-legal" column, which is up from a mere 6% to 30%. Secondly, however, there is, on the surface at least, some

[69] *Re 'D'; Re 'A'; Re 'G'; Re 'H'; Re 'C'; Re 'I'; Re 'E'; Re 'J'.* In one illustrative case there was an insufficiency of medical evidence and a difference of opinion between medical practitioners and the Office of Public Advocate about competence. Another of the cases involved an insufficiency of medical evidence, as also in one case concerning a legal dispute about which of two wills applied. Five cases raised the financial competence of the represented person, while in two it was the competence of an existing "de facto as administrator" and in another two that of the proposed new administrator which was one of the major issues.

[70] *Re 'F'; Re 'E'; Re 'J'.*

[71] *Re 'B'; Re 'I'.*

[72] *Re 'K'.*

[73] *Re 'H'.*

[74] *Re 'J'.*

[75] *Re 'D'; Re 'A'; Re 'B'; Re 'C'; Re 'E'; Re 'J'; Re 'K'.*

[76] *Re 'A'.* (Another case involved a dispute both as to ownership of certain house extensions and the validity of two competing wills: *Re 'H'*).

[77] The only other bases for characterizing issues as legal were rather weak: such as whether the Office of State Trustees have a role where another administrator has been appointed by the Board (*Re 'D'*); the prospect of the represented person purchasing a house (*Re 'B'*); whether a non-conformist lifestyle constituted evidence of "disability" (*Re 'I'*); access by a de facto spouse to property of the represented person (*Re 'E', Re 'J'*) [In the second case the question was whether an administrator living in the represented person's house should contribute to its upkeep]; a power of attorney (*Re 'J'*); and the leasing of the represented person's farm (*Re 'K'*).

slight confirmation of the supposition that the legacy of a prior court appearance may cause parties to characterize proceedings before the Board as "legal". However the trend is weak: 91% of those characterizing the Board as legal had previously appeared in court, compared to 78% in the sample as a whole.

Perusal of the reasons given by the parties themselves for classifying proceedings as "legal" (or otherwise) provides further insights into their perceptions of the issues. With two exceptions (both professionals)[78] it is clear that the legal stamp, in the minds of most of those of the parties who adopt that classification, is coterminous with proprietary or financial subject matter. Thus ownership and sale of real estate, management of finances and so on recur as the reasons given for saying the hearing was legal. Outside this, there was one case where it was the "form" of proceedings and another (from the Office of Public Advocate) where the fact that it dealt with basic questions regarding the life of the person, underpinned the classification.

(b) *Procedural Fairness/Participation*

The data obtained during the observation stage of the project provided substantial evidence of success in achieving a relaxed, informal and non-legal atmosphere for the hearing. Without exception, first names were used by the Board at the outset of the hearing.[79] Informality was a keynote. Thus in *Re 'A'* the chair referred to aspects of Italian culture to put the represented person at ease, spoke of the administrator as the "boss of . . . the money", and described the regular review of cases as a "safety net process". Arguably extraneous matters formed a prominent part of discussion in some cases, such as the discussion in *Re 'B'* between a Board member, the represented person and a welfare worker concerning a holiday; or the discussion by two members of the Board in *Re 'J'* of the difficulties of life in a wheelchair. So also the smooth continuity of conversations between the end of the formal hearing and the post-hearing discussion. In this last and another case,[80] discussion with the Board carried on to explore matters pertinent to the care of the represented person. The welfare phase was almost indistinguishable in tone from the Board hearing which preceded it. And in *Re 'H'* the medical member went to some lengths during the hearing to stress, on behalf of the Board, the importance of reaching a resolution of long-standing family disputation: a conciliation or mediation role.[81] Finally, an informal atmosphere was promoted by extending apologies for delays in the commencement of hearings,[82] by speaking of "stepping outside" to indicate that the Board was retiring to make its decision, and by thanking parties for attending and by saying good bye (and

[78] The lawyer characterized the hearing as legal because "it takes place pursuant to statutory authority", while the social worker concentrated on the substance — namely that the hearing related to the decision-making powers of the represented person.

[79] Parties, however, rarely reciprocated by using first names to address Board members once the hearing was underway.

