# *Re-Mixing 'Access', 'Advocacy', 'Empowerment' and 'Protection': A Case for a Specialised Division of Labour in Guardianship, Mental Health and Disability Services Adjudication?*

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## A. Introduction

Federal systems of government offer latitude for constituent states to experiment with differing patterns of laws to address issues shared by other units of the federation.[1] Laws about mental health, disability and substitute decision making are a case in point.[2] California innovated within the US federation when it enacted special legislation providing for administrative review of state decisions about access to services for intellectually (developmentally) disabled people,[3] a move paralleled in US federal laws about education of disabled children.[4] In Australia, the State of Victoria followed suit in 1986, introducing the Intellectual Disability Services Review Panel (IDRP) to adjudicate disputes about

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1 Liebig, P., "The Effects of Federalism on Policies for Care of the Aged in Canada and the United States" (1993) 5 Journal of Aging and Social Policy 13.

2 For recent collections surveying the international pattern of legislation see: Jones, M., Basser Marks, L. (eds) Disability, Divers-Ability and Legal Change, The Hague: Martinus Nijhoff, 1999; Hauritz, M, Sampford, C., Blencowe, S (eds), Justice for People with Disabilities, Sydney: Federation Press, 1998; Carney, T. "Globalisation and Guardianship: Harmonisation or (Postmodern) Diversity?" (2001) 24 International Journal of Law and Psychiatry, in press.

3 Welfare and Institutions Code Division 4.5, Chapter 7, Article 1fff, ss 4700, (2000).

4 Individuals with Disabilities Education Act, 20 USC, ss 1400-1485 (1990). This is a modern version of the Education for All Handicapped Children Act PL 94-142 (1975). For a brief review: Forlin, C., Forlin P., "The Legal Implications of Including Students with Disabilities in Regular Schools" in Hauritz, M., Sampford, C., & Blencowe, S. (eds), Justice for People with Disabilities, Sydney: Federation Press, 1998, 109 at 122-3.

access to services and to review decisions by service providers to restrain or seclude intellectually disabled people for management reasons. This joined several other highly specialised pieces of legislation (or specialised agencies) in this sphere, differentiating Victoria from other States where fewer enactments or agencies offered 'broader-spectrum' responses to these needs (or left them to extra-legal remedies).

What are the advantages of such a specialised division of labour? Do those benefits outweigh the fragmentation of services, duplication and financial cost? And what *should* be the guiding policies of the different constituents of the legislative mosaic covering mental health, adult guardianship and disability? One important part of the answer to this may lie in the work of the 1999 Richardson enquiry into mental health laws for England and Wales.[5] Reflecting on the experience of that review, its chair recently suggested that a prime achievement was in refocusing debate on issues of principle: such as deciding how to re-balance issues of 'access' to services, of 'autonomy' of citizens in dealing with their lives, and of (public or citizen) 'protection'.[6]

This paper applies a similar analysis to the Victorian legislation, paring it back to its unvarnished (or most basal) policy descriptors. Having 'deconstructed' the Victorian pattern in this way (Part B below), Part C of the paper reviews the apparent strengths of the model, drawing on research in the early 1990s assessing the operation of both the Disability Panel and the adult guardianship system. Part D then turns to possible limitations of this approach in light of changed social and economic conditions. The final section (Part F) considers whether the specialised 'division of labour' model has outlived its usefulness; asking whether there is still a place for segmented specialisation of functions, where each institution or body has a single (or primary) function.

The paper suggests that a fine-grained specialisation of functions model faces challenges on three fronts: from the forces of economic rationalism (such as the wisdom of retaining bodies with small caseloads); from contraction of the scale and responsibilities of the state (and associated state arbitral machinery); and, finally, from the oft presumed demand for more complex, more heterogeneous, and more flexible bodies – bodies better able to accommodate the plurality and diversity of 'postmodern' society. However, rather than undermining the validity of the division of labour approach, or justifying abolition of the Disability Services Panel experiment, it is argued that it should be retained for two main reasons.

First, because there *is* a proper place for external review of disputes about access by intellectually disabled young people to needed resources

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[5] United Kingdom, Report of the Expert Committee, 'Review of the Mental Health Act 1983, London: Department of Health, November 1999 (Richardson, Chair; subsequently 'Richardson Report').

[6] Richardson, G., "Reforming Mental Health Laws: Principle or pragmatism?" Unpublished notes for an address, 2001.

of state support and planning; and for external monitoring of possible misuse by service providers of their powers of restraint and management. Guarantees which it is argued are less well provided by alternative regulatory models such as 'quality management'. Secondly, because the Disability Panel may presage the 'post-modern' form of merits review demanded in the 21st century.

## B. Elements of the Victorian Model

The first step in the analysis is to inspect more closely the finely tiled mosaic which forms the Victorian system of legislation and associated institutions.

As already foreshadowed, the Victorian model comprises multiple interlocking institutions and pieces of legislation.[7] It includes an Office of the Public Advocate, a Mental Health Review Board, an Adult Guardianship Board, and the Intellectual Disability Review Panel. Finally, 'threading through' the various elements, there is the support offered to the structure by a network of community visitors. Each piece of this overall pattern of services has its own historic rationale, and dominant 'policy'.

### 1. Advocacy Services for All in Need: the Public Advocate and Community Visitors.

One of the most obvious distinguishing feature of the Victorian model is that it created a powerful new advocacy body, the Office of Public Advocate (OPA).

#### 1.1 *A generic but specialist advocacy facility*

OPA's statutory role in Victoria is quite broad. It covers *systemic* grievances as well as having authority to handle individual citizen complaints. The Office of the Public Advocate can react to complaints but can also act of its own initiative. Its charter encourages it to be proactive as well as reactive, and to entertain systemic grievances in addition to individual complaints.

In common with agencies in other jurisdictions, OPA may act for members of vulnerable populations who have already come to notice and been brought under a protective order. But it is not restricted to this identified or 'visible' population. It can also deal with people whose plight has not previously come to notice. This community-wide mandate gives OPA its real force as an agent for systemic monitoring and change,

[7] The Guardianship and Administration Act 1986 (Vic); the Mental Health Act 1986 (Vic); and the Intellectually Disabled Person's Services Act 1986 (Vic).

sharply distinguishing it from its (more conservative) namesakes in other Australian jurisdictions.[8]

To all intents and purposes, then, OPA is a specialist office of 'Ombudsman'. This design feature was quite deliberate. A strong 'advocacy' (or rights) rationale was clearly identified in the Cocks Report which first mapped out its proposed role,[9] a role later extended to other populations of vulnerable people, under companion legislation such as that dealing with mental health and access to services for the intellectually disabled.[10]

1.2 *An empowered network of community visitors crossing spheres.*

The network of community visitors, on the other hand, had its genesis in the work of the Parliamentary Social Affairs Committee of the Victorian Parliament.

