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Law Reform
Commission

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Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001 Australia
DX 144, Melbourne

Level 3, 333 Queen Street
Melbourne Victoria 3000 Australia

Telephone: + 61 3 8608 7800
Freecall: 1300 666 555 (within Victoria)
Facsimile: + 61 3 8608 7888
Email: law.reform@lawreform.vic.gov.au
Web: www.lawreform.vic.gov.au

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Terms of reference

1. The Victorian Law Reform Commission is to review and report on the desirability of changes to the *Guardianship and Administration Act 1986* (the Act), having regard to:
 - a) the principle of respect for the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons, and the other General Principles and provisions of the United Nations Convention on the Rights of Persons with Disabilities (the United Nations Convention);
 - b) the introduction of the Victorian Charter of Human Rights and Responsibilities;
 - c) developments in policy and practice in respect of persons with impaired decision making capacity since the Act commenced;
 - d) the increase in Victoria's ageing population and the changing demographic nature of the clients of the Office of the Public Advocate.
2. The purpose of the review is to ensure that guardianship and administration law in Victoria is responsive to the needs of people with an impaired decision making capacity, and advances, promotes and protects the rights of people with an impaired decision making capacity.
3. In particular, the Commission is to have regard to:
 - a) the role of guardians and administrators in advancing the represented person's rights and interests and in assisting them to make decisions;
 - b) the need to balance the protection of the interests of an adult with impaired capacity by a guardian or an administrator with the person's exercise and enjoyment of the human rights, such as the right to freedom of choice, association and movement, including consideration of whether the Act strikes the right balance between facilitating action in the best interests of an adult with impaired capacity and the person's rights as expressed in the United Nations Convention;
 - c) the alignment of guardianship and administration law with other relevant statutory regimes, including consideration of the appropriateness and feasibility of extending guardianship and administration law to individuals who are 17 years of age and have impaired decision making capacity;
 - d) the validity and efficacy of informal decision-making for an adult with impaired capacity;
 - e) the need to ensure that the powers and duties of guardians and administrators established by the legislation are effective, appropriate and consistent with Australia's human rights obligations and the Victorian Charter;
 - f) the functions, powers and duties of the Public Advocate;
 - g) the role and powers of the Victorian Civil and Administrative Tribunal in relation to guardians and administrator and the efficacy of its processes for the appointment of guardians and administrators in the Act and the *Victorian Civil and Administrative Tribunal Act 1998* and Rules;
 - h) the feasibility of introducing additional mechanisms for review of decisions made by guardians and administrators under the Act, including the scope of these review powers and the meaning of 'decision' for this purpose and whether there should be a mechanism to address unconscionable conduct of a guardian or administrator;

Terms of reference

- i) the appropriateness of the current requirements for and criteria pertaining to, the treatment of a represented person under the Act, including a consideration of the existing provisions dealing with medical research, non-medical research, medical and other treatment, the appropriateness of the existing 'person responsible' model in Part 4 of the Act and a consideration of any area of overlap between the operation of the Act and the *Medical Treatment Act 1988*;
- j) whether the language of 'disability' is the appropriate conceptual language for the guardianship and administration regime and to what extent concepts such as capacity and vulnerability would be appropriate;
- k) whether confidentiality requirements under the Act are sufficient to adequately balance the protection of the privacy of persons providing information or who are affected by or involved in a decision made pursuant to the Act, and the promotion of the principle of transparency.

In making its report, the Commission should consider the relationship and the appropriate boundaries between the Act and any other relevant Victorian or Commonwealth legislation, including the *Instruments Act 1958*, the *Mental Health Act 1986*, the *Disability Act 2006*, the *Children, Youth and Families Act 2005*, and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and take into account the results of any other relevant, contemporaneous reviews or policies in these fields. Issues associated with end of life decisions, beyond those currently dealt with by the *Medical Treatment Act 1988*, are not within the scope of the review.

The Commission is to report by 30 June 2011.¹

¹ The Attorney-General extended the date for reporting to 31 January 2012.

Preface

Victoria has been an Australian and world leader in the field of guardianship law. Legislation passed by the Victorian Parliament in 1986 has been the model for similar laws in other states and territories, as well as other countries.

While much of the existing legislative framework is sound, the Commission suggests that it is time for new guardianship laws, built around that framework, that reflect contemporary thinking about people with impaired decision-making ability and which are designed for the many different groups of people who now use these laws.

Perhaps the most significant change in thinking has been a shift from the language of ‘protection’, so evident in our current guardianship laws, to an emphasis on enabling people with decision-making disabilities to participate as fully as possible in decisions that affect them.

The identity of the people who use guardianship laws is changing, with older Victorians becoming major users. Many of the recommendations in this report seek to respond to the anticipated greatly increased usage of these laws in the next few decades.

The nature of this reference required extensive community consultation to understand the day-to-day realities of those community members affected by guardianship laws. I would like to thank the many individuals and community organisations who made submissions and attended consultations. I would also like to acknowledge the contribution of those people for whom this review canvassed deeply personal issues that affect their lives every day.

Our consultants and expert reference groups provided invaluable information about the current guardianship system, and helped to identify and refine recommendations for reform. The members of these groups are listed in an appendix to this report. I thank them for the time they devoted to this review and for the quality of the assistance we received.

I thank the Commissioners who comprised the Division that worked on this reference with me—Magistrate Mandy Chambers, Justice Karin Emerton, Lynne Haultain and Hugh de Kretser, and before their retirement from the Commission, Professor Sam Ricketson and Justice Iain Ross—who together contributed to the Commission’s thinking about proposals for change.

I am very grateful to the research and policy team who have worked tirelessly to produce high quality work. Team leader Emma Cashen has managed this large project with great skill and commitment. Researchers Martin Wimpole and Ian Parsons were involved from the commencement of the project. They were later joined by Kirsten McKillop, Michael Williams and Emily Minter. Tess McCarthy contributed greatly to the success of the consultations with her organisational skills and she also participated in research and writing. Thanks to Amanda Kite and Natalie Lilford for research assistance and to Mia Hollick for assistance in the final editing stages of the report. Our communications officer Carlie Jennings expertly guided the editing and production process for the report, with assistance in the final stages from the operations manager Kathy Karlevski. The Commission’s CEO Merrin Mason ensured that the reference had the organisational support it needed and assisted in the development of policy.

This report represents an opportunity to improve the lives of many people, some of whom are the most vulnerable members of the community. I encourage everyone with an interest in guardianship laws to read and consider the many recommendations for reform.



Professor Neil Rees

Chairperson

31 January 2012

Glossary

This glossary is a list of terms used throughout this report. It does not contain technical definitions of these terms, but simply describes how we use them in this report.

ademption	When a person gives an item to someone in their will, but they no longer own the item when they die, the item is adeemed and the gift fails. For example, when a painting left to someone in a will is sold before the will is executed, the person would receive nothing.
administrator	A person appointed under the <i>Guardianship and Administration Act 1986</i> (Vic) to make financial and some legal decisions for a person who has a disability. VCAT determines the extent of the administrator's decision-making authority when making an appointment.
advance directive	A statement (usually written) in which a person sets out what they want to happen to them in particular circumstances in the future if they are unable to make a decision themselves. Advance directives are most commonly associated with medical decision making, but can be used in other contexts.
advocate	A person who speaks or acts on behalf of someone else. There are many different types of advocates, including people working in formal advocacy organisations, lawyers, family members and friends.
agent	A person who has been given medical power of attorney under the <i>Medical Treatment Act 1988</i> (Vic).
appointor	A person who appoints an enduring guardian under the <i>Guardianship and Administration Act 1986</i> (Vic).
attorney	A person who someone appoints to make some decisions for them by using a document called a 'Power of Attorney'.
Automatic appointment	The appointment of a person as substitute decision maker by virtue of that person's place on a list in the <i>Guardianship and Administration Act 1986</i> (Vic).
best interests	A term often used to guide substitute decision making in guardianship laws.
capacity	A person's cognitive ability to make their own decisions. The term 'competence' is sometimes used with a similar meaning.
carer	Unless otherwise specified, the term is used throughout this report to refer to someone who provides personal support to a person with a disability on an unpaid basis. Usually the carer will have a personal relationship with the person with the disability, such as a spouse, partner, family member or close friend.
Charter	The Victorian <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic). It aims to ensure that all Victorian public authorities act in ways that are consistent with human rights, and that all Victorian laws are consistent with those rights.

Cocks Committee/Cocks Report	The Victorian Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, established in 1980, was chaired by Errol Cocks and is often referred to as the Cocks Committee. Recommendations in its final report (published in 1982) served as the basis for the current <i>Guardianship and Administration Act 1986</i> (Vic). That report is generally known as the Cocks Report.
cognitive impairment	A term used throughout this report to refer to the impact of any of a range of disabilities that may limit a person’s decision-making ability. These include intellectual disability, acquired brain injury, mental illness, autism spectrum disorder and dementia.
common law	Law that derives its authority from decisions of the courts rather than from Acts of Parliament.
confidentiality	A term used to describe a legal obligation not to disclose information that is passed between two or more people within a protected relationship, for example a patient and doctor relationship.
Convention	The United Nations’ <i>Convention on the Rights of Persons with Disabilities</i> . Australia is a signatory to this Convention, which seeks to promote and protect the rights and dignity of people with disabilities and to ensure their equality under the law.
co-decision making	A proposed new legal arrangement for authorising decisions. It involves appointing a person, known as a ‘co-decision maker’, to make decisions jointly with a person with impaired decision-making ability.
disability	Generally used in the same sense as it is in the <i>Guardianship and Administration Act 1986</i> (Vic), where it is defined to mean a person with an ‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’.
donor	A person who gives a power of attorney to someone else (an attorney) to make decisions on their behalf.
elder abuse	A broad term used to describe any abuse, exploitation or neglect of an older person.
enduring power of attorney	A power of attorney made by a person with capacity, which continues to operate, or endures, when that person loses capacity.
estate	A generic term to describe a person’s assets (property and money) and liabilities (debts and regular financial commitments). An administrator or attorney can be authorised to manage some or all of a person’s estate.
fiduciary	A relationship of trust and confidence between two people, such as that of trustee and beneficiary, in which one person has a duty to act in good faith for the benefit of the other.