[80] *Re 'I'*.

[81] So also in *Re 'F'* where extensive efforts were made to pacify an aggressive party.

[82] *Re 'I'*; *Re 'H'*.

sometimes "good luck"[83]). The perceptions formed by the parties, however, may be derived from other material.

According to the accounts given by respondents (with the exception of those influenced by the presence of property or financial aspects), views about the nature of the hearing were formed by reference to a rather diverse array of benchmarks. Thus one of the people who classified a hearing as "non-legal", nevertheless commented on the legal feel of the setting (a coat of arms and security doors). Another, in concluding that the hearing was partly legal and partly non-legal, found the legal content in the presence at the hearing of the State Trustee "who has something to do with the law". If the role of a participant was significant for this individual, it was the question of the delineation of the "powers of the guardian", which led another party to similarly conclude that a "mixed" hearing had been experienced . Finally an identical assessment was made on the basis of the procedural regularity of the session (even though the lack of formality was also rated positively). In short, various features were picked out, such as the setting for the hearing, the personnel in attendance, the nature of the decision called for, and procedural aspects of the hearings.

Allied with the character of the hearing as a whole, perhaps, is the extent to which parties are able to recognize the particular professional backgrounds and interests of Board members. This is very problematic, however. In the first place it assumes that members retain in the hearing room the narrow, role specific identities of their profession or background, rather than that they all assume a corporate, *generic* identity of "Board member". Secondly it overlooks the practical issue of the degree to which members are active: some may monopolize proceedings while others adopt a passive "passenger" role. For these reasons, too much cannot be made of the accuracy with which parties recognized the true background of members who sat on their case.

The results, in any event, are predictable. Parties were invited to identify the background of each of the members of their Board (comprising three members). The largest group (44%) were uncertain. This was followed by the one in three (32%) whose choice was in error: accordingly only 23% made accurate identifications. Moreover it was only the lawyers or medical practitioners who were the subject of correct recognition, with only the latter having better than an even chance of accurate identification (70% correct, against 54% for the lawyers). No other background was correctly picked. Representatives of disability groups, ethnic organizations, occupational therapists, the aged, and people with backgrounds in property administration, all went entirely unrecognized (or they were misclassified). Lawyers, property managers and occupational therapists were also over-represented in the "unable to recognize" group.

This suggests that only medical practitioners and lawyers leave any marked impression on participants in terms of their professional backgrounds. Yet this is as would be expected. A medical practitioner inevitably breaks ranks (in breaking away from a "corporate" identity) when asking questions about

[83] As in *Re 'E'*.

demonstrably specialized medical issues. So also with the presiding lawyer: when legal issues crop up the lawyer's professional training comes to the fore. Otherwise it seems that profession or background is rarely prominent enough to stand out against the collegiate identity of Board membership.

5. Assessing the Outcomes — a "Best Interests" Enquiry and Outcome?

Two critical objects of the Victorian legislation, and its counterparts elsewhere, are that the "best interests" of the disadvantaged person are to be promoted, and that means are to be chosen which are "least restrictive of a person's freedom of decision and action as is possible in the circumstances". The extent to which the parties believe these objects to have been realized is one important way of gauging the effectiveness of the Board. The level of understanding and acceptance of the orders made by the Board is a third measure.

On all these measures the Board is rated highly. Nearly eight out of ten (78%) felt that the final decision of the Board was in the best interests of the represented person; and the same proportion expressed themselves to be in agreement with the order. Only two (9%) categorically disagreed with the order, or with the proposition that it promoted the best interests of the person affected by it.[84] Identical numbers had a mixed assessment on both counts, while around 5% were unsure. Without exception, everyone felt that the principle of the least restrictive alternative had been honoured: no one concluded that the order had inappropriately restricted the rights of the represented person. The only qualification to this rosy future is that, on a four point scale rating the comprehension by parties of the order made (ranging from full down to nil comprehension), just under two in ten (17%) were in the bottom two of the four categories. Since only one out of four of these people appear in the "disaffected" categories just dealt with, it cannot be said that dissatisfaction with the outcome (and/or a poor best interests rating) is a product of lack of an adequate comprehension of what the order entails (though, as is to be expected, there is a stronger correlation between dissatisfaction with the outcome and a view that it is contrary to the best interests of the person affected).