Advised by the project officer who had worked on the Cock's Report, the idea of having a network of community visitors to act as the 'eyes and ears' of OPA gained further currency. Accordingly this idea was likewise generalised to apply to the whole package of mental health, guardianship and disability services legislation.[11]

As with the attention given to ensuring that OPA had public standing and 'clout', the network was given a special status through requiring the Public Advocate to convene a twice yearly meeting of visitors, and convey directly to Parliament any systemic or other concerns which might be raised at those gatherings.

Faith in this mechanism remains strong to the present day. For example in 1999/2000 the mandate of Victoria's community visitors was further expanded to take in programs run under the Federal *Disability Services Act* 1991 (Cth).[12] Even so, its reach into the population of intellectually disadvantaged people has been patchy. Thus the Victorian Auditor General's Report in 2000 graphically chronicled the isolation, lack of support or advocacy, and generally low levels of participation found

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8 Carney, T., "Abuse of Enduring Powers of Attorney – Lessons From the Australian Tribunal Experiment?" (1999) 18 New Zealand Universities Law Review 481-508.

9 Victoria, Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Melbourne: Vic. Gov. Pr. 1982 (Errol Cocks, chair; subsequently 'Cocks' Report').

10 Carney, T., "The Mental Health, Intellectual Disability Services and Guardianship Acts" (1986) 11 Legal Service Bulletin 128-131.

11 Thus visitors were linked through a Visitors Board, chaired by the independent statutory Office of Public Advocate, which reports to Parliament: see for example Intellectually Disabled Persons' Services Act 1986 (Vic) ss 60-62.

12 Victoria, Department of Human Services Annual Report 1999-2000. Melbourne: Department of Human Services, 28 (Subsequently 'Annual Report, 2000'). For a review of the Disability Services Act, see: Rose, A. "Australian Law Reform Commission Review of the Disability Services Act 1986" in Hauritz, M., Sampford, C., Blencowe, S (eds), Justice for People with Disabilities, Sydney: Federation Press, 1998, 85.

during their fieldwork inspection of selected service sites.[13]

Visitors may be an important institutional protection, but they are not a policy panacea it would seem.

## 2. 'Millean' Mental Health: Protection against harm to self or to others?

Victoria's mental health laws now conform closely to John Stuart Mill's edict that state compulsion is warranted only if sufficient harm to self or to others can be demonstrated.[14]

After enjoying a period of more interventionist, paternal, or 'treatment facilitating' legislation in the second half of the 20th Century, Victoria joined the mental health reform movement in 1986, though this reform package partly had its genesis in earlier legislation.[15] In common with the reforms pursued elsewhere in Australia, this legislation tracks more closely to the civil commitment reforms adopted in North America from the late 1960s.[16]

As with historical antecedents in the 19th Century, the 1986 reforms re-balanced the use of compulsory treatment around showing harm to self or harm to others, provided tighter definitions of mental illness, and set up review and accountability mechanisms. A model spoken of at the time as a return to the 'new legalism' in both Australia and Britain.[17] The more medically, or clinically sensitive, model of past eras (from the late 1950s in Victoria), was now hedged around by greater procedural protections, and greater checks on the discretionary power of treatment personnel.

Just as was the case in Britain,[18] critics of the new balance argued that civil rights of prospective patients might now be better protected, but only at the expense of erecting 'unnecessary' barriers to easy access to treatment, thus increasing the likelihood that needed treatment would be delayed or denied.[19] Doubts were also raised about the way law and

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13 Victoria, Auditor General, Services for People with an Intellectual Disability, Melbourne: Auditor General Victoria, November 2000, 47 (Subsequently 'Auditor General, 2000').

14 See: Monahan, J., "John Stuart Mill on the Liberty of the Mentally Ill: A Historical Note" (1977) 134, American Journal of Psychiatry, 1428.

15 Williams, H, Thompson, I., Casey, D., "The Australian Mental Health System" (2000) 23, International Journal of Law and Psychiatry, 403 at 413-14; Auditor General, 2000 (n. 13 above), 16.

16 Myers, J., "Involuntary Civil Commitment of the Mentally Ill: A System in Need of Change" (1983) 29 Villanova Law Review 367.

17 Verdun-Jones, S., "The Dawn of a "New Legalism" in Australia? The New South Wales Mental Health Act, 1983 and Related Legislation" (1986) 8 International Journal of Law and Psychiatry 95; Shapland, J., Williams, T., "Legalism Revived: New Mental Health Legislation in England" (1983) 6 International Journal of Law and Psychiatry 351.

18 Rose, N., "Unreasonable Rights: Mental Illness and the Limits of the Law" (1985) 12 Journal of Law and Society 199.

19 Jones, K., "The Limitations of the Legal Approach to Mental Health" (1980) 3 International Journal of Law and Psychiatry 1.

treatment interfaced with each other.[20]

In Australia, debate about mental health reform took a rather lower profile and a more muted form, however: reforms were crafted mainly 'in-house', and most attention was given to definitional gateways and review machinery.[21] Mental health staff retained their fairly unchecked powers to treat patients without their consent once the person had been compulsorily detained. Not for Australia the Canadian (and American) privileging of the right to consent to treatment, such as under Ontario's 1992 *Consent to Treatment Act*.[22]

The most prominent feature of the Victorian *Mental Health Act* from our perspective, then, was its 'gatekeeper' function. The function of deciding in what circumstances a person might be admitted for treatment against their will, or be converted from a voluntary to an involuntary patient while residing within a facility. A gatekeeping role which respects patient choices regarding their entry or otherwise, unless the condition threatens harm to the affected person or to others.

## 3. Empowering Visions for Guardianship: 'Substitute judgement' facilitation on loss of social functionality?

On the other hand, Victoria pioneered adult guardianship laws within the Australian federation, adopting a radical *new* model, one having few international parallels. This model of adult guardianship was recommended in the Cocks Report, a committee established to review 'rights and protective legislation' affecting the intellectually disadvantaged.[23]

It was an inquiry undertaken in an intellectual and social environment especially sympathetic both to Wolfsenberger's mid 1970s model of 'citizen advocacy',[24] and to the principle of 'normalisation' already contained in various International Declarations of the Rights of the Disabled.[25] Concepts

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[20] Shah, S., "Legal and Mental Health System Interactions" (1981) 4 International Journal of Law and Psychiatry 219.