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guardian	<p>A person appointed under the <i>Guardianship and Administration Act 1986</i> (Vic) to make lifestyle or personal decisions for a person who has impaired decision-making capacity due to a disability. This can include things such as where the person will live, their medical treatment, the services they receive, and the people with whom they associate.</p> <p>We refer to different types of guardians. These include:</p> <ul style="list-style-type: none">• Private guardian Usually used to describe a guardian who is appointed by VCAT but who is not the Public Advocate.• Public guardian The Public Advocate and her staff, who are employed to perform this role.• Community guardian A volunteer who is part of the Public Advocate’s Community Guardian Program and who acts as a guardian for someone as a delegate of the Public Advocate.• Enduring guardian A guardian (often a family member or friend) appointed by a person to be their guardian if they lose capacity to make their own decisions.• Plenary guardian A guardian who has full guardianship powers.
guardianship laws	<p>The <i>Guardianship and Administration Act 1986</i> (Vic) and other laws that enable a substitute decision maker to be appointed when a person is unable to make their own decisions. The term includes laws concerning guardianship, administration and personal appointment of a substitute decision maker under the <i>Guardianship and Administration Act 1986</i> (Vic), the <i>Instruments Act 1958</i> (Vic) and the <i>Medical Treatment Act 1988</i> (Vic).</p>
Guardianship and Administration Board	<p>The tribunal which originally appointed guardians and administrators under the <i>Guardianship and Administration Act 1986</i> (Vic). It was abolished in 1998 when the Victorian Civil and Administrative Tribunal (VCAT) was established.</p>
Guardianship List	<p>A part of VCAT, which deals with applications made under the <i>Guardianship and Administration Act 1986</i> (Vic) and other related Acts.</p>
Habeas corpus	<p>One of the common law’s oldest causes of action that allows a person to challenge the legality of their deprivation of liberty.</p>
informal decision making	<p>Describes arrangements where someone makes decisions with or for another person without any formal legal authority to do so.</p>
instructional directive	<p>A document completed by a person explaining decisions that they wish to be made when they lose capacity.</p>
impaired decision-making capacity	<p>Inability to make legally binding decisions because of impaired cognitive ability.</p>

lifestyle decisions	Decisions about a person’s life that do not directly relate to financial matters. These are the kinds of decisions that guardians and enduring guardians currently make, and include decisions such as where a person should live, who they should spend time with, what type of work they should do (if any), what type of services they should access and what type of health care or medical treatment they should receive. The term ‘personal decisions’ is used with the same meaning.
limited guardian	A guardian with authority to make decisions on behalf of the represented person in relation to some personal or lifestyle matters. Most VCAT guardianship orders are limited.
medical treatment	Used differently in different contexts. For example, the <i>Guardianship and Administration Act 1986</i> (Vic) has a different definition of medical treatment to that in the <i>Medical Treatment Act 1988</i> (Vic). Both Acts refer to treatment administered by a medical practitioner, but each refers to different procedures that are included in, or excluded from, their respective definitions.
merits review	Reviewing a decision of a person (usually a public official) on the ground that it was wrong.
on the papers	When a court or tribunal makes a decision by considering the relevant documents without attendance by the parties or their representatives, they make that decision ‘on the papers’.
order	A direction by a court or tribunal that is final and binding unless overturned on appeal.
parens patriae	The inherent power of a superior court to make orders in the best interests of individuals, such as children and adults who lack capacity, who are unable to safeguard their own welfare.
person responsible	A person who has authority under the <i>Guardianship and Administration Act 1986</i> (Vic) to consent to most medical treatment on behalf of an adult.
personal appointment	Refers to when a person with capacity nominates another person to make decisions for them when they are unable to do so. Victorian law provides for the personal appointment of an enduring guardian, an attorney with enduring powers and a medical agent.
personal decisions	Used with the same meaning as ‘lifestyle decisions’.
plenary guardian	A guardian with authority to make all decisions on behalf of a represented person in relation to personal or lifestyle matters.
power of attorney	A document in which a person with capacity appoints another person to make nominated decisions for them.
privacy (right to)	A person’s right to protect their personal life from unwanted intrusion and to control the flow of public information about themselves.

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proposed represented person	A person for whom an application for a guardianship or administration order has been made under the <i>Guardianship and Administration Act 1986</i> (Vic).
Public Advocate	A statutory officer with a range of roles and functions under the <i>Guardianship and Administration Act 1986</i> (Vic). These roles and functions include acting as guardian of ‘last resort’ and promoting the rights of people with disabilities.
Public Trustee	An earlier form of the organisation that is now State Trustees Limited.
question of law	An issue that requires a judge’s interpretation of legislation or legal principles.
reassessment	The process by which VCAT decides whether a guardianship or administration order should continue and, if so, in what form.
refusal of treatment certificate	A document completed under the <i>Medical Treatment Act 1988</i> (Vic) by a person with capacity to refuse future medical treatment in relation to a condition that they have when the certificate is completed.
rehearing	The process by which VCAT decides whether a guardianship and administration order should have been made.
represented person	A person who has a substitute decision maker.
State Trustees	State Trustees Limited is a state-owned company with a number of functions that is often appointed as the administrator for people who are unable to manage their own financial affairs due to a disability.
substitute decision maker	A person who has legal authority to make decisions on behalf of someone else. Usually the law treats the decisions of a substitute decision maker as if they were made by the represented person with the capacity to do so. Guardians, administrators and attorneys are substitute decision makers.
substituted judgment	The principle of substituted judgment guides a substitute decision maker to make the decision they believe the person they represent would have made themselves if they were able to do so. It asks the decision maker to ‘stand in the shoes’ of the represented person, and to seek to make that person’s decision.
supported decision making	An approach to decision making that involves providing a person with impaired decision making ability the support they need to make their own decision. It is often contrasted with substitute decision making, where a decision is made on behalf of a person who is unable to make that decision.
supporter	A person appointed to assist a person with impaired capacity to make their own decisions. The supporter has no decision-making authority, but may have authority to do things necessary to assist the person to make the decision, and to ensure it is carried out.

tribunal appointments	Appointments of substitute decision makers by VCAT.
unconscionable conduct	A legal concept that refers to exploiting a vulnerable person who is unable to protect their own interests.
unjust enrichment	A legal concept that deals with circumstances where one person must repay another person a benefit which has been unfairly gained at their expense.
VCAT	The Victorian Civil and Administrative Tribunal. It is a decision-making body, which is similar to a court. There are a number of different sections of VCAT, called 'lists', including the Guardianship List, which hears and decides upon applications made under the <i>Guardianship and Administration Act 1986</i> (Vic) and other related Acts.
Victorian Parliament Law Reform Committee	A committee of government and non-government Members of Parliament established to consider issues of law reform referred to it by the Victorian Government.
Victorian Registry of Births, Deaths and Marriages	Victorian government office currently responsible for holding records in relation to births, adoptions, marriages, domestic relationships, name changes, deaths and other information pertaining to people living in Victoria.

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INTRODUCTION

1. This report makes recommendations for modernising Victoria’s guardianship laws so that they better cater for the contemporary needs of the many Victorians who need assistance with decision making now, or might need assistance at some time in the future.
2. The Attorney-General asked the Victorian Law Reform Commission to review the *Guardianship and Administration Act 1986* (Vic) (G&A Act) and a range of other laws that deal with substitute decision making for people with impaired decision-making ability. The primary purpose of the review is to report on what changes are needed to the law to ensure that it responds to the current and future needs of people with impaired decision-making ability, and promotes their rights.
3. The scope of the Commission’s review, as outlined in the Terms of Reference on page xi, was broad. This report represents the conclusion of a two-and-a-half-year review that has involved the release of two papers for community discussion and significant consultation.

THE NEED TO MODERNISE THE LAW

4. Victoria’s guardianship laws have played an important role over the last 26 years in assisting people with a range of disabilities that affect their decision-making ability. They allow for the appointment of a person to make personal, financial and medical decisions for someone with impaired capacity when a formal decision maker is needed. Substitute decision makers can be appointed by a person with capacity, by the Victorian Civil and Administrative Tribunal (VCAT) and, in some instances, by statute.
5. Current laws are complex because they permit a range of substitute decision-making appointments under different legislative schemes. There are six different types of substitute decision-making appointments in three different Acts. These arrangements do not always operate harmoniously because they were not designed as parts of an integrated scheme.¹ The G&A Act has also been amended on numerous occasions since it was introduced, to respond to needs that were not foreseen when it was enacted in 1986. This has added to the complexity and inaccessibility of legislation.
6. The law needs to be integrated and simplified to assist people with impaired decision-making ability to safeguard their rights. Integration and simplification will also aid community understanding of the roles and responsibilities of people who provide decision-making assistance to others under these laws.

RESPONDING TO A CHANGING ENVIRONMENT

7. While the G&A Act was groundbreaking legislation when it was first enacted over 25 years ago, the range of people who use the legislation and the social environment in which it operates are now very different. The strong policy themes that underpinned the original legislation are no longer clearly identifiable or entirely relevant to current circumstances.
8. In Chapter 4 the Commission considers key changes to the social, legal and policy environment in which guardianship laws operate.

CHANGING PROFILE OF PEOPLE USING GUARDIANSHIP LAWS

9. The G&A Act was initially designed with the needs of people with intellectual disabilities primarily in mind. It emerged from the recommendations of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (the Cocks Committee) in 1982. The Cocks Committee reported to the Victorian Government about

¹ These appointments are: guardians, administrators, enduring attorneys (financial), enduring agents (medical treatment), enduring guardians, and persons responsible for medical treatment decisions. They are provided for in the *Guardianship and Administration Act 1986* (Vic), the *Instruments Act 1958* (Vic) and the *Medical Treatment Act 1988* (Vic).

the legal needs of people with an intellectual disability who were moving from institutional life to community living. Since the legislation commenced almost all of Victoria's institutions for people with intellectual disabilities have closed.

10. While people with intellectual disabilities are still significant users of guardianship laws, they are no longer the largest user group. People with dementia, people with mental illness and people with acquired brain injury are now the major users of the legislation.
11. The ageing profile of the population is the main factor affecting the incidence of disability in the community. Dementia is now the leading cause of disability in Australians aged 65 and over. It is anticipated that people with dementia are likely to be the major users of guardianship laws over the next 20 years.
12. The report contains broad projections based on the work of Monash University's Centre for Population and Urban Research (CPUR), headed by demographer Dr Bob Birrell.

CHANGES IN SOCIAL ATTITUDES, PUBLIC POLICY AND SERVICE DELIVERY

13. Community attitudes towards people with disabilities have also changed considerably over the last three decades. While notions of vulnerability and protection will continue to influence public policies concerning some people with disabilities, the human rights perspectives of equality and citizenship of people with disabilities are also influential. These human rights perspectives are reflected in the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention). They are also reflected in changes to policy underpinning the provision of services for people with disabilities.
14. There is now much greater emphasis upon people with disabilities being supported to be active, participating members of our community. Notions of people with disabilities as passive recipients of services are being replaced with those of people as active citizens of communities, regardless of the nature or extent of their disabilities.
15. Over time, the service system has gone from one dominated largely by government, which either funded or directly provided services, to one that is principally concerned with individual package funding. Service delivery now places much greater emphasis on supporting families, informal networks and local communities to better respond to the needs and goals of the person with the disability.