Once again the reasons given by parties for reaching their conclusions about the order helps to shed light on the process. The assessment of whether or not the order was in the person's best interests is a case in point. Favourable ratings were frequently defended by pointing to the congruence between the order made and the parties' evaluations of the functional ability of the represented (or proposed represented) person in coping with social activities. Thus, in endorsing the discharge of temporary orders and the dismissal of applications for long term orders, one respondent said that the represented person "knows what he is doing", even though he "may fumble a bit", and despite some concern about his ability to make "big decisions".[85] In similar vein, an

[84] The two groups are not coincident: one person (a social worker) is common to both; the other is not.

[85] The limitations, it was said, "had nothing to do with mental illness".

appointment of the State Trustees Office as administrator of the property was endorsed because the represented person "cannot look after money".

Similar sentiments to these[86] tend to be reflected also in the reasons given for having mixed feelings about the order, or for concluding that it was not an order which advanced the best interests of the represented person. Two of the orders to receive a mixed assessment involved decisions by the Board not to continue the temporary orders then in force (a temporary guardianship and a temporary order over medical matters respectively). In the first of these, the parties felt that the Board had "backed off" (in dissolving orders which otherwise gave control to others) to ultimately allow the parties to do what they thought best — namely to place the person in sheltered accommodation. The mixed feelings went to the issue of whether "negotiation" was the best way of achieving this otherwise acceptable outcome. The second case likewise received a mixed reception: the parties accepted that, in the short term while the represented person remained in hospital, that person's best interests would not be harmed by their resumption of control over medical decision-making; but the longer-term welfare (and accommodation needs) of the represented person was more worrying.

Revocation of existing temporary orders also dominated in the "not in the best interests" category of assessments. Here parties objected to the failure of the Board to share their view that a paternal protective order was needed in the interests of the represented person. Some attributed this lack of congruence of views to an insufficiency of evidence placed before the Board[87] or they pointed to ad hoc decision-making on the part of the Board itself. The common thread, however, appears to be a more interventionist (that is to say, paternalist) position taken by the parties, compared to the more conservative (freedom preserving) attitude held by the Board. This is not an unexpected outcome: parties in a close relationship to the proposed represented person might be expected to err on the side of over-caution; the Board, on the other hand, can be anticipated to be more objective (in not accepting the views of parties without modification) and to attach greater weight to the normalization and the "least restrictive alternative" policies as enunciated in the governing legislation.

[86] This pattern was duplicated in the reasons for concluding that the decision by the Board did not unduly restrict the rights of the represented person. Where orders had been made, respondents stressed that the represented persons could not manage their finances (or affairs) or that reasonable areas of decision-making had been preserved in their hands despite that order. Conversely, where orders were denied, parties generally felt that the represented person could cope (at least for the time being).

[87] Indeed the represented person was present in only four (44%) of the nine completed hearings; and three of the disapproving parties attended one of the hearings where the represented person was absent. Although present in another case, the disaffected party felt that insufficient time was given for parties to answer questions, and she was dissatisfied with her husband's accommodation in hospital (a hospital social worker had brought the application to ensure bills were paid) and hoped that the Board would return him to her care (which the Board naturally did not broach at a hearing concerned only with an administration order).

IMPLICATIONS FOR THE ROLE AND LIMITS OF LAW

The findings reported here already provide insights into the vision which people hold about the nature and the limits of the law in this field of social policy. In this section additional material will be considered. This includes the basic characterisation which people make of the prime function of the law, and their comprehension of the nature and purpose of key features of the guardianship laws. In each case, the discussion draws on the responses to the detailed post-hearing questionnaires.

1. The Perceived Functions of Law

Before considering the attitudes held by people to guardianship laws in particular, it is helpful to have some ideas of their basic attitudes to the role of law generally. The questionnaire presented five paradigms for rating on a four point scale (strongly agree, agree, disagree, strongly disagree). First, the punishment of wrongdoing. Second, the protection of private property. Third, the prevention of abuse of government services. Fourth, the protection of people against financial need. And, finally, assisting people requiring emotional support.