[21] Bottomley, S., "Mental Health Law Reform and Psychiatric Deinstitutionalization: The issues in New South Wales" (1987) 10 International Journal of Law and Psychiatry 369; Bottomley, S., "The Concept of Mental Illness and Mental Health Law in New South Wales: A critical argument" (1989) 12 University of New South Wales Law Journal 284.

[22] Consent to Treatment Act (SO 1992).

[23] Cocks Report (n 9 above). This enquiry had been prompted by the public profile attracted by a campaign to release a young woman (Anne McDonald) who had been treated within an acute palliative hospital setting following failure to detect the active and inquiring mind masked (or imprisoned) by her severe physical disability. For further details of the McDonald case see: Jones, M., Basser Marks, L. 'Law and the Social Construction of Disability' in Jones, M., Basser Marks, L. (eds) Disability, Divers-Ability and Legal Change, The Hague: Martinus Nijhoff, 1999, 3-24 at 14-15.

[24] Wolfensberger, W., Towards Citizens Advocacy for the Handicapped, Impaired and Disadvantaged, Nebraska Psychiatric Institute, 1975.

[25] The international treaties and their (limited) reception into domestic Australian law are reviewed by Rose (n 13 above) at 91-95.

further elaborated by Wolfsenberger and re-stated as 'role valorisation' during the early 1990s.[26]

Ideas of citizen-based responsibility for supporting and engaging disadvantaged people in their community were prominent. One consequence of this has been that the principle of the least restrictive alternative was taken very seriously from this time forward. And the test of need which triggers the possibility of making an order has rather eschewed abstract cognitive enquiries in favour of a test of 'social' (or *functional*) competence.[27]

This socially-grounded, socially-facilitative ethos, does not have the field to itself of course. Powers granted to Guardianship Boards permitting them to give a substitute consent to proposed treatment of a person, or to direct where such a person is to live, follow a Millean logic. For they authorise protective interventions based on perceived threats of harm or neglect of the interests of the affected person. They balance the case for respecting human autonomy against the 'protective' responsibilities first enunciated by English courts when they assumed responsibility for the 13th Century *parens patriae* jurisdiction, a jurisdiction of the sovereign to protect the person and property of vulnerable subjects such as children, the mentally ill, or the intellectually disadvantaged.[28] Indeed, in adult guardianship the clash between autonomy and paternalism is never far below the surface.[29]

But it is social facilitation which is distinctive in our analysis here.

## 4. California Calling: A Panel as broker of service 'access' for the intellectually disadvantaged?

Victoria's Disability Panel is unique within Australia, and one of the rare examples (together with early Californian and the US federal Education provision) where legal machinery has been enacted to 'broker' access to state services.[30]

Of course the Panel also had responsibility for reviewing the appropriateness of certain potentially intrusive medically- or

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[26] Wolfensberger, W., "Social Role Valorisation: A proposed new term for the principle of normalisation" (1983) 21 Mental Retardation 234. This was later re-stated as 'role valorisation': Wolfensberger, W., A Brief Introduction to Social Role Valorisation as a High-Order Concept for Structuring Human Services, Syracuse University, 1991.

[27] Carney, T., Tait, D., The Adult Guardianship Experiment: Tribunals and Popular Justice, Sydney: Federation Press, 1997.

[28] Carney, T., "Civil and Social Guardianship for Intellectually Handicapped People" (1982) 8 Monash Law Review 199; Seymour, J., "Parens Patriae and Wardship Powers: Their nature and origins" (1994) 14 Oxford Journal of Legal Studies 159.

[29] Carney, T., Singer, P., Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People, Canberra: AGPS, 1986.

[30] See nn 4, 5 and accompanying text above; further: Carney, T., "Special Needs Children and Human Rights: Relational Change under the Rights Banner?" (1993) 3 Australian Disability Review 6.

behaviourally-based management powers over a disabled person,[31] but it was the service brokerage function which made it unusual.[32] Especially given its development of conciliation as its preferred means of dealing with such cases at the outset. At least until recent times.

The Panel was part of the scheme recommended in the 1984 Rimmer Report, which had been commissioned to cleanse the then *Mental Health Act* 1959 (Vic) of its provisions dealing with intellectually disabled persons,[33] completing work first begun when that earlier Act provided for limited separation of the two groups.[34] The Report proposed the establishment of a legislative scheme of entitlements to seek access to services (through the mechanisms of general and individual service plans), and recommended establishing a Review Panel to advise the relevant Minister and permanent head on decisions about individual cases. This inter-disciplinary Panel was to sit in divisions of three persons, with authority to review decisions about eligibility for services, about the content of general service plans, and about the application of powers of restraint and seclusion, together with review of decisions about the detention and care of disabled offenders (including a later responsibility to prepare justice plans for their management).[35]

The Rimmer Report decided against giving the Panel a power of final decision on these questions, plumping instead for an 'advisory' role on the grounds that decision-making functions would encroach upon the powers of the executive and lead to delays in decision-making.[36] But the establishment of the IDRP did interpolate a legally constituted 'broker' into a welfare funding and administrative arena which had previously not seriously encountered the law (or its associated institutions).

## C. The Strengths of the Disability Services Review Panel

One way of assessing this web of laws and tribunals is to ask how well the IDRP has performed.

This is something of a mixed bag.

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[31] The decisions reviewed by the Panel under the Intellectually Disabled Persons' Services Act 1986 (Vic.) s 51 are: (i) eligibility for various services such as education, training, or accommodation (s 8); (ii) the appropriateness from time to time of the general 'service plans' detailing the areas where services are required and the strategies for their provision (ss 9, 10); (iii) the use of restraint, seclusion and aversion therapy (s 44); (iv) the detention or care of a security resident; and, (v) the admission of a person to a residential institution (s 18).

[32] For a summary of the Act: Carney, T., "Rights of Intellectually Disadvantaged People" in Pagone, T., Wallace, J., Rights and Freedoms in Australia, Sydney: Federation Press, 1990, 54.

[33] Victoria, The Report of the Committee on a Legislative Framework for Services to Intellectually Disabled Persons, Melbourne: Vic. Gov. Pr., 1984 (John Rimmer, chair; Subsequently 'Rimmer Report').

[34] Auditor General, 2000 (n 13 above) 16.