A CHANGING LEGAL CLIMATE

16. The notion of 'protection' was a central part of the task set for the Cocks Committee. It was asked 'to formulate proposals for legislation to deal with the protection of intellectually handicapped persons' as well as considering the preservation of their rights. At the time there were few formal frameworks addressing the rights of people with disabilities.
17. Australia is now a state party to a number of international conventions concerned with protecting and promoting human rights, including the rights of people with disabilities.

United Nations' Convention

18. The United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention) is the most comprehensive international human rights statement of the rights of people with disabilities. It protects and promotes a broad range of civil, political, economic, cultural and social rights for people with disabilities, almost all of which are directly or indirectly relevant to guardianship laws. The Convention was ratified by Australia on 17 July 2008.

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19. The Convention represents an important step beyond providing protection for people with disabilities to taking positive steps to maximise their participation in all aspects of life. It stresses a state's obligation to promote active participation by championing equal access to different aspects of community life,² and recognising the right of people with disabilities to enjoy legal capacity on an equal basis with other people.³
20. In the Commission's view, this means that disability alone should never cause a person to lose responsibility for making their own decisions and that all reasonable efforts should be made to assist people with impaired decision-making ability to participate to the fullest extent possible in decisions about themselves.

Victorian Charter

21. The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) establishes a legislative framework for the protection and promotion of human rights in Victoria. The Charter, which came into full operation on 1 January 2008, contains a number of rights that are particularly important for people with impaired decision-making ability.

RISK MANAGEMENT

The role of informal arrangements

22. The Cocks Committee was concerned about the 'possibility that [guardianship] legislation ... can be used to restrict as well as to protect an individual'. The Committee therefore sought to ensure that guardianship would be a last resort, for use only after other less restrictive options had been considered. This view was subsequently reflected in the G&A Act.
23. The G&A Act provides that VCAT must consider arrangements less restrictive of a person's freedom of decision and action before appointing a guardian or an administrator. In practice, VCAT is unlikely to find there is a need to appoint a guardian or administrator if informal arrangements, such as family members making decisions on behalf of a person with a disability, appear to be operating successfully.
24. A growing concern with risk management throughout the community is challenging the utility of informal decision making. It is now much more common for third parties, such as financial institutions, medical professionals and disability service providers, to seek authorisation from formally appointed substitute decision makers, rather than to rely upon informal arrangements when providing services to a person who lacks capacity.

INCREASING USE OF PERSONAL APPOINTMENTS

25. In recent years, there has also been increased emphasis on creating new legal mechanisms that permit people with capacity to appoint another person to make decisions for them when they are no longer able to do so.
26. In Victoria, it is now possible for an adult with capacity to appoint another person to make decisions for them in the future about financial,⁴ medical⁵ and a range of personal matters⁶ once they lack the capacity to make these decisions. Most of this body of law has developed quite separately from other guardianship laws.

2 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 9.

3 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12.

4 *Instruments Act 1958* (Vic) pt XIA.

5 *Medical Treatment Act* (Vic) s 5A.

6 *Guardianship and Administration Act* (Vic) pt 4 div 5A.

27. In most instances, personal appointments of supporters and substitute decision makers are clearly preferable to tribunal or automatic appointments because they promote the autonomy and dignity of the person concerned. While these appointments should be encouraged, there is now a great need for the laws concerning personal appointments of substitute decision makers to be more closely aligned with laws dealing with tribunal and automatic appointments.

NEW LEGISLATION

28. Changes to the social, policy and legal environment are sufficiently far-reaching to require a new legislative framework rather than further modification of the existing G&A Act and related legislation. However, the Commission believes that new legislation should retain those features of the existing laws that have operated successfully over the last 26 years. Those features include tribunal appointments of substitute decision makers and a statutory champion of the rights of people with disabilities—the Public Advocate.

NEW PUBLIC POLICY

29. The Commission has identified modern policy themes that should underpin new legislation to ensure that Victoria’s guardianship laws remain relevant for the diverse range of people who use them now and into the future. These are discussed below.

A more realistic view of capacity

30. Guardianship law currently draws a sharp line between those people who have legal capacity and those who do not. At present, the law only has one response to the needs of people with impaired decision-making ability: the appointment of a substitute decision maker to make decisions on that person’s behalf.
31. Issues of capacity can be very different, however, for the many groups of people who now use guardianship laws. A person with an age-related disability, for example, is likely to experience a gradual loss of capacity over time. A person with an acquired brain injury might recover important areas of capacity over time. A person with a mental illness might experience fluctuating capacity.
32. New laws should reflect the reality that some people will need only a small amount of assistance to make decisions, while others will need a substitute decision maker. New laws must also be sufficiently flexible to accommodate changing levels of decision-making ability. Some people may move along a decision-making continuum, depending on both the nature of their disability and the complexity or novelty of the decisions they must make.
33. In Chapter 7, the Commission recommends a modern capacity standard and new capacity assessment principles that reflect a more realistic understanding of capacity. The Commission also recommends new decision-making assistance mechanisms that are a proportionate response to varying needs.

Maximising participation in decision making

34. The United Nations’ Convention places great emphasis on promoting the participation of people with disabilities in decisions that affect them.

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35. These ideas have shaped the underlying principles that the Commission proposes for new guardianship legislation in Chapter 6. The principles recognise a number of important values that the Commission believes should underpin modern guardianship laws. These include principles that are at the core of the Convention, such as:
- respect for the dignity of all people
 - recognition that people with impaired capacity have the same rights and freedoms as other members of the community
 - support for the principle of supported decision making
 - a focus on empowering laws that also protect people with disabilities from abuse, exploitation and neglect.
36. These ideas have also influenced the Commission’s recommendations for new responsibilities for substitute decision makers in Chapter 17. Those principles emphasise that decision makers should make decisions that promote the personal and social well being of the person they are representing. The paramount consideration should be substituted judgment, which means attempting to make the decisions the person would make themselves if able to do so. Substituted judgment requires decision makers to consider the expressed wishes of the person—both past and present—and to place these wishes in the context of the person’s current circumstances. While substituted judgment should be the paramount consideration, it should not be the only consideration when making decisions that seek to promote the personal and social well being of the represented person.

A wider range of decision-making assistance

37. The emphasis on maximising participation in decision making and on adopting a more realistic view of capacity has also shaped the Commission’s recommendations for the introduction of new supported decision-making arrangements. These mechanisms are based on laws introduced in Canada. They will allow assistance to be tailored to the needs of different user groups and to be a more proportionate response to different needs.
38. Although no other Australian jurisdiction has reformed its guardianship laws to introduce supported decision-making mechanisms, the South Australian Public Advocate has developed a Supported Decision Making Project that seeks to encourage and trial supported decision making in South Australia.
39. The range of decision-making assistance recommended by the Commission comprises:
- **new supported decision-making arrangements** that are designed to assist people to make their own decisions. These mechanisms provide a supporter with access to the information that is held by third parties about the person they are supporting before helping that person to make their own decision about an important matter. The supporter could also help the person they are supporting to communicate and implement any decisions. It is proposed that these arrangements can be made both personally and by VCAT. These recommendations are discussed in Chapter 8.
 - **new co-decision-making arrangements** made only by VCAT that enable a person with some impairment to their decision-making ability to make a decision *with* another person, rather than having a decision made *for* them by a guardian or administrator. These recommendations are discussed in Chapter 9.
 - **existing substitute decision-making arrangements** which can be made either personally or by VCAT, that permit one person to make decisions for another person.
 - **existing informal arrangements** by which family members and friends of a person with impaired decision-making ability assist them to gather information, make decisions and implement them.

40. The decision-making ability of some people is impaired to such an extent that autonomy, at least in its more conventional sense, is impossible. Nonetheless, by introducing a wider range of decision-making arrangements—and by encouraging people to consider the decisions that the assisted person would make—the Commission believes that guardianship laws can be seen as a positive means of promoting the participation of people whose decision-making ability is impaired, rather than solely as a protective mechanism that restricts freedom of decision and action.
41. Informal decision-making arrangements should continue to operate in many circumstances as an important adjunct to new guardianship laws. Many organisations and individuals willingly provide goods and services to a person with impaired decision-making ability by making informal arrangements with that person’s family members and friends. It should be possible for these arrangements to continue without the need for the formal appointment of a substitute decision maker, or supporter, when they are operating fairly and effectively.

A preference for personal appointments

42. The Commission believes that new guardianship laws should encourage people to make their own personal appointments of supporters and substitute decision makers whenever possible. Personal appointments promote autonomy because they permit a person to appoint a trusted individual, who is well placed to know and implement their wishes, to make decisions for them when they are unable to do so.
43. The Commission recommends reform to the personal appointments scheme to ensure that it is as simple and accessible as possible. The Commission’s proposals are aligned with the recommendations made by the Victorian Parliament’s Law Reform Committee *Inquiry into Powers of Attorney*.
44. The Commission recommends abolishing the role of agent under the *Medical Treatment Act 1988* (Vic) (Medical Treatment Act) and allowing an enduring guardian to make all medical treatment decisions, including those concerning treatment at the end of life. This change would remove unnecessary overlap between the role of an enduring guardian and that of an agent appointed under the Medical Treatment Act. This recommendation is discussed in Chapters 10 and 13.
45. In order to deal with the complexity and lack of cohesion in the existing personal appointments scheme the Commission also recommends that the new guardianship legislation:
 - integrates the many different statutory substitute decision-making regimes involving both personal and state appointments in order to create a coherent and unified legal framework
 - provides a logical framework for the different roles of those providing assistance under the legislation
 - provides for supported and substitute decision-making arrangements to be activated in consistent ways, regardless of the nature of the appointment
 - describes the roles and responsibilities of people who provide decision-making assistance under guardianship legislation consistently regardless of the manner of appointment.

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A new online register of appointments

46. The Commission recommends the establishment of an online register of all appointments of substitute decision makers, co-decision makers and supporters.
47. The online register would be an important step in the modernisation of Victoria's guardianship laws because it would greatly assist people, such as health professionals and the staff of financial institutions, who regularly engage with people with impaired decision-making ability. The Commission's recommendations in Chapter 16 complement the recommendation by the Victorian Parliament's Law Reform Committee in 2010 that there be a register for power of attorney documents.

Retaining the distinction between personal (or lifestyle) decisions and financial decisions

48. The Commission believes that the existing legislative distinction between substitute decision making for financial decisions and personal (or lifestyle) decisions should continue for both tribunal appointments and personal appointments.
49. The Commission acknowledges that the reality of most people's lives is that lifestyle and financial decisions are seldom completely separate. Financial decisions invariably affect lifestyle, and lifestyle decisions often affect a person's finances. However, the Commission believes, as the Cocks Committee did 30 years ago, that substitute decision making about financial and personal matters often requires significantly different skills and responsibilities. In Chapter 12, the Commission makes recommendations about how to better manage the overlap between the two types of decisions.