When the responses are dichotomized into support and opposition, the strongest support (unanimous) is for the prevention of the abuse of government services. This suggests that there is limited tolerance for government largesse, and a mistrust of government waste. Next strongest support came for the protection of private property (88%) and the punishment of wrongdoing (81%). From this it might be anticipated that the property administration responsibilities of the Board might be accepted best. It can be seen, however, that the criminal law paradigm has wide acceptance also.

Much weaker support was given to the involvement of the law in "helping people in financial need" (62%) or in ensuring that emotional supports were provided (56%). While this is a poor approximation to the welfare strand conceived for guardianship laws, it is nevertheless suggestive of public reservations about this role. This is brought out more clearly in the questions which focus specifically on guardianship.

The questionnaire presented respondents with eight questions designed to identify attitudes towards the role of guardianship laws in the private lives of people. Three responses were open: to agree or disagree, or to select the category "undecided". Five models of the law were covered. First that it be held back as a "last resort"[88]; second that it be an instrument of the person[89]; third that it be invoked at the instigation of friends or relatives[90]; fourth that the law step in whenever there is serious abuse (of finances, personal safety, or simply inadequate food or clothing)[91]; and, fifthly, in a more welfare vein,

[88] The question was "The law should involve itself in the private lives of people only as a last resort" (Question 12(a)).

[89] "Only when requested to do so by the person who is at risk" (Question 12(d)).

[90] "Only when requested to do so by a friend, relative or guardian of a person at risk" (Question 12(e)).

[91] Questions 12 (b), (c), and (h) respectively.

whenever it is "suspected that something is wrong" or "to ensure that a person can remain at home".[92]

The humanitarian concerns of the fourth model were the most strongly supported, with 95% agreeing that physical abuse was reason to intervene, 75% that abuse of finances was good reason, and the same number justifying intervention to ensure that a person is fed and clothed. No one actually opposed intervention on the first two grounds, but 19% did on the last. Next strongest support was expressed for the "relatives-based" (third) model. This attracted support from 62%, but also the second highest level of opposition (25%), suggesting that there is less consensus on this rationale than on the first.

The stated rationale for guardianship laws, that intervention be held back as a last resort, attracted the next largest vote, but only bare majority support (50%) — though most of the rest were undecided (38%) rather than outright opposed. The second model, enshrining the classic liberal position of intervening only at the request of the person (risk aside), led to an almost even three way split: 31% in support, 31% in opposition and 38% undecided.

The welfare rationale of the fifth model fell somewhere in between the last two. A quarter were opposed to it, around one third were undecided about it, and 38–44% supported it.

All this suggests that the participants in the process have rather mixed opinions about the role of the law generally and guardianship law specifically. Certainly it is agreed that high risk situations call for intervention. But after that, most confidence is placed in the capacity of relatives or friends to judge the circumstances calling for intervention (perhaps understandably, given that many respondents were in this boat themselves). The prime rationale of the guardianship laws, though, was less warmly supported, with the most lukewarm (and divided) opinion reserved for a welfare role. Classical liberal values, for their part, were apparently thought to be of very limited application.

2. Law As an Expression of Basic Concepts

Undoubtedly "guardianship" is (or should be) the core concept in this legislation — though it is open to the possible contaminating effect of some people mistakenly equating it with the financial management of a person's affairs. The suggestion by the Board that this might be so,[93] received some support here. Thus one person (a technician) spoke of dealing with a person's affairs "financial or otherwise" while another (a retired person) spoke of "caring for the person or property of another". Other responses perhaps fudged the distinction.

On the main responses, all but 13% felt confident to advance a statement of what the concept entailed. The replies fell into three main groups.

The largest group (41%) adopted the guideline of advancing the "best interests" or wishes of the person. Or they spoke even more generally (and in

[92] Questions 12(f) and (g).
[93] Supra fn. 32.

more paternal terms) of a caring ethos, reflected in such responses as being "responsible for the care and well being" (or just the "well being") of the person. Something of the welfare model colours this set of responses, though they remain reasonably true to the legislative objectives.