[35] Intellectually Disabled Person's Services (Amendment) Act 1989 (Vic) s 9, [amending s 20 of the Principal Act].

[36] Rimmer Report (n 33 above), 85.

## 1. Early success in monitoring restraint and seclusion

By far the bulk of the work undertaken by the IDRP has been its oversight of notifications of the use of restraint and seclusion. Thus in 1998 it was reported that 9,060 restraint and seclusion notifications were received, compared to just 20 new (and 14 unresolved) cases challenging eligibility for services, or contesting the content and realisation of service Plans.[37]

Nearly 80% of this very small number of cases hinging on service access, involved dissatisfaction with the terms of the first tier of planning – the contents of General Service Plans – as distinct from outright denial of qualification for services.[38] Two years later, the number of new cases had dropped to 14, ten of which were later withdrawn (six in one hit).[39] Initial contacts, or preliminary lodgments with the Panel were slightly higher, prompting the Panel to suggest, a trifle weakly, that involvement of the Panel was perhaps a kind of 'circuit-breaker' which brought the Department back to the bargaining table.[40]

But even monthly notification reports about incidents of restraint of clients were very patchy. The yearly aggregate dropped by 1,872 between 1997 and 1998.[41] Moreover, 542 people subjected to restraint or seclusion during 1996 or 1997 entirely disappeared from the 1998 data set. A decline no doubt influenced by worrying levels of ignorance by grass roots level service providers of their statutory obligations to report in the first place.

After a series of regional consultation meetings with service providers and Departmental staff, the Panel observed that,

> In most regions, house supervisors and cluster managers were not aware that a decision to use restraint or seclusion is reviewable under the Act and that notification must be given to the relevant parties. While in some cases regional accommodation managers understood the requirements of the Act, this was not translated into practice. The lack of compliance is of concern. It is not possible to exercise your right to appeal a reviewable decision if you are unaware of that right.[42]

This trend was partly retrieved in subsequent years, with just over a thousand of the 1,872 notifications reappearing in the stream of monthly reports screened by the Panel.[43] However nearly 40 percent of these

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37 Victoria, Intellectual Disability Review Panel Annual Report 1997-1998 Melbourne: IDRP, 16. (Subsequently, 'IDRP, 1998').
38 'IDRP, 1998', 18.
39 Victoria, Intellectual Disability Review Panel Annual Report 1999-2000 Melbourne: IDRP, 15. (Subsequently, 'IDRP, 2000').
40 'IDRP, 2000', 4.
41 'IDRP, 1998' (n 37 above), 2.
42 'IDRP, 1998', 2-3.
43 'IDRP, 2000' (n 39 above), 19.

notification forms were still found to have been incorrectly, or only partially, completed.[44] And, because of duplication of information on the forms, and a drastic reduction both in IDRP support staff and its overall budget from 1993 (losing 5 of its then 7 support staff), the Panel remained unable to code or properly digest the data which was being supplied to it,[45] a deeply disturbing state of affairs given that in 16 percent of cases the reported reason for imposing restraint did not mention even one of the legislative bases for legitimating such restraint.[46]

The imbalance of work documented here plainly raises some questions. As also does the equivocal level of penetration of its target audience in terms of winning compliance with obligations to report incidents of restraint, an issue with obvious civil rights implications. As the Auditor General pointed out on the service planning issue, at least two and a half thousand potentially reviewable decisions are made about general service plans alone each year. Yet only 14 entered the system at all and only 3 came to contested hearings.[47]

Lack of sufficient accountability for incursions into the civil rights of intellectually disadvantaged people when subjected to restraint speaks for itself.

## 2. Unexpected benefits to other systems

Despite this very low penetration of the target population of primary decisions by the IDRP, one of the unexpected bonuses of the Victorian system has apparently been a greater ability for constituent bodies to 'stick to their last'; avoiding the pressures to be deflected from the legislative mandates laid down by Parliament to govern each institutional player. This is particularly so for Guardianship Tribunals.

Lacking such 'purpose built' institutional avenues, the NSW Guardianship Tribunal has, for example, apparently felt obliged to use that legislation in order to deal with service access issues which in Victoria are better able to be handled by the Disability Panel, or to deal with advocacy ('voice') issues better able to be accommodated in Victoria by OPA.[48]

This may not be a conscious decision on their part in NSW – though it does appear to be affected by differences in underlying metaphors which inform the culture in the two states[49] – but certainly the *practice* or the outcomes do differ between the States.

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[44] 'IDRP, 2000', 20.
[45] Auditor General, 2000 (n 12 above), 48; 'IDRP, 2000': 4-5.
[46] 'IDRP, 2000', 21-22.
[47] 'Auditor General 2000', 47.
[48] Carney & Tait, 1997 (n 27 above); Carney, T., Tait, D., "Adult Guardianship: Narrative Readings in the "Shadow" of the Law?" (1998) 21 International Journal of Law and Psychiatry 147.
[49] Tait, D., "Metaphor Wars in Evaluation Research: Reviewing guardianship boards in two states" (1994) 21, Journal of Law and Society, 238.

### 3. Unexpected strengths of conciliation

Contrary to expectations derived from merits review of areas such as income security entitlement, the lack of 'final' decision making power, and the necessity instead to rely on 'recommendations', or prior resort to alternative dispute resolution techniques, did not detract from the ability of the Panel to achieve its main objectives.[50]

Indeed, research in the 1990s found that results were not very different from those obtained under California's system of *determinative* rulings.[51] A conclusion reaffirmed in the most recent IDRP report which found that, over the past 5 years, only 3 percent of recommendations had been rejected outright.[52]

However conciliation was abandoned from mid 1996 in any event, with all service plan disputes being listed for a full hearing.[53] So any benefits associated with this alternative style of dispute brokerage have perhaps now been lost for the time being.

## D. Challenges To The 'Division Of Labour' Model

Times change. Or times remain the same. And it can be devilish difficult to tell which applies to a given institution or area of policy, not least because the body politic is frequently awash with the rhetoric and symbolism of change, even if the *substance* of reform is sometimes lacking.[54]

So the case (or not) for change should sensibly be treated with some skepticism.

### 1. The fiscal and economic efficiency imperative

The slow changing of the guard in terms of who crafts and who administers public policy has attracted comment at different points of history.

Speaking about trends in welfare policy-making in the United States,

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[50] Carney, T., Akers, K., "A Coffee Table Chat or a Formal Hearing" (1991) 2 Australian Dispute Resolution Journal 141.