Retaining tribunal appointments of personal and financial decision makers

50. While personal appointments of substitute decision makers should be encouraged, tribunal appointments will continue to be needed.
51. Appointments by an inexpensive and reasonably accessible tribunal have been a positive aspect of Victoria's guardianship laws. Because matters in the Guardianship List at VCAT are deeply personal and quite different from most other cases dealt with by VCAT, they call for unique processes and responses. The Commission recommends changes to further improve VCAT processes to ensure that guardianship matters are dealt with as sensitively and informally as possible. These recommendations are discussed in Chapter 21.

Retaining the link between impaired decision-making ability and disability

52. At present, a guardian or administrator can be appointed only when a person has impaired decision-making ability because of a 'disability'. The Commission recommends that the link between a person's disability and their impaired decision-making ability should be retained in new legislation for the purposes of determining whether a person lacks capacity to make their own decisions.
53. That link adds an important objective element to the process of assessing capacity. It is a way of ensuring that guardianship laws are used beneficially and not to manage people who engage in harmful behaviour that is not the direct result of disability. This matter is discussed in Chapters 7 and 12.

Refining the criteria for appointment—need

54. The Commission recommends a number of reforms for tribunal appointments that respond to issues that have been raised for people with profound intellectual disabilities.
55. At present, the G&A Act provides that a guardian or administrator can be appointed only when needed. In practice, these provisions have been interpreted to mean that there must be an existing need for a decision by a guardian or administrator, and not just the possibility that a person might need a substitute decision maker at some time in the future.

56. This practice has led to the suggestion that the current regime is crisis driven and does not encourage effective advance planning for people with seriously impaired decision-making ability who might need a guardian or administrator in the future and who cannot plan ahead for themselves due to their impaired capacity.
57. Some people are highly unlikely to attain the capacity to make their own decisions at any stage of their life, even with significant support. The Commission believes that it should be possible to appoint a substitute decision maker for people in this position in some circumstances, even when there is no immediate need to make an important decision.
58. The Commission believes that it should be possible to appoint a substitute decision maker in situations where:
- the person's decision-making incapacity is of a nature that they are unable, and are unlikely to be able in the future, to make their own decisions, even with significant support, and
 - decisions are currently being made for them by a decision maker who has been making those, or similar, decisions for much of the person's life, and
 - that decision maker is likely to continue to be appropriate for the role.
59. Appointing a guardian or administrator in these circumstances would provide formal recognition of an arrangement that is currently operating informally. In this situation the person's need for a decision maker is clear, but the need for a formal arrangement might not yet have arisen. The appointment would complement an existing informal substitute decision-making arrangement and allow the appointed person to act in the formal role when required in the future. These recommendations are discussed in Chapter 12.

Authorisation for restrictions upon liberty

60. Some people with impaired decision-making ability who live in residential care facilities have their liberty restrained—usually for their own safety—by being locked in rooms or strapped into chairs. Currently, carers are sometimes asked to provide informal consent to these practices or the decision to adopt them is taken by staff at a residential facility. Neither approach provides any legal authorisation for these actions, which operate with few checks and balances.
61. This issue has received considerable attention in the United Kingdom in recent years because of a decision by the European Court of Human Rights and the legislative response to that decision known as Deprivation of Liberty Safeguards.
62. The Commission believes that it is important to establish an appropriate means of authorising these restrictive practices because liberty, or freedom of movement, is a value of fundamental importance in our community. Although it will sometimes be necessary and proper to restrict the movements of some people with impaired decision-making ability for their own safety, these decisions should not be taken lightly or merely for the convenience of carers. Sensible and cost-effective safeguards are required.
63. In Chapter 15, the Commission recommends the introduction of a new tripartite authorisation process for use by some hospitals, supported accommodation and residential facilities when action is taken to restrict a person's liberty to an extent that would ordinarily be unlawful.

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Authorisation of medical treatment

64. There appears to be a widespread lack of understanding about how the law provides for the authorisation of medical treatment for people who lack capacity to make their own decisions. The current law is complex. This is largely because it is sometimes necessary to consider a number of overlapping statutes as well as the common law in order to determine the legal rules that apply when a person is unable to make their own decisions about medical treatment. In Chapter 13 the Commission recommends additional principles apply to substitute decision makers who make medical treatment decisions.
65. The Commission believes that it is possible to simplify the law governing authorisation of medical treatment and to improve community understanding of its operation. As noted earlier, the Commission recommends reducing the number of personal appointments for medical decision making. The Commission also recommends a number of improvements to the process of the automatic appointment of a person to become the substitute decision maker for medical treatment when there is no personal guardian with the power to make these decisions. One of those improvements involves making the Public Advocate the substitute decision maker of last resort in some instances. These recommendations are discussed in Chapter 13.

Authorisation of participation in medical research

66. The existing provisions for authorising participation in medical research procedures by people who lack capacity to make their own decisions are also complex. This is because they seek to balance the need to protect vulnerable people from involuntary participation in procedures that may be intrusive with the need to encourage research about new treatments that might benefit the person concerned and the broader community.
67. The Commission's recommendations seek to streamline the steps that must be followed to secure participation in a medical research procedure by reducing the overlap between the G&A Act and relevant ethical guidelines in some instances and by making the Public Advocate the substitute decision maker of last resort. These recommendations are discussed in Chapter 14.

Accountability and safeguards

68. The Commission is aware of increasing community concerns about abuse of vulnerable people in the community and the misuse of substitute decision-making powers. There is a need to strengthen accountability mechanisms in guardianship laws.
69. The checks and balances in current guardianship laws vary considerably, depending upon the nature of the appointment. While the actual extent of abuse is unknown, it is important that members of the community have faith in the integrity of the substitute decision-making process and feel confident that abuses of power are both detectable and uncommon.
70. There is a wide range of views about the effectiveness of current accountability mechanisms. Some people find them too heavy-handed, some find them too light-touch, while others find them to be confusing and inconsistent.
71. The Commission believes that accountability mechanisms should be clear, consistent and balanced. Achieving an appropriate balance is probably the greatest challenge. Guardianship laws permit the creation of formal substitute decision-making relationships which ultimately rely upon trust and confidence in order to operate effectively. While it is important to encourage family members and friends to accept the difficult, unpaid role of making important decisions for a person who is unable to make their own decisions, it is also important to ensure that these people do not abuse their powers or neglect a vulnerable person they have promised to assist.

72. The Commission’s recommendations are designed to improve accountability mechanisms for people who have responsibilities under guardianship laws. Some of these include:
- more training for people appointed to the various decision-making roles
 - requiring appointees to make declarations regarding compliance with their legal duties
 - broadening the investigative role and powers of the Public Advocate
73. In addition, the Commission proposes that a new public wrong of abusing, neglecting or exploiting a person with impaired decision-making ability should be enforceable by civil penalty. This provision would complement existing criminal laws and could be used where criminal proceedings would be unlikely to succeed or might not be appropriate. Civil penalty offences are easier to enforce than criminal sanctions because of their greater procedural flexibility. The Commission recommends that a new independent statutory officer be responsible for initiating the proposed civil penalty proceedings.
74. The Commission also recommends that VCAT’s jurisdiction be expanded to allow it to hear and determine any cause of action for damages or any claim for equitable relief brought by or on behalf of the represented person against their personal or financial guardian, co-decision maker or supporter that would be available to the represented person in the Supreme Court. This additional jurisdiction would make VCAT a ‘one stop shop’ for responding to most instances of abuse, neglect and exploitation.
75. These recommendations are discussed in Chapter 18.

A stronger role for the Public Advocate

76. People with impaired decision-making ability are among the most vulnerable members of our community. They are open to abuse or neglect by many people, including residential facility staff, service providers, substitute decision makers and, sadly, sometimes by their own family members and friends. People with impaired decision-making ability need a strong champion to protect their interests.
77. The Commission believes that the Public Advocate should continue to perform most of her existing functions and that she should be given a range of additional responsibilities. A stronger supervisory, regulatory and investigative role fits well with the Public Advocate’s existing responsibilities to protect and promote the rights of people with disabilities.
78. In Chapter 20 the Commission recommends that new guardianship laws should clarify, strengthen and extend the role of the Public Advocate in a variety of ways, including:
- stronger and more enforceable investigative powers into alleged or suspected abuse, exploitation or neglect of people with disabilities
 - a clearer role in relation to both individual and systemic advocacy
 - a stronger community education role
 - a stronger role in training and supporting private guardians, administrators and attorneys
 - responsibility for recruiting and supporting volunteers who can act as supporters for people with disabilities for whom family members or friends are not available to carry out the role
 - authority to consent to significant medical treatment or participation in medical research for a person unable to consent themselves who has no guardian or next of kin available to make the decision.

Executive summary

Lowering the age jurisdiction for guardianship and administration

79. In Chapter 22, the Commission recommends that VCAT should be able to appoint a substitute decision maker for any person who meets the G&A Act's criteria for appointment, and who is aged 16 years or over.
80. This change would close the gap between the provisions of the *Children, Youth and Families Act 2005* (Vic) (the CYF Act), which do not allow a guardian to be appointed for a person under the child protection system after they have turned 17, and those of the G&A Act, which do not allow a guardian or administrator to be appointed for a person with impaired decision-making capacity until they turn 18.
81. The Commission also recommends that the age at which a guardian can be appointed under the CYF Act be raised to 18. This would allow overlap between the two jurisdictions so that the most suitable appointment can be made for a young person with impaired decision-making ability who needs assistance.

Interaction with other laws

82. The Commission recommends some changes to the way new guardianship legislation should interact with other laws that provide for substitute decision making for some people with a disability. In particular:
 - The Commission recommends that the compulsory treatment provisions of the *Disability Act 2006* (Vic) be extended to apply to people with cognitive impairments other than just intellectual disability, and particularly to people with an acquired brain injury. This will avoid the need to rely on guardianship orders to consent to treatment in those circumstances where this step is taken for the protection of the community. This recommendation is discussed in Chapter 23.
 - The Commission proposes some changes to the way in which mental health and guardianship legislation interact. It should be possible for a person with capacity to appoint another person to be their enduring personal guardian to make psychiatric treatment decisions for them when they lack capacity to make their own decisions. In some circumstances, the enduring guardian rather than an authorised psychiatrist would be the primary decision maker about matters of psychiatric treatment if the person concerned becomes an involuntary patient under the *Mental Health Act 1986* (Vic). This recommendation is discussed in Chapter 24.