The next bracket (covering 36%) spoke more neutrally of "making decisions", "managing," "controlling or guiding", or "totally controlling" a person's affairs, or of being that person's "legal guardian". They had a more bureaucratic conception of the responsibilities of a guardian.

Finally there was the smallest group (21%), who subscribed more to the principle of becoming substitute decision-makers. Thus this group spoke of "acting in the best interests . . . that is as she/he would for him/herself" or of "working for the best wishes" or "undertaking lifestyle decisions for" or as making decisions "on behalf of" the person.

Of the three groups, this last is the one closest to the ideals expressed in the legislation, while the attitudes of the second group are perhaps the least sensitive to the human side of the Board's operation. The caring ethos of the first group of respondents was the most popular sentiment, and the one most likely to undermine the "last resort/crisis model" on which the legislation and its administration is based. On a more positive note it is, of course, true that strong support was found in this sample for relatives, both for their adopting the role of "gatekeepers" (in deciding when to approach the Board) and in putting themselves forward as the preferred careers. Even so, family members also pose one of the sources of risk and exploitation. The views of the first group, then, are a mixed bag. Accordingly, it is the latter group whose attitudes most accurately reflect the principles of the new guardianship laws.

CONCLUSION

This study suggests that the policy foundation for adult guardianship laws is more problematic than appears on the surface. Autonomy is a worthy goal to which to accord preference in any competition of interests. But not if it comes at too great a price in terms of exposure to levels of risk or exploitation due to the vulnerability of the intellectually disadvantaged person. On the other hand protective paternalism can all too easily be overdone, denying civil rights to self-expression and independence. However there is more to the resolution of this policy equation than simply putting these two philosophic poles into balance. Aggregate policy outcomes are important. And the legislative framework can seek to reconcile the polar extremes. But individual cases may cross over into the wrong categories. Or as McLaughlin tartly observed, ". . . the same guardianship law could be used to rescue one person and to place another in danger".[94]

This suggests that the law should be designed for sparing use, and should be administered in a highly restrained way. It should be invoked when other strategies have been tried (or considered), only to prove unequal to the need.

[94] P. McLaughlin, *Guardianship of the Person* (Downsview, Ontario, National Institute on Mental Retardation, 1979) 17.

Yet this rather begs another question. For it assumes that the status quo is superior to the riskier business of a guardianship intervention. Certainly there is substance in this assumption: the disadvantaged person is frequently in the care of (ageing) parent(s) or close relatives/friends. Such people have the depth of knowledge about the interests and needs of the person to enable more caring and insightful support and assistance to be provided for the disadvantaged person.[95] Legislation commonly mirrors this assumption.[96] Even if flawed, the natural carer is more likely to act cautiously in the interests of the disadvantaged person, and will have greater insight and sensitivity than would a non-relative official guardian.[97]

To complicate this picture, however, it is the close relative who, in a proportion of cases, poses the greatest risk to the disadvantaged person. That risk may be benign in motive — an overly caring parent or relative who wraps the person in a cloyingly restrictive protective mantle which stifles that person's self-development — or it may stem from the less savoury side of human nature: relatives may be cruel or be motivated by venal self-interest (especially where property is at stake).[98] Certainly someone does need to take some decisions for the disadvantaged person, and make those decisions "in the best interests" of the person. The conundrum which is posed is that the group of people best placed to make sound decisions of this character is also a serious source of risk of over-protection or exploitation. Natural carers, then, are both the boon and the bane of the intellectually disadvantaged.

The implications for this debate from the present study are twofold. First, the levels of satisfaction expressed by parties to the hearing cannot be uncritically accepted where they form part of the "natural carer" group. Secondly, the population of cases appearing before the Board has its poor and its rich cousins: poor cousins in the case of those who would benefit from a Board hearing but for the absence of someone who appreciates their need, or but for the fact that they are cared for by someone with a "vested interest" in avoiding an appearance; rich cousins in the case of those who are otherwise identical to Board cases but equally or better cared for without the necessity of a Board appearance.[99] This present study sheds light only on the first area: the perceptions of the Board formed by parties experiencing its operation.