[51] Carney, T., Akers, K., The Victorian Disability Review Panel: 'Legitimacy in Reviewing Welfare Entitlements'. Monash University: i-iii, 1, December 1990.

[52] 'IDRP 2000' (n 39 above), 4.

[53] 'IDRP 1998' (n 37 above), 9.

[54] For instance in the field of welfare policy it is now almost a truism that public attitudes towards welfare clients in general, and the unemployed in particular, have undergone a sea change transformation of values: where the ethos of 'protection and entitlement' has been replaced by expectations of reciprocal commitment and 'mutual obligations'. Yet the evidence points to unchanged attitudes, to stability rather than change: Eardley, T., Matheson, G., "Australian Attitudes to Unemployment and Unemployed People'"(2000) 35 Australian Journal of Social Issues 181.

Diller identified three epochs,[55] each able to be captured by a caricature. First an historic epoch where social work was king, with professional administrators or professionals deciding in their discretion what was 'best'. This was followed by the epoch where lawyers propounded the then dominant 'rights-based' entitlement paradigm. And (most recently) by the current epoch where policy is made and implemented by holders of MBA qualifications – the age of 'managerialism'. Even if law and legal institutions are not entirely superceded by managerialism and market forces, then it is said that they are likely to be heavily buffeted by these forces, and to be transformed (subtly or otherwise) in the process.

Thus, the establishment of the Victorian Civil and Administrative Tribunal (VCAT), and the subsuming of the Guardianship Board as a division of that generic appeals body, is part of a national trend towards managerial efficiency.[56] The Australian Administrative Review Council, in its *Better Decisions Report*,[57] set out the reasoning. And, while NSW has as yet left its Guardianship Tribunal outside its equivalent Administrative Decisions Tribunal (the ADT), one-stop-location would appear to perhaps be merely a matter of time.[58] The review by the Auditor General of the cost-efficiency of services under Victoria's *Intellectually Disabled Persons' Services Act* 1986 simply adds weight to that trend.[59]

Yet, as seen with the federal government's ill-fated ART proposal (defeated in the Senate in early 2001), such enterprises can weaken the values of independent merits review, give undue weight to managerial values (such as performance management of members), and lead to lowest common denominator qualities. So *full integration* and placement of the IDRP under the umbrella of VCAT could imperil its specialised integrity.

But should there be some re-marriages to re-establish old cohabitation's between bodies *outside* VCAT? After all, the Richardson Report[60] found relative calm during public consultations on the potentially highly explosive question of keeping both mentally ill and the intellectually disabled people under a single *Mental Health Act*. The arguments for separation were canvassed in that Report – that intellectual disadvantage

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55 Diller, M., "The Revolution in Welfare Administration: Rules, Discretion & Entrepreneurial Government" (2000) 75 New York University Law Review 1121.

56 Bacon, R., "Tribunals in Australia: Recent developments" (2000) 7 Australian Journal of Administrative Law 69; Bayne, P., "The Proposed Administrative Review tribunal: Is there a silver lining in the dark cloud?" (2000) 7 Australian Journal of Administrative Law 86.

57 Commonwealth of Australia, Administrative Review Council Report No. 39, Better Decisions: Review of Commonwealth Merits Review Tribunals, Canberra: AGPS, 1995.

58 The direction of reform is unclear at the time of writing, though it is possible that the forthcoming Public Bodies Review Committee Report of the NSW Parliament may recommend that decisions of the Guardianship Tribunal be opened to a merits review before the ADT: Bartlett, J. "Guardianship by Centralised Government Agencies – The New South Wales experience," an unpublished paper delivered at the 26th Congress of the International Academy of Law and Mental Health, Montreal, 1-6 July 2001.

59 Auditor General, 2000 (n 13 above), 28.

60 Richardson Report (n 5 above).

is not an 'illness', mental health involves stigma, their needs are long-term and stable (not fluctuating or temporary), and the machinery regulating coercion is inapt – but the Committee nevertheless decided to keep them in the one Act for the time being; at least while further work was undertaken on crafting more suitable substitute consent legislation.[61] Frankly this is unthinkable in Australia, though it perhaps shows how unholy policy compromises are born.

But might coercive powers, such as those covering decisions to 'actively limit a person's harmful actions (restraint or seclusion)' – as the Departmental brochure quaintly terms the power to impose restraint or seclusion under s 44 of the *Act* – be 'grouped' together? Perhaps in the *Guardianship Act?*

## 2. The age-old bug-bear of 'coercion'.

The Cocks' Report was mindful of the policy problems at the 'sharp end' of the guardianship spectrum.[62] So it provided elaborate safeguards to deal with 'irreversible' medical procedures, or other specially sensitive cases.

However it left open the possibility that coercion might be exercised as one of the terms of a guardianship order in other more 'routine' instances.

### 2.1 *Coercion as a special or a routine procedure?*

Unlike NSW, where the Guardianship Tribunal will entertain tube feeding or other coercion in cases where people suffering severe anorexia refuse consent to treatment, Victoria (perhaps rightly) insists that such 'major' cases go before the Mental Health Review Board. This is because there are civil liberty and 'treatment need' principles requiring to be balanced off against each other.[63] But, on the other hand, Victoria sees little apparent problem in having its Guardianship Boards routinely exercising 'live where directed' powers over a represented person's place of accommodation, powers which arguably are exercised too liberally.[64]

### 2.2 *Coercion only by specialist MH bodies; or a socially useful facility?*

No doubt there is a case for further *narrowing* the coercive powers of the Guardianship Board, but this would expose to undue risk a group of

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61 Richardson Report, 41-42.

62 Cocks Report (n 9 above).

63 Carney, T., "Regulating Anorexia?" A paper to be delivered at the 26th Congress of the International Academy of Law and Mental Health, Montreal, 1-6 July 2001.

64 Richardson, G., "Personal Communication". Notes of a Faculty of Law Seminar, University of Sydney, 15 March 2001.

people whose real problem is arguably their inability to function in society unaided; a group for whom these orders offer *assistance* in preserving community-based living. It would do no service, then, to return them to the Millean framework, restricted choice of orders and the lingering stigma of mental health. Rather, these 'place of living powers' might perhaps be more *tightly monitored?*

Arguably the same debate holds true of the power to monitor the 'restraint and seclusion' powers now with IDRP? Certainly these powers could – in *theory* at least – be shifted over to the Mental Health Review Board. But this would surely be a most backward step. It would return to the historic conflation of intellectual disability with mental illness. An image too retrograde to contemplate; one which is slowly on the way out even in Britain it would seem.