A NEW GUARDIANSHIP ACT

A single Act

83. The Commission recommends a new single integrated Act that provides for:
 - all of the areas of decision making currently provided for in the G&A Act, including tribunal appointed guardians, tribunal appointed administrators, personally appointed enduring guardians and automatically appointed persons responsible for medical treatment
 - the personal appointment of substitute decision makers for financial matters currently covered by the enduring power of attorney provisions of the *Instruments Act 1958* (Vic)
 - the personal appointment of substitute decision makers for medical treatment decisions currently covered by the enduring power of attorney (medical treatment) provisions of the *Medical Treatment Act 1988* (Vic)
 - the new co-decision-making and supporter mechanisms described in this report.

An accessible statute

84. The Commission proposes new terms for the various appointments available under new legislation. The Commission believes that it is desirable to retain but amplify the terminology that has been used for the past 26 years. It proposes that a person who is appointed as a substitute decision maker for financial and property matters should be known as a 'financial administrator' and a person appointed to make personal or lifestyle decisions should be known as a 'personal guardian'.
85. The Commission believes that the advantages of using the same terms to describe personal and tribunal appointments of substitute decision makers outweigh the disadvantages. While the sources of power for the appointments are different and the functions given to the appointees sometimes differ, the role they play in facilitating formal transactions between the represented person and the rest of the world is the same. Community understanding of these roles and confidence in dealing with one person who makes decisions for another is likely to be enhanced if substitute decision makers have the same name, regardless of the source of their appointment.
86. The Commission suggests one difference in the terminology used to describe personally appointed substitute decision makers from that used to describe tribunal appointments. It is desirable to continue to use the term 'enduring' to describe a person who has been appointed by a principal to be their substitute decision maker and the nature of the appointment is such that it proceeds beyond, or endures, the principal's loss of capacity.
87. The term 'person responsible' is used in the G&A Act to describe a person who is automatically appointed by statute to make medical treatment decisions for a person who is unable to make their own decisions. The 'person responsible' is appointed to this position by virtue of their relationship to the person who is unable to make their own decisions. The term does not appear to be well understood and it is not a particularly informative description of the precise role played by that person. The Commission suggests that it be replaced by 'health decision maker'. These recommendations are discussed in Chapters 5 and 10.

Community education

88. The apparent widespread lack of awareness about guardianship laws contributes to a number of difficulties including:
 - limited use of personal appointments
 - limited understanding within the community of substitute decision-making arrangements
 - confusion among some users of guardianship laws about their roles, rights and responsibilities.
89. The Commission's recommendations contain a number of suggestions for improving community education. These suggestions are drawn from comments made to the Commission throughout the reference. A number of responses highlighted the need for education to be targeted and delivered in a way that is relevant, simple and accessible to different user groups and their supporters in order to be effective.
90. The Commission believes that the Public Advocate's community education role should be retained and extended. The Public Advocate should have primary responsibility for developing and delivering community education programs about new guardianship legislation. However, wherever possible, these programs should be delivered in partnership with other organisations that interact with different user groups.

Executive summary

91. There is a particular need for educational programs for health professionals because of the many challenges in understanding and applying the law that governs substitute decision making for medical treatment. The Commission suggests that consideration be given to devising materials and programs that form part of the ongoing professional development of medical practitioners. These recommendations are discussed in Chapters 5 and 20.

DATA COLLECTION

92. The Commission has found it difficult to locate reliable data about the operations of many aspects of Victoria's guardianship laws. This lack of data impedes the development of evidence-based law reform proposals and makes it difficult for the major public agencies—VCAT, the Public Advocate and State Trustees—to evaluate their performance and to benchmark with relevant interstate agencies.
93. These major public agencies collect and compile their own data using different categories and terminology. In Chapter 5 the Commission recommends a coordinated approach to data collection and presentation which it believes would be of great benefit to all people and organisations with an interest in the operations of Victorian guardianship legislation.

Recommendations

CHAPTER 5—A NEW GUARDIANSHIP ACT

A SINGLE ACT

1. A new single statute should be created to provide for supported decision making and substitute decision making for people with impaired decision-making ability.
2. The new statute should replace the *Guardianship and Administration Act 1986* (Vic) and those provisions of the *Instruments Act 1958* (Vic) and of the *Medical Treatment Act 1988* (Vic) that provide for substitute decision making for people with impaired capacity.
3. The new statute should also include provisions for:
 - (a) general principles that reflect the values upon which the statute is based and guide interpretation of the Act
 - (b) principles to guide the assessment of incapacity and decisions about medical treatment
 - (c) a continuum of decision-making arrangements and the mechanisms for putting these in place, including processes for personal appointment, tribunal appointments, and automatic appointments
 - (d) the roles and responsibilities of decision makers
 - (e) mechanisms for ensuring accountability of decision makers, including monitoring and review of orders and decisions
 - (f) the functions and powers of the Public Advocate
 - (g) an online register of appointments.
4. The new statute should be called the Guardianship Act.
5. The new statute should provide for supported and substitute decision makers to be appointed personally, by tribunal and automatically.
6. The new statute should include separate provisions in relation to personal, financial and medical decisions.

AN ACCESSIBLE STATUTE

7. New guardianship legislation should contain language and a structure that are as simple and as accessible as possible.

NAMES OF APPOINTMENTS

8. A person appointed by the tribunal to make substitute decisions about another person's lifestyle and personal matters should be known as that person's 'personal guardian'.
9. A person appointed by the tribunal to make substitute decisions about another person's financial affairs should be known as that person's 'financial administrator'.
10. When someone appoints another person to make substitute decisions about their lifestyle and personal matters, that person should be known as their 'enduring personal guardian'.
11. When someone appoints another person to make substitute decisions about their financial affairs, that person should be known as their 'enduring financial administrator'.
12. A person appointed automatically by statute to make substitute decisions about another person's medical or dental treatment should be known as that person's 'health decision maker'.

COMMUNITY EDUCATION

13. The Public Advocate should have primary responsibility for developing and delivering community education programs about new guardianship legislation.

Recommendations

14. Community education programs about the new statute should be delivered in a variety of ways that will maximise their accessibility and relevance to diverse audiences and communities, including:
 - (a) people with disabilities
 - (b) older people
 - (c) families and carers of people with disabilities and older people
 - (d) Indigenous communities
 - (e) CALD communities
 - (f) health care professionals
 - (g) financial sector professionals
 - (h) police.
15. Community education programs for people with disabilities and older people should emphasise:
 - (a) the value of making personal appointments and instructional directives wherever possible
 - (b) the operation of new supported decision-making and co-decision-making arrangements
 - (c) the rights of a person whose decision making is impaired, particularly when a supporter, co-decision maker or substitute decision maker has been appointed for them
 - (d) the rights of a person whose decision-making ability is impaired.
16. Community education programs for the general community should emphasise:
 - (a) the value of people making personal appointments and instructional directives wherever possible
 - (b) the operation of the proposed new online register and relevant transitional arrangements
 - (c) the new civil penalties applying to abuse, neglect or exploitation of a person with a disability.
17. Community education programs for families and carers of people with disabilities should emphasise:
 - (a) the importance of considering supported decision-making and co-decision-making arrangements wherever possible
 - (b) the proposed new arrangements for people with lifelong impaired decision-making ability.
18. Community education programs for third party users of guardianship laws, such as health professionals and financial sector employees, should emphasise:
 - (a) the different roles and responsibilities of the various decision-making arrangements
 - (b) the different ways in which a person with a disability can be supported to make their own decisions, without the need for a formal appointment to be made
 - (c) the operation of the proposed new online register.

DATA COLLECTION

19. VCAT, the Public Advocate and State Trustees should liaise in the collection and publication of data about the operations of Victoria's guardianship laws including:

- (a) the numbers, duration and types of orders being made at the tribunal
- (b) the numbers and types of personal appointments (following the introduction of the online register)
- (c) the areas of decision making for which appointments are made
- (d) the relationship of the person appointed with the represented person
- (e) details of the people for whom tribunal appointments are made, including types of disability, age, living arrangements, cultural and linguistic background
- (f) outcomes of reassessments and reviews of orders.

CHAPTER 6—PRINCIPLES OF NEW LAWS

A NEW PURPOSE

20. The purpose of this Act is to protect and promote the dignity and human rights of people with impaired decision-making ability. To this end, the Act establishes mechanisms to:
- (a) support and assist people to make, participate in, or implement decisions that affect their lives
 - (b) appoint and guide substitute decision makers
 - (c) ensure the ongoing appropriateness of support and substitute decision-making arrangements
 - (d) safeguard against the abuse, neglect and exploitation of people with impaired decision-making ability.

NEW GENERAL PRINCIPLES

21. New guardianship legislation should contain general principles. Those principles should include words to the following effect:

It is the intention of Parliament that the following general principles should guide interpretation of the Act and should be considered by any person or body when making any decision or taking any action under the Act:

All people are presumed to have capacity to make decisions that affect their lives unless this is shown not to be the case.

People with impaired decision-making ability:

- (a) have human dignity which must at all times be respected and upheld
- (b) have the same human rights and fundamental freedoms as other members of the community, including those set out in the *Convention on the Rights of Persons with Disabilities* and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- (c) should be provided with the support necessary for them to make, participate in and implement decisions that affect their lives
- (d) have wishes and preferences that should inform decisions made in their lives
- (e) are entitled to take reasonable risks and make choices that other people might disagree with
- (f) should be able to participate in the life of the community on an equal basis with others
- (g) should be able to communicate in any way that allows them to understand and be understood
- (h) have the right to live in safety and security and to be protected from abuse, neglect and exploitation

Recommendations

- (i) should have supportive relationships in their life recognised and respected by others
- (j) should have their cultural and linguistic circumstances recognised and respected by others.

Any limitations on the rights and freedoms of a person with impaired decision-making ability to make their own decisions must be justified, reasonable and proportionate.

CHAPTER 7—CAPACITY AND INCAPACITY

RETAINING THE CONNECTION BETWEEN DISABILITY AND INCAPACITY

22. The law should state that a person lacks capacity in relation to a matter if at the relevant time they are unable to make a decision in relation to the matter because of a disability.

THE DEFINITION OF DISABILITY

23. The definition of ‘disability’ should include intellectual impairment, autism spectrum disorder, mental disorder, brain injury, physical disability or dementia.

DEFINING INCAPACITY

24. A person is unable to make a decision if they are unable to:
- (a) understand the information relevant to the decision and the effect of the decision
 - (b) retain that information to the extent necessary to make the decision
 - (c) use or weigh that information as part of the process of making the decision, or
 - (d) communicate the decision in some way.

DEFINING CAPACITY

25. A person has the capacity to make a decision if they are able to:
- (a) understand the information relevant to the decision and the effect of the decision
 - (b) retain that information to the extent necessary to make the decision
 - (c) use or weigh that information as part of the process of making the decision, and
 - (d) communicate the decision in some way.