The assessment of the Board portrayed in the research reported here is quite favourable. Parties universally agreed that the legislative purpose of not

[95] G. Morris, "The Use of Guardianships to Achieve — Or to Avoid — the Least Restrictive Alternative" (1980) 3 *International Journal of Law and Psychiatry* 97, 100.

[96] It is, for example, contained in legislative provisions which require the Board to have regard to the desirability of preserving family relationships (*Vic:* s. 23(2)(b)) or which secure the position of parents and relatives against being *presumed* to have a conflict of interest: *Vic:* s. 23(3).

[97] Ibid.

[98] J. Monahan, "Empirical Analyses of Civil Commitment: Critique and Context" (1977) 11 *Law and Society Review* 619, 624; D. Jost, "The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from their Zealous Protectors" (1980) 56 *Chicago-Kent Law Review* 1087, 1089.

[99] Preliminary research at a major hospital for aged persons, suggests that social workers act as proxies for the board (on its advice) in approximately half of all cases considered for, but ultimately not taken to the Board: T. Carney, "Social Workers as Guardians of the Pathways" (Unpublished draft, Dec. 1989).

unnecessarily restricting rights[100] was being honoured. There was also widespread recognition that orders of the Board were conforming to the statutory directive that they promote the best interests of the represented person.[101] Exceptions to this sentiment, it was found, stemmed mainly from the greater weight attached to paternalist objectives than the Board was prepared to endorse. This is because it adopts a "current crisis" pre-condition to intervention,[102] rather than follow the test laid down by Powell J. in *Re M*, that orders not be made (or continued) where the person can "manage . . . ordinary routine affairs . . . in a reasonably competent fashion".[103] The people closest to the represented person do not always share the confidence of those called to exercise the statutory powers of the Board.

Parliament's objective of creating an accessible, informal and expert decision-making body, would also appear to have met with a large measure of success. Certainly the Board rates highly with those appearing before it for its friendly, relaxed and caring approach to the hearing itself. There are, however, a number of people who are ill-prepared for their hearing prior to their attendance — partly as a consequence of the legacy of prior experience with courts or a lack of preparatory material explaining the nature of the enquiry and the procedures to be followed. A smaller, but significant, group (17%), was found to be poorly informed about the true nature of the order made by the Board at the conclusion of the hearing. Despite the efficiency gains from a legislative provision requiring that reasons be supplied only on request, the small numbers taking advantage of that facility (approximately 4%) suggests that additional measures might be considered to ensure that all parties grasp the essential elements of orders made.

The study, although only suggestive, does lend some support to the main findings from the literature on lay evaluation of legal proceedings. Thus it was found that people surveyed in this study did have pre-conceptions of the legal system,[104] and that the punishment ethos of the criminal law loomed large.[105] The most striking impression to be drawn from this data, however, is its compatibility with the notion that people facing a "crisis or conflict" place great weight on the opportunities given for participation,[106] and that informal settings, though appreciated, are evaluated in fairly similar ways to other more formal settings.[107] However, in rating achievements, it appears that people do indeed pay special regard to perceptions of how hard the body tries to honour their expectations (even if it falls short). The high satisfaction rating of the Board on this score bears out the significance of this factor,[108] though,

[100] *Vic*: s. 4(2)(a).
[101] *Vic*: s. 4(2)(b).
[102] Supra fn. 27.
[103] *Re M* (1988) 12 N.S.W.L.R. 96, 102.
[104] See the discussion of the material under the heading "A Novel or a Familiar Body?" supra.
[105] See the hypothesis at fn. 12 supra and accompanying text and the findings at "The Perceived Functions of Law" supra.
[106] Note 28 and accompanying text, above.
[107] Supra fn. 20.
[108] See generally the discussion on Representation/participation in Board Hearings, supra.

consistent with the literature, it appears that people make global assessments, based on a variety of features of the process,[109] including perceptions of the consistency, impartiality and general accuracy of the outcomes.[110]

The initial evaluation, then, is quite favourable. However further work is called for before we can be entirely confident that, to apply McLaughlin's dictum, Victoria's guardianship laws only "rescue" and do not place people "in danger".[111]

[109] Supra fn. 68.
[110] Supra fn. 17.
[111] Supra fn. 94.