2.3 *Reliance on common law consent to restrain over-use of coercion?*

Of course, as the Victorian Auditor General observed, confidence could instead be placed in the common law. In its requirement to obtain informed consent of the person proposed to be restrained. A common law principle backed up by the ability to seek the appointment of a guardian in the event of refusal of consent.

Such a common law model applies in New South Wales; and the argument runs that this is the superior guarantor of respect for the civil rights of disabled people.[65] In theory this has attractions. It may better concentrate the mind of some decision-makers on the letter of the common law requirement to obtain valid consents. Thus forcing institutions and carers to confront the need to obtain a real, or at least a substitute consent. However there is surely a level of unreality here.

As both the Victorian Auditor General and the IDR Panel note, the real problem is palpably one of widespread community *ignorance* of the common law principles about obtaining consent to treatment. Even specialist service providers appear to lack knowledge of the need to obtain consent (or other official permissions). A deficiency compounded by the general lack of advocacy for or involvement of the intellectually disadvantaged (or their families, if any) in the relevant processes.

So there is a real risk of paying but mere 'lip service' to common law (or guardianship) notions of 'consent'. Even people able to communicate their wishes are likely in practice to be treated as unable to decide in their own 'best interests'.[66]

2.4 *A new 'consent and capacity' body?*

A more attractive reform option might be to combine, in a *new* body, the

[65] 'Auditor General, 2000' (n 13 above), 44.
[66] 'Auditor General, 2000', 43-45, 50.

restraint and seclusion powers of the IDRP, together with the 'live as directed' and the other coercive powers now entrusted to the Guardianship Board. A body along the lines of Ontario's 'Consent and Capacity' Board might be set up to do this work.

Such a body might also acquire jurisdiction to police a new regime insisting on the fully informed consent of the patient (or a substitute authority) as a pre-condition to treatment of even civilly committed (compulsory) mental health patients. (Requiring separate consent rather than giving treatment authorities carte blanche to treat once a patient is civilly committed, rendering universal the protections now confined to only to *severe* interventions, such as obtaining authority for psychosurgery or ECT).

While this latter is a different debate it would certainly serve to elevate the 'autonomy' value (or 'consent') to a higher plane than has currently been accepted in Australian social policy debate about mental health.

### 3. Contracting out of state services

As the state has moved out of direct service provision, private sector contractual arrangements have become more popular as a way of delivering services. This is now evident from a cursory reading of Victoria's principal Act, following its amendment to reflect the neo-liberal privatisation agenda pursued by the former neo-liberal Kennett Government.

Thus the power to impose restraint and seclusion orders now applies not only to various registered service providers, but also to 'contracted service providers'. A group defined as persons with whom the Department has contracted for the supply of services to intellectually disabled people.[67]

These powers to impose restraint or seclusion are only available where they have been written into the 'Individual Service Plan' for the person in question[68] and their exercise must be reported to[69] or be approved by a designated 'authorised program officer'.[70] Moreover, each form of restraint is formally conditioned on satisfaction of a policy protection, such as requiring a showing of harm to self, to property or to others.[71] Or by insisting on the consent of the person or their parent/guardian.[72]

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[67] Intellectually Disabled Persons' Services Act 1986 (Vic.) s. 22A. Consistent with Victoria's strong reliance on a vibrant non-government sector, definitions of registered residential and non-residential services also encompass both local government services and those delivered by non government organisations: s. 3 [definitions].

[68] Ss. 3(b)(i) [restraint], 4(a) [seclusion]. Also see former s 6(a) [aversive therapy prior to its abolition in October 1997].

[69] S. 4(a) (ii) [seclusion].

[70] S. 6(c) [former aversive programs].

[71] For example: s. 3(a) [bodily restraint].

[72] Eg former s. 6 (b) dealing with aversive therapy.

Authorised program officers are appointed by the Secretary of the Department, and must report monthly to the IDRP on their activities.[73]

As can be seen, the legislation does set out a reasonably adequate line of accountability, even if the Auditor General found that some (unapproved) program officers lacked adequate skill and sufficient 'distance' from those being regulated.[74] Certainly, the level of accountability is superior to, say, the Federal Government's Job Network, or some of Victoria's contracting out of services like private prisons.[75] Even so, the combination of attenuation of the reach of government, and the serious nature of the powers entrusted to such private 'contractors', puts the legislative framework under considerable strain.

Does that strain exceed its effective breaking point? Is it time to radically re-think the form taken by administrative law, as some commentators envisage,[76] such as by its *incorporation* of contractual notions?[77] Has time simply marched on?

## 4. The March of Time?

As starkly illustrated in the Victorian Auditor General's report,[78] the law on the books as stipulated in the *Intellectually Disabled Persons' Services Act* 1986 (Vic) now bears little relation to the law on the ground in this field.

The framework of General Service Plans as entrée to, and guarantor of a 'right' to services, has been distorted – or even side-stepped – by the Department's adoption of its (somewhat ill-fated) 'point in time' system of case management as its major administrative modality.[79] While the Department is apparently committed to re-aligning the two,[80] the Secretary of the Department, in the published response to the Auditor General's Report, speaks rather too elliptically of 'new statutory planning machinery'.[81] And despite lip service given to speeding up initial GSP assessments, which are supposed to be completed within a month, but which had slipped out to an average of six months – a fair reading of the

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[73] S. 9.

[74] 'Auditor General, 2000' (n 13 above), 44.

[75] Owens, K. "The Job Network: How legal and accountable are its (un)employment services?" (2001) 8 Australian Journal of Administrative Law 49; Carney, T., "Privatizing Youth Detention?" in Cook, S, Hancock, L. (eds) Privatising Youth Detention: a roundtable, Melbourne: Centre for Public Policy, University of Melbourne, 1999, 7; Seidenfeld, M., "An Apology for Administrative Law in the "Contracting State"" (2000) 28 Florida State University Law Review, in press.

[76] Diller (n 55 above).

[77] Foster, J. 2000. "The Private Role in Public Governance" (2000) 75, New York University Law Review, in press; Foster, J. 2001. "The Contracting State" (2001) 28 Florida State University Law Review, in press. Compare Seidenfeld (n 75 above).

[78] 'Auditor General, 2000' (n 13 above).

[79] 'Auditor General, 2000', 35-37.

[80] 'Auditor General, 2000', 38.

[81] 'Auditor General, 2000', 41.