PRESUMPTION OF CAPACITY

26. A person must be presumed to have capacity unless it is established that the person lacks capacity.

CAPACITY ASSESSMENT PRINCIPLES

27. New guardianship legislation should contain the following capacity assessment principles:
- (a) A person’s capacity is specific to the decision to be made.
 - (b) Impaired decision-making capacity may be temporary or permanent and can fluctuate over time.
 - (c) An adult’s incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour.
 - (d) A person should not be considered to lack the capacity to make a decision merely because they make a decision that others consider to be unwise.
 - (e) A person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support.
 - (f) When assessing a person’s capacity, every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.

MEANS OF ASSESSING CAPACITY

28. The Victorian Government should develop a comprehensive resource about capacity and capacity assessment based on the New South Wales capacity toolkit.

QUALIFIED CAPACITY ASSESSORS

29. The Victorian Government should consider the development of a system of designated capacity assessors, based on the Alberta model of designated capacity assessors.

CHAPTER 8—SUPPORTERS

INTRODUCTION OF SUPPORTERS INTO VICTORIAN GUARDIANSHIP LAWS

30. A new appointment, known as a ‘supporter’, should be introduced into new guardianship laws.
31. The person supported under the arrangement should be known as the ‘supported person’.

PERSONAL APPOINTMENTS OF SUPPORTERS

32. A person should be able to appoint a personal supporter or financial supporter through a written ‘supported decision-making appointment’ if they have the capacity to do so.
33. The appointment should be in a prescribed form, written in plain English and available in an easy English format. Translated plain language and ‘easy’ versions of the form should also be available in community languages.
34. The formal requirements for the creation of a supported decision-making appointment should be the same as for other personal appointments.

VCAT APPOINTED SUPPORTERS—CRITERIA FOR APPOINTMENT

35. VCAT should be able to appoint a personal or financial supporter to assist a person if:
- the person’s ability to make or implement decisions about the matters referred to in the order is impaired in some way
 - the person would be assisted to make decisions about the matters referred to in the order if provided with appropriate guidance and support from one or more supporters
 - the person is unable to make the appointment themselves
 - there is a need for an appointment to be made
 - the proposed supporter/s is suitable to act in the role and consents to the appointment
 - the person freely and voluntarily consents to:
 - the appointment of the individual/s who are proposed to be appointed as a supporter
 - all other aspects of the order
 - the appointment of the supporter/s will promote the personal and social wellbeing of the person.

THE IDENTITY OF A SUPPORTER

36. In determining whether a person is suitable to act in the role of supporter, VCAT must take into account:
- the wishes of the person
 - the desirability of preserving existing family relationships, and other relationships of importance to the person

Recommendations

- (c) the nature of the relationship between the person and the proposed supporter, and in particular whether the relationship is characterised by trust
- (d) the ability and availability of the proposed supporter to assist the person to make the decisions about the matters to be referred to in the order
- (e) whether the proposed supporter will act honestly, diligently and in good faith in the performance of their role
- (f) whether the proposed supporter has a potential conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any potential conflicts.

PROFESSIONAL SUPPORTERS SHOULD NOT BE APPOINTED

- 37. The Public Advocate should not be able to be appointed as a 'supporter'.
- 38. Supporters should not receive any direct financial remuneration for the performance of their role.

TYPES OF DECISIONS COVERED BY SUPPORT ARRANGEMENTS

- 39. The supported decision-making appointment or order should specify the areas of decision making in which the supporter is authorised to act.
- 40. The appointment or order should also specify any conditions or limitations upon the appointment.

PERSONAL AND FINANCIAL DECISIONS

- 41. Supported decision-making appointments and orders should be available for both personal and financial decisions.
- 42. Separate orders or appointments should exist in relation to the appointment of 'personal supporters' and 'financial supporters'.

POWERS OF SUPPORTERS

- 43. A supported decision-making appointment or order should authorise a supporter to exercise some or all of the following powers in relation to a decision:
 - (a) the power to access, collect or obtain or assist the supported person in accessing, collecting or obtaining from any person any relevant information to assist the supported person to understand the information
 - (b) the power to discuss the relevant information with the supported person in a way the person can understand and that will assist the person in making the decision
 - (c) the power to communicate or assist the supported person in communicating the decisions to other people, and advocate for the implementation of the person's decision where necessary.
- 44. The appointment or order should specify which of these powers the supporter is authorised to exercise.
- 45. To avoid doubt, the law should specify that:
 - (a) A supporter is not authorised to make decisions on behalf of the supported person, and may not exercise their authority without the knowledge and consent of the person.
 - (b) A supporter may not use their authority to access, collect or obtain information that the supported person themselves could not legally have accessed, collected or obtained if able to do so.

- (c) The power to communicate decisions under a support agreement should not authorise the supporter to enter into significant financial transactions, including:
 - (i) investing for the supported person
 - (ii) continuing the investments of the supported person, including taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by their existing shareholding
 - (iii) signing any documents that have legal effect.

RECOGNITION OF DECISIONS MADE UNDER SUPPORT APPOINTMENTS

46. Any decision made with the assistance of a supporter or communicated by or with the assistance of a supporter within the authority of the appointment or order should be recognised as the decision of the supported person for all purposes.

RESPONSIBILITIES OF SUPPORTERS

47. The law should specify that in performing their role, supporters should:
- (a) assist the supported person to make the decisions specified in the appointment or order
 - (b) act honestly, diligently and in good faith
 - (c) act within the limits of the appointment, and comply with any conditions, limitations or requirements set out in the appointment or order
 - (d) identify and respond to situations where the supporter's interests conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, and seek external advice where necessary
 - (e) respect the privacy and confidentiality of the supported person by:
 - (i) only collecting personal information about the supported person in their capacity as supporter to the extent that is relevant to and necessary for carrying out the supporter's role, and
 - (ii) only disclosing such information:
 - with the supported person's consent, and
 - for a purpose that is relevant to and necessary for carrying out the supporter's role, or
 - for the purposes of any legal proceedings arising out of the Act or of any report of any such proceedings, or
 - with any other lawful excuse.
48. The law should also require that supporters:
- (a) not use their authority to assist the supported person to conduct an illegal activity
 - (b) not coerce, intimidate or in any way unduly influence the supported person into a particular course of action.

REGULAR REVIEWS OF SUPPORTED DECISION-MAKING ORDERS BY VCAT

49. Supported decision-making orders made by VCAT must be reviewed by VCAT at least once within the first 12 months of making the order and subsequently at least once every three years.

Recommendations

APPLICATIONS FOR REVIEW AT VCAT

50. Any person with an interest in the affairs of the supported person should be able to apply for review of a supported decision-making arrangement made either by VCAT order or by personal appointment.
51. Applications to VCAT should be possible in respect of supported decision-making appointments or orders on the basis that:
 - (a) the supported person lacked the capacity to make the personal appointment
 - (b) the appointment was not validly made
 - (c) the supported person no longer has the capacity to participate in a supported decision-making arrangement
 - (d) the supported person no longer consents to the appointment or order
 - (e) the supporter is acting in breach of their responsibilities
 - (f) the order is no longer appropriate to the needs of the supported person
 - (g) the supporter is exercising undue influence over the supported person.

POWERS OF VCAT UPON REVIEW

52. Upon hearing an application for review, VCAT should have the power to:
 - (a) revoke the appointment
 - (b) vary the appointment with the consent of the supported person
 - (c) continue the order for a specified period with the consent of the supported person
 - (d) amend the appointment with the consent of the supported person
 - (e) revoke the order, and where appropriate, replace it with a different order.

REGISTRATION OF SUPPORTED DECISION-MAKING APPOINTMENTS

53. A supported decision-making appointment should not become a valid instrument until it is registered.

REVOCAION OF PERSONAL APPOINTMENTS AND ORDERS

54. A person supported under a supported decision-making appointment should be free to revoke the appointment at any time if they have the capacity to do so.
55. A person supported under a supported decision-making order should be able to apply to VCAT for revocation of a supported decision-making order at any time.
56. A supporter should be required to notify VCAT if they believe the supported person no longer consents to the arrangement, or no longer has the capacity to make their own decisions with support.
57. The registry should immediately be notified upon revocation or variation of a supported decision-making appointment or order.
58. Revocation should take effect once the revocation is registered.

FIDUCIARY DUTIES OF SUPPORTERS AND LIABILITY

59. To avoid doubt, the relationship between the supporter and the supported person should be designated by law as one that imposes fiduciary obligations upon the supporter.
60. The law should specify that supporters are not personally liable for anything done or not done in good faith while exercising their authority or carrying out their duties and responsibilities.

61. Supporters should be liable for the same penalties as substitute decision makers for misuse and abuse of their powers, in addition to any other criminal penalties or civil remedies that may apply.

VOLUNTEER SUPPORTERS

62. The Public Advocate should establish a pilot program, modelled broadly on the community guardianship program, to match people in need of decision-making support with appropriate individuals to become supporters in relation to personal decisions.
63. Appointments under this program could be made by personal appointment where possible, or by VCAT appointment with the consent of the supported person.

CHAPTER 9—CO-DECISION MAKING

INTRODUCTION OF CO-DECISION-MAKING ORDERS IN VICTORIAN LAW

64. VCAT should be able to appoint a co-decision maker to assist a person in need of decision-making support.

CRITERIA FOR TRIBUNAL APPOINTMENTS

65. VCAT should be able to appoint a co-decision maker to assist a person if it is satisfied that:
- (a) the person's ability to make the relevant decisions is impaired and it is unlikely that the person will have the capacity to make relevant decisions alone
 - (b) the person would have the capacity to make decisions jointly with the proposed co-decision maker about the matters referred to in the order
 - (c) the proposed co-decision maker is suitable to act in the role and consents to the appointment
 - (d) there is a need for an appointment to be made
 - (e) the person freely and voluntarily consents to:
 - (i) the appointment of the individual who is proposed to be appointed as a co-decision maker
 - (ii) all other aspects of the order
 - (f) the person's needs could not be met through informal arrangements or through the appointment of a supporter
 - (g) the appointment of the co-decision maker will promote the personal and social wellbeing of the person.

THE IDENTITY OF A CO-DECISION MAKER

66. In determining whether a person is suitable to act in the role of co-decision maker, VCAT must consider:
- (a) the wishes of the person
 - (b) the desirability of preserving existing family relationships, and other relationships of importance to the person
 - (c) the nature of the relationship between the person and the proposed co-decision maker, and in particular whether the relationship is characterised by trust
 - (d) the ability and availability of the proposed co-decision maker to assist the person to make decisions about the matters to be referred to in the order
 - (e) whether the proposed co-decision maker will act honestly, diligently and in good faith in the performance of their role

Recommendations

- (f) whether the proposed co-decision maker has a potential conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any potential conflicts.
- 67. The Public Advocate should not be able to be appointed as a co-decision maker.
- 68. Co-decision makers should not receive any financial remuneration for the performance of their role.
- 69. No more than one co-decision maker should be appointed in relation to each type of decision to be made.