Departmental response again suggests that the real intention may be to water down the legislation rather than honour its existing performance standards.[82] A sentiment plainly contrary to the Auditor General's endorsement of retention of *measurable* standards, rather than their replacement by managerialist theory's preference for *process* measures of compliance.[83]

That is not to deny that coverage of the present Victorian Act requires to be broadened. Thus the restraint and seclusion monitoring function does not presently extend to services fully funded under the State's own *Disability Services Act* 1991 (Vic),[84] and some forms of physical seclusion are not covered.[85] Nor can the Panel review planning decisions where an intellectually disadvantaged person is placed in a nursing home, hostel or psychiatric facility, since these service sites are not among those listed in the Act.[86] And, as already mentioned, there are other restrictions on the authority of the Panel, including its lack of clear powers to deal with deficiencies revealed from reports about seclusion and restraint[87] and the recommendatory status of its service access decisions.[88]

General complaints and grievance machinery also is arguably lacking.[89] This might, as in New Zealand, be given to an ombudsman type body: in their case the Health and Disability Commissioner model.[90] Or in Victoria's case by boosting the capacity for OPA to do this work, a sphere for which it arguably already has adequate legislative authority.[91] Plainly, then, the legislative framework is overdue for review.[92] A review which properly should canvass alternative models, given that there are other ways of achieving agreed policy goals (as illustrated by NSW not having separate statutory monitoring of restraint and seclusion; or its more limited ADT role in dealing with deinstitutionalisation plans). But two notes of caution must be sounded.

First, I am extremely skeptical of the supposed superior merits of case management (or other stratagems from the 'managerial stable' of governance), either as a basis for protecting civil rights (such as monitoring use of restraint and seclusion), or in securing access to services. Despite any weaknesses of its legislative planning and monitoring model, it is I believe more than a happy coincidence that Victoria currently has the

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82 A departmental review is currently in train, having begun in 1998-9 when discussion took place about merging the 1986 and 1991 Acts: 'Auditor General, 2000', 34-35.
83 'Auditor General, 2000', 73.
84 'IDRP, 2000' (n. 40 above), 18.
85 'Auditor General, 2000', 44.
86 'Auditor General, 2000', 47.
87 'Auditor General, 2000', 45.
88 'Auditor General, 2000', 47.
89 'Auditor General, 2000', 39 [citing the official IDRP response to the draft report].
90 Further, Carney (n 8 above).
91 Carney, (n 8 above), 503-506.
92 Victoria, Intellectual Disability Review Panel Annual Report 1998-1999 Melbourne: IDRP, 2. (Subsequently, 'IDRP 1999').

*highest* per capita level of expenditure on disability services in the nation;[93] and that it is the State which offers citizens the 'fullest' picture about the use of coercive powers.

The power of legislation in helping to secure services for intellectually disadvantaged people, and in protecting their civil rights, is borne out by a counterfactual. Namely that the IDRP budget and staffing was drastically *pruned* in 1993, just as neo-liberal (ie 'small') government became fashionable. And by the fact that the Departmental response to the Auditor General's *Report* is at its most opaque, most elusive, and most equivocal when dealing with its explicit endorsement of retention of clear legislative benchmarks, defined time-lines, and access to merits review of complaints about failure to meet legislative standards.

Second, an entirely 'in-house' review of such sensitive legislation appears unwise, even if some token provision is made for public consultation at the conclusion of its work. If bureaucracy is selected as the main driver of review, then at the very least there should be oversight by an independent, outside reference group; as with say the 1986-87 Advisory Committee to the Health Legislation Review in that state.[94]

## E. New Paradigms for New Challenges?

If, for purposes of debate, the case for change is found to be compelling, or if its *rhetorical* (or political) power is such that change is unavoidable, what are the main reform options?

### 1. Abolish the IDRP responsibilities?

Abolition of some or all of the current responsibilities of the IDRP is one option. Several lines of argument might be made.

The case for abolition of the jurisdiction over service eligibility and the content of general service plans rests partly on another counterfactual: that the IDRP does not 'add value' for the clients it purportedly helps to shoe-horn into services. That the existence of the IDRP simply encourages decision-makers to 'play safe' by rejecting borderline claims for services, in the knowledge that the Panel is there to correct errors. This is a reasonable hypothesis, but it is quite untested.

The low number of IDRP service plan challenges does not bear out the thesis. Nor is it supported by inspection of the *composition* of that part of the Panel's docket. The nub of the bulk of challenges made is a complaint

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[93] 'Auditor General, 2000' (n 13 above), 22.

[94] For a discussion of the relative merits of different avenues for review of public policy, see: Carney, T., "Reforming Child Welfare: Diverting By-ways on the Road to Utopia" (1985) 18 Australian and New Zealand Journal of Criminology 237.

about Government parsimony or about an insensitive mix of proffered service entitlements. This is a style or type of complaint which speaks more of bureaucratic *error* than of a pattern of simply 'playing safe'.

The case for abolition can of course also be made on the utilitarian ground of low volumes of cases, or the marginal nature of the disputes handled. But this loses its edge given that the client population is one which for centuries has been recognised by the law as especially vulnerable (hence the intervention of the *parens patriae* jurisdiction of Equity), and given also that the service needs are expensive to the State. Abolition does not seem to be made out on this basis either.

The case for abolition of the jurisdiction to monitor and protect intellectually disabled citizens from over-zealous use of powers of restraint and management is even harder to run. Volumes here are large. And ignorance on the part of service providers of their responsibilities is worryingly high. While it might have been hoped that the need for such an external oversight role would be transitory – a product of a potential for misuse characteristic of old-style, large-scale care in 'total institutions' – that need for external oversight does not appear to have dwindled as the population moved out into community care delivered by services contracted by the state for that purpose.

Moreover, this protection lies squarely in the sphere of civil rights. While the case for turning to law to guarantee *social* rights may be more equivocal, it is a brave argument which says the same about incursions on basic human rights (such as the rights to be free of unwarranted interference with physical freedom and integrity).

A different argument which might be put is that law is not the *optimal* way of guaranteeing access to services, service quality, or protection from misuse of powers of restraint and management. Certainly it can be a mistake to assume that adjudicative machinery on its own is enough.[95] Just as it is a mistake to assume that equal opportunity protections, or 'legal rights' strategies, are a panacea. The power of social advocacy should never be underestimated as an instrument of protection for instance.