TYPES OF DECISIONS COVERED BY CO-DECISION-MAKING ARRANGEMENTS

- 70. A co-decision maker should be given the power to assist a person to make decisions in relation to any of the financial or personal matters that a substitute decision maker can be authorised to decide on behalf of another person.
- 71. The co-decision-making order should specify the types of decisions for which the person needs support.
- 72. The order may also specify any conditions or limitations upon the appointment.

POWERS OF CO-DECISION MAKERS

- 73. A co-decision-making order should authorise a co-decision maker to exercise the following powers, and to do the following things in relation to a decision:
 - (a) to access, collect or obtain or assist the person in accessing, collecting or obtaining from any person information that is relevant to assist the person to understand the information
 - (b) to discuss the relevant information with the person in a way they can understand and to assist the person in making the decision
 - (c) to make decisions of the type referred to in the order jointly with the person
 - (d) to do all things necessary to give effect to decisions of the person made with the co-decision maker.VCAT may specify in the co-decision-making order that a contract in relation to any identified personal or financial matter is voidable if it is not in writing and signed by both the person and the co-decision maker.
- 74. To avoid doubt, the law should specify that a co-decision maker:
 - (a) is not authorised to make decisions on behalf of the person, and may not exercise their authority without the knowledge and consent of the person
 - (b) may not use their authority to access, collect or obtain information that the person could not legally have accessed, collected or obtained if able to do so
 - (c) may not enter into a conflict transaction together with the person, unless the transaction has been specifically allowed in the order.

RECOGNITION OF DECISIONS MADE UNDER CO-DECISION-MAKING ORDERS

- 75. Any decision made, action taken, consent given or thing done by a co-decision maker together with the person in good faith within the authority of the order should be considered to have been made, taken, given or done by the person.

PERSON WITH IMPAIRED CAPACITY DEEMED TO BE INCAPABLE OF MAKING CERTAIN DECISIONS ALONE

- 76. The law should clarify that, to the extent that an area of decision making falls within the terms of a co-decision-making order, the person with impaired decision-making ability is deemed to be incapable of making that decision without the support and consent of the co-decision maker.

RESPONSIBILITIES OF CO-DECISION MAKERS

77. The law should specify that in performing their role, a co-decision maker should:
- (a) make the decisions referred to in the order jointly with the person
 - (b) act honestly, diligently and in good faith
 - (c) act within the limits of the order, and comply with any conditions, limitations or requirements set out in the order
 - (d) identify and respond to situations where the co-decision maker's interests conflict with those of the person, ensure the person's interests are always the paramount consideration, and seek external advice where necessary
 - (e) respect the privacy and confidentiality of the person by:
 - (i) only collecting personal information about the person in their capacity as co-decision maker to the extent this is relevant to and necessary for carrying out the co-decision maker's role, and
 - (ii) only disclosing such information:
 - with the consent of the person assisted under the co-decision-making order, and
 - for a purpose that is relevant to and necessary for carrying out the co-decision maker's role, or
 - for the purposes of any legal proceedings arising out of the Act or of any report of any such proceedings, or
 - with other lawful excuse.
 - (f) not use their authority to assist the person to conduct an illegal activity
 - (g) not coerce, intimidate or in any way unduly influence the person into a particular course of action.

DISAGREEMENTS BETWEEN A PERSON AND THEIR CO-DECISION MAKER

78. In the event of an irreconcilable disagreement between the person and the co-decision maker, either party should be able apply to VCAT for review of the order.
79. The co-decision maker should be responsible for informing VCAT if they believe the support relationship has broken down, or if it is no longer possible for the person to be supported under a co-decision-making arrangement.

REVIEW OF CO-DECISION-MAKING ORDERS BY VCAT

80. Co-decision-making orders should be reviewed by VCAT at least once within the first 12 months of making the order, and subsequently at least once every three years.
81. Any person with an interest in the affairs of either party to a co-decision-making arrangement should be able to apply for review of a co-decision-making order.
82. Applications to VCAT for review of co-decision-making orders should be possible on any of the following grounds:
- (a) the person no longer consents to the order
 - (b) the person no longer has the capacity to participate in a co-decision-making arrangement
 - (c) the co-decision maker no longer has the capacity to participate in a co-decision-making arrangement
 - (d) the co-decision maker is acting in breach of their responsibilities

Recommendations

- (e) the order is no longer appropriate to the needs of the person
- (f) the order is contrary to the personal and social wellbeing of the person.

POWERS OF VCAT UPON REVIEW

83. Upon hearing an application for review, VCAT should have the power to:
- (a) continue the order in its current form
 - (b) amend or vary the order with the consent of the person
 - (c) revoke the order, and where appropriate replace it with a different order.

SAFEGUARDS TO PROTECT PEOPLE WITH IMPAIRED CAPACITY

84. VCAT may require financial co-decision makers to lodge annual accounts for examination.

REGISTRATION OF CO-DECISION-MAKING ORDERS

85. Co-decision-making orders should be registered and should not take effect until they are registered.

REVOCAION OF CO-DECISION-MAKING ORDERS

86. A person supported under a co-decision-making order should be able to apply to VCAT for revocation of the order at any time.
87. A co-decision maker should be required to notify VCAT if they believe the person no longer consents to the order.
88. Revocation should take effect once the revocation has been completed on the register.

FIDUCIARY DUTIES OF CO-DECISION MAKERS AND LIABILITY

89. To avoid doubt, new guardianship legislation should stipulate that the relationship between a co-decision maker and the person is one which imposes fiduciary obligations upon the co-decision maker.
90. The law should stipulate that co-decision makers are not personally liable for anything done or omitted in good faith while exercising the authority or carrying out the duties and responsibilities of the co-decision maker in accordance with their legal obligations.
91. Co-decision makers should be liable for the same penalties as substitute decision makers for misuse and abuse of their powers, in addition to any other criminal penalties or civil remedies that may be applicable.

CHAPTER 10—PERSONAL APPOINTMENTS OF SUBSTITUTE DECISION MAKERS

RETAIN ENDURING POWERS OF ATTORNEY

92. An adult with capacity should continue to be able to appoint a person to make decisions for them about personal matters, including medical treatment and financial matters, when they lack capacity to make these decisions in the future.

TERMINOLOGY

93. The documents used to create an enduring appointment should be called 'enduring appointment of a personal guardian' and 'enduring appointment of a financial administrator'.
94. A person who makes an enduring appointment should be called a 'principal'.
95. The people appointed under these documents should be called an 'enduring personal guardian' and an 'enduring financial administrator'.

REMOVAL OF MEDICAL AGENTS

96. The range of powers that can be given to an enduring personal guardian should include the power to consent to or refuse medical treatment on behalf of the principal. These new provisions should replace the current provisions in the *Medical Treatment Act 1988* (Vic) for appointing an agent to make substitute decisions about medical treatment.

REGISTRATION

97. It should be compulsory to register an enduring appointment of a personal guardian and an enduring appointment of a financial administrator for the appointment to be legally valid.
98. After the commencement of new guardianship legislation:
- (a) registering an appointment of an enduring financial administrator will revoke an appointment of an enduring attorney made under the *Instruments Act 1958* (Vic).
 - (b) registering an appointment of an enduring personal guardian will revoke an appointment of an enduring guardian made under the *Guardianship and Administration Act 1986* (Vic).
 - (c) registering an appointment of an enduring personal guardian with decision-making powers in relation to health matters will revoke an appointment of an agent made under the *Medical Treatment Act 1988* (Vic). If the enduring guardian has not been given decision-making powers in relation to health matters, the appointment of the agent under the *Medical Treatment Act* should survive.
99. The register should indicate if an appointment of an enduring personal guardian or enduring financial administrator is one that grants standard (full) powers or if the powers granted are limited or subject to conditions or restrictions.

TRANSITIONAL PROVISIONS—TIME TO REGISTER AN EXISTING PERSONAL APPOINTMENT

100. An enduring guardian appointed under the *Guardianship and Administration Act 1986* (Vic), enduring attorney appointed under the *Instruments Act 1958* (Vic) or an agent appointed under the *Medical Treatment Act 1988* (Vic) before the commencement of new guardianship legislation should continue to have the powers provided by the appointment.
101. These appointments should be registered within five years of the commencement date of new guardianship legislation in order to be valid.

POWERS

102. An adult with capacity (the principal) should be able to appoint an enduring personal guardian to make decisions for them about personal matters, including medical treatment, or an enduring financial administrator to make decisions for them about financial matters.
103. The document appointing an enduring personal guardian or an enduring financial administrator should specify which decision-making powers the enduring personal guardian or enduring financial administrator is to have.
104. 'Financial matters' and 'personal matters' should be defined in the statute. The definitions of 'financial matters' and 'personal matters' should include a non-exhaustive list of powers that can be given. The definitions should also include a list of restrictions on the powers that can be given to an enduring personal guardian or to an enduring financial administrator.
105. A principal may specify conditions and limitations on the powers and exercise of powers by the enduring personal guardian or enduring financial administrator.

Recommendations

FINANCIAL MATTERS

106. A financial matter should be defined as a matter relating to the person's financial or property matters. An appointment may give an enduring financial administrator or a financial administrator full powers to make decisions about financial or property matters or specify the powers that are given. Examples of the financial decision-making powers that can be given to an enduring financial administrator or financial administrator are listed in Divisions 3 and 3A of Part 5 of the *Guardianship and Administration Act 1986* (Vic) and include but are not limited to:
- (a) paying sums of money to the person for their personal expenditure
 - (b) paying maintenance and accommodation expenses for the person and their dependants, including, for example, purchasing an interest in, or making a contribution to, an establishment that will maintain or accommodate the person or one or more of their dependants
 - (c) paying the person's debts, including any fees and expenses to which an administrator is entitled under a document made by the person or under a law
 - (d) receiving and recovering money payable to the person
 - (e) carrying on a trade or business of the person
 - (f) performing contracts entered into by the person
 - (g) discharging a mortgage over the person's property
 - (h) paying rates, taxes, insurance premiums or other outgoings for the person's property
 - (i) insuring the person or their property
 - (j) otherwise preserving or improving the person's estate
 - (k) investing for the person
 - (l) continuing investments of the person, including taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by their existing shareholding
 - (m) undertaking a real estate transaction for the person
 - (n) dealing with land for the person
 - (o) undertaking a beneficial transaction for the person involving the use of their property as security (for example, for a loan or by way of a guarantee) for an obligation
 - (p) withdrawing money from, or depositing money into, the person's account with a financial institution
 - (q) a legal matter relating to the adult's financial or property matters.