However this argument is usually run as making the case for offering general advocacy and service quality initiatives as an *additional protection.* Providing a second tier (or 'second-wave') reform which breaks down any overly-complacent assumption that disability needs can be solved by equal opportunity and adjudication rights *on their own.* That indeed has been my position even in the context of advancement of the *social citizenship* rights of disabled people.[96] I would argue that this case is immeasurably strengthened when considering personal restraint, and other management powers. Such an additional layer of generalist advocacy

[95] Carney (n 30 above).

[96] Carney, T., "Social Citizenship Rights for the Disabled: A role for the law?" in Shaddock, T., Bond, M., Bowen, I., Hales, K. (eds) Intellectual Disability and the Law: Contemporary Australian Issues, Callaghan, NSW: ASSID, 2000, 49-62.

may well be added to the mandate of bodies like OPA, community visitors, or through community advocacy measures. But surely not in *substitution* for a legal forum able to monitor and protect such basic civil rights in the usual way?

So the case for abolition of the two sets of external review functions currently entrusted to the IDRP does not appear to be made out. But it does not necessarily follow that some *other* tribunal or agency might not be better able to do justice to those functions.

## 2. Retain the jurisdiction and keep the IDRP within Victoria's 'interacting but purist' model

The argument for retaining the status quo about who is best placed to wisely exercise these two powers should not be lightly dismissed.

It has been shown in our previous work on guardianship evaluation that in practice the operation of the legislation which comprises the 'package' shows a greater fidelity to its Parliamentary design setting under conditions of autonomous operation.[97] And adoption of the 'economies of scale' associated with co-location of bodies does not require that specialist bodies lose their identity: it is perfectly open to retain their operational culture as a *co-housed* body within an appropriate 'tribunal centre' for instance.[98]

Of course it is not *necessarily* placed in peril if a sympathetic form of *integration* as a division of an umbrella body is pursued, along the lines of the Victorian VCAT, NSW ADT, or the original 'Better Decisions' form of ART. However great caution must be exercised if the drive to lowest common denominator (quasi-legalist) culture is not to emerge over time – as rather proved to be the case with the AAT.[99] And it is hard to see this achieved if a small Division on 'social law' – such as that encompassing guardianship, mental health and disability – is incorporated into a body whose main divisions are concerned with 'commercial' matters, such as Planning, state taxes, or local government.

The economies of co-location in a 'tribunal centre' would appear to be in safer hands if guardianship, mental health and disability were to be joined with other social jurisdictions such as residential tenancies and consumer protection tribunals.

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[97] Carney & Tait (n 27 above).

[98] Creyke, R., "The State of the ART' unpublished paper to the AIAL seminar 'Current Issues in the Tribunals and Courts" Sydney, 9 March 2001.

[99] See: De Maria, W., "The Administrative Appeals Tribunal in Review: On Remaining Seated During the Standing Ovation." in McMillan J., (ed) Administrative Law: Does the Public Benefit? Canberra: Australian Institute of Administrative Law, 1992, 96; De Maria, W. "Mediation and Adjudication: Friends or Foes at the Administrative Appeals Tribunal" (1992) 20 Federal Law Review 276.

### 3. Towards an accommodation of diversity

On the other hand, wherever it is based, I would argue that there is a good case to be made in favour of having a multi-purpose, but adaptable body. One where the composition of panels is flexible. Where a variety of different forms of dispute resolution (such as mediation and other alternative dispute resolution modalities) is coupled with the 'open texture' and socially adaptive characteristics of a well crafted, inquisitorial, tribunal model.

These were the characteristics which we found to be prominent during our work on the operation of Guardianship Boards. Qualities which were present in much greater measure in those multi-disciplinary tribunal settings than proved the case where equivalent work was undertaken by courts.[100] Characteristics which render such tribunals as the 'forum of choice' for accommodating the diversity, flexibility, individualisation, and the plurality (or 'difference') within a so-called post-modern, globalised society.[101]

On that basis, there is a case for melding the best of the IDRP past (and present), with other innovative cognate jurisdictions perhaps. As mentioned already, there are few easy (or 'natural') adoptive homes in which to re-locate any powers 'orphaned' by closure of the IDRP. The social justice grouping proposed here has the attraction of offering a more congenial environment in which to foster such innovations

While other solutions are explored, it may be prudent to take the IDRP 'in from the cold' in the way Creyke has envisaged at Federal level following defeat of the ART Bill:[102] a common social tribunal grouping which shares premises and opens up possibilities of sharing of administrative and registry support resources may be the best option. One which can be effected simply by exercising the prerogatives of Executive government.

## F. Conclusion

This article mapped the various institutional players which comprise Victoria's interlocked network of laws, institutions, advocacy and adjudicative bodies catering for vulnerable populations such as the mentally ill, the intellectually disadvantaged, and adults who have lost the power to manage their personal or property affairs. It then reviewed the work of the IDRP and some of the arguments which might be put in favour

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[100] Carney & Tait (n 27 above).

[101] Further: Carney, T., "Protection, Populism and Citizenship" (2000) 17 Law in Context 54; Carney, T., "Globalisation and Guardianship: Harmonisation or (Postmodern) Diversity?" (2001) 24 International Journal of Law and Psychiatry 95.

[102] Creyke (n 98 above).

of abolishing its jurisdiction over service brokerage and use of restraint. The paper concludes that there is still a need for merits review of both questions, however.

Given that conclusion, the paper then considers but refutes the argument that Victoria's model of a clear 'division of labour' is unsustainable. While this model is more problematic for the IDRP, with its low volume of applications;[103] and while a division of labour model is vulnerable to currents such as contraction in the scale and responsibilities of the state (and state arbitral machinery) – it is argued to the contrary that a prominent and powerful auspice is needed to act as a *check* on market power.

Finally, we have speculated about whether the IDRP has been bypassed by the steady march towards 'postmodern' society, which is said to be characterized by a demand for new bodies better able to accommodate the more complex, more heterogeneous and more flexible needs of society. Better reading plurality and diversity. Or whether, perversely, IDRP stole a march on those emerging needs, foreshadowing the way such work can best be performed.

In this respect it has been suggested that the IDRP is more a harbinger of the future form of modern tribunals than an anachronistic example of a costly 'mistake' of 1980s reform zeal its critics might suggest.

[103] Current volumes of services adjudication is much smaller (at well under 20 pa) than the higher (but still tiny) numbers in the 1990s, when low volume was already a source of angst in the Panel, a state of affairs then variously attributed to poor publicity, fear of the disproportionate power of the Department, and the sexier attraction of taking disputes to OPA: Carney & Akers (n 51 above), 37.