LIMITATIONS ON FINANCIAL DECISION-MAKING POWERS

107. The financial decision-making powers that cannot be given to an enduring financial administrator or financial administrator, and that should be listed in the statute, include but are not limited to:
- (a) making or revoking the person's will
 - (b) managing the estate of the principal upon their death
 - (c) consenting to an unlawful act
 - (d) making decisions that restrict the person's personal decision-making autonomy, but cannot be reasonably justified in order to ensure proper management of their finances
 - (e) a conflict transaction, unless the transaction has been specifically allowed in the order.

PERSONAL MATTERS

108. A personal matter should be defined as a matter relating to the person's personal or lifestyle matters, including medical treatment. An appointment may give an enduring personal guardian or personal guardian full powers to make decisions about personal, lifestyle, and medical treatment, or limit the powers that are given. The personal decision-making powers that can be given to an enduring personal guardian or personal guardian and that should be listed in the statute, include but are not limited to:
- (a) where and with whom the person lives and decisions about restrictions upon liberty (discussed further in Chapter 15)
 - (b) with whom the person associates
 - (c) whether the person works and, if so, the kind and place of work and the employer
 - (d) decisions about health care, including refusal of life-sustaining medical treatment if the conditions for refusal of medical treatment are fulfilled, and consent to forensic examinations (discussed further in Chapter 13)
 - (e) what education or training the person undertakes and the place where this occurs
 - (f) daily living issues, including, for example, diet and dress
 - (g) any legal matters not relating to the person's financial or property matters.

LIMITATIONS ON PERSONAL DECISION-MAKING POWERS

109. The personal decision-making powers that cannot be given to an enduring personal guardian or personal guardian, and that should be listed in the statute, include but are not limited to:
- (a) making or revoking the person's will
 - (b) making or revoking an appointment, enduring appointment or common law advance directive, or refusal of treatment certificates or instructional directives
 - (c) voting on the person's behalf in a Commonwealth, state or local election or referendum
 - (d) entering into or dissolution of a marriage or sexual relationship
 - (e) decisions about the care and wellbeing of any children of the person, including a decision in relation to adoption
 - (f) a decision to detain or compulsorily treat the person for reasons other than the personal and social wellbeing of the person
 - (g) consenting to an unlawful act
 - (h) a decision about a special procedure.

MULTIPLE REPRESENTATIVES

110. The principal should be able to give an enduring personal guardian or an enduring financial administrator as many or as few of the relevant available powers as they wish.
111. The principal should be able to appoint more than one but not more than three enduring personal guardians or enduring financial administrators and should be able to give different powers to each.

CONSENT AND ACKNOWLEDGEMENT OF RESPONSIBILITIES

112. An appointment of an enduring personal guardian or enduring financial administrator should only be effective if the appointee signs a form formally accepting the appointment.
113. Acceptance should be given using a prescribed form. The prescribed forms should be set out in the new statute.

Recommendations

114. The statement of acceptance should include an undertaking by the person accepting the appointment to act in accordance with their responsibilities.

WITNESSING A PERSONAL APPOINTMENT

115. New guardianship legislation should require all personal appointments to be witnessed by two witnesses, one of whom is authorised to witness affidavits or is a medical practitioner.

PROOF OF IDENTITY

116. The principal should show proof of identity documents to the two witnesses at the time the enduring appointment document is signed.
117. The authorised witness should be required to certify that they have seen appropriate identification documents, which confirm the principal's identity. New guardianship legislation or regulations should detail what combination of documents is eligible as effective proof of identification.

SIGNING FOR THE PRINCIPAL

118. If, because of physical limitations, the principal is unable to sign the documents making an enduring appointment, it should be possible for someone to sign for them on their direction and in their presence.
119. Similar provisions to those contained in sections 123(2)(b), 124 and 125A(2) of the *Instruments Act 1958* (Vic) should be included in new guardianship legislation to provide for this practice.

CONFLICT TRANSACTIONS

120. New guardianship legislation should define a conflict transaction. It should prohibit someone appointed as a financial administrator or an enduring financial administrator engaging in conflict transactions and set out the relevant exceptions to this rule.
121. A conflict transaction should be defined as a transaction in which there may be conflict, or which results in conflict, between:
- (a) the duty of a financial administrator or an enduring financial administrator towards the principal, and
 - (b) either—
 - (i) the interests of the appointee, or a relation, business associate or close friend of the appointee, or
 - (ii) another duty of the appointee.
122. The legislation should provide that:
- (a) An enduring financial administrator may not enter into a conflict transaction unless they have been authorised prior to the transaction taking place. The enduring financial administrator may be authorised in advance by the principal, who must have the capacity to authorise the conflict transaction, or by VCAT.
 - (b) A principal may authorise a particular conflict transaction, conflict transactions of that type or conflict transactions generally.
 - (c) A principal who has capacity may retrospectively authorise or ratify a conflict transaction.
 - (d) VCAT may authorise a particular conflict transaction, conflict transactions of that type or conflict transactions generally.
 - (e) VCAT may ratify a conflict transaction.

123. New guardianship legislation should specify that:
- (a) Gifts made in accordance with the gifting provisions recommended by the Victorian Parliament Law Reform Committee are not a conflict transaction.
 - (b) Provision made for the maintenance of the principal's dependants in accordance with the legislation will not be a conflict transaction.
 - (c) A transaction is not a conflict transaction only because by the transaction the appointee, in the appointee's own right and on behalf of the principal:
 - (i) deals with an interest in property jointly held, or
 - (ii) acquires a joint interest in property, or
 - (iii) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in (i) or (ii).

COMMENCEMENT OF POWERS

124. The appointment of an enduring financial administrator may come into effect immediately, at a date specified by the principal, or on a specified occasion or circumstance.
125. The document making the appointment can include conditions about how a determination should be made that a specified circumstance has occurred.
126. If no date is specified, the powers of an enduring financial administrator come into effect when the principal loses capacity.
127. The powers of an enduring personal guardian should only come into effect when the principal loses capacity.

RESIGNATION BY THE ENDURING PERSONAL GUARDIAN OR ENDURING FINANCIAL ADMINISTRATOR

128. An enduring personal guardian or an enduring financial administrator should be able to resign at any time when the principal has capacity. If a principal has lost capacity or there is doubt about their capacity, it should not be possible to resign without the leave of VCAT.
129. An enduring guardian or enduring financial administrator must resign in writing using a prescribed form that is provided to the registry. The enduring guardian or enduring financial administrator should make reasonable attempts to notify the principal of the resignation.
130. A resignation should not be effective until registered.
131. When a resignation is registered, the registry should make reasonable attempts to notify the principal.

VCAT'S POWER TO REVOKE APPOINTMENTS

132. Any person with an interest in the affairs of the principal should be able to apply to VCAT when the principal has lost capacity for an order that a personal appointment be revoked or varied or declared invalid on the ground that:
- (a) the principal lacked capacity at the time it was made
 - (b) the document is not a proper record of the principal's wishes at the time it was made
 - (c) the appointee is not complying with their obligations
 - (d) the appointee lacks capacity to perform their obligations.

Recommendations

CHAPTER 11—DOCUMENTING WISHES ABOUT THE FUTURE

WAYS OF DOCUMENTING WISHES, INSTRUCTIONS OR DIRECTIONS

133. New guardianship legislation should enable a person with capacity to document instructions about future decision making by:
- (a) appointing an enduring personal guardian or enduring financial administrator with no instructions about how to exercise or how not to exercise their decision-making powers, or
 - (b) appointing an enduring personal guardian or enduring financial administrator with instructions about how to exercise or how not to exercise their decision-making powers, or
 - (c) making a stand-alone ‘instructional directive’.

INSTRUCTIONAL DIRECTIVES

134. An instructional directive should be able to provide:
- (a) binding instructions or advisory instructions about health matters
 - (b) advisory instructions about personal and lifestyle matters, other than health matters and financial matters, that should be taken into account and followed where reasonably possible but should not be legally binding.

REPLACE ‘REFUSAL OF TREATMENT CERTIFICATE’ WITH ‘INSTRUCTIONAL HEALTH CARE DIRECTIVE’

135. The ability to make refusal of treatment certificates under the *Medical Treatment Act 1988* (Vic) should be replaced with a statutory scheme that provides for binding instructional directives about health care to be made in a broader range of circumstances. To reflect these changes, the name ‘refusal of treatment certificate’ should be replaced with ‘instructional health care directive’.

EXISTING REFUSAL OF TREATMENT CERTIFICATES—TRANSITIONAL ARRANGEMENTS

136. Refusal of treatment certificates made under the *Medical Treatment Act 1988* (Vic) prior to the introduction of new provisions for instructional directives should retain their force as a legally valid way of refusing treatment to the extent that this was authorised by the Medical Treatment Act.

PRESERVATION OF COMMON LAW

137. New guardianship legislation should provide that the existence of statutory provisions to make an instructional health care directive does not affect any existing common law right to make an advance directive about medical treatment.

SCOPE OF INSTRUCTIONAL HEALTH CARE DIRECTIVES

138. An instructional health care directive should allow the principal to:
- (a) give directions about health care and medical treatment for their future health care
 - (b) give information about their directions
 - (c) provide information about exercising the power.
139. The principal should be able to make instructional health care directives about future as well as current conditions.
140. The principal should be able to provide advance consent to treatment as well as advance refusal. However, a principal cannot demand treatment that is not offered.

141. To avoid doubt, new guardianship legislation should specifically provide that an instructional health care directive allows the principal to give directions about requiring a life-sustaining measure to be withheld or withdrawn in particular circumstances.

INSTRUCTIONAL HEALTH CARE DIRECTIVES CANNOT AUTHORISE EUTHANASIA OR ASSISTED SUICIDE

142. New guardianship legislation should include a statement that an instructional health care directive cannot authorise, justify or excuse taking positive steps to assist someone to end their life unlawfully.

CONSCIENTIOUS OBJECTION

143. A health professional should be required to refer the patient or enduring personal guardian to another health professional if their personal views or beliefs prevent them from complying with lawful directions in a valid instructional health care directive.

PSYCHIATRIC TREATMENT

144. Any directions in an instructional health care directive about psychiatric treatment are not binding if a person becomes an involuntary patient under the *Mental Health Act 1986* (Vic).

PRESCRIBED FORMS

145. New guardianship legislation should provide that an instructional health care directive must be in the prescribed form.
146. The forms should be developed by a multidisciplinary team in consultation with a wide range of community members as well as representatives from professional organisations and interest groups.
147. The forms should be user-friendly, simple, written in plain English and provide appropriate information about how to complete them. The forms should have a consistent design.
148. The forms and any associated information and educational material should be available in a range of community languages. Translated forms should be in a bilingual format that includes both English and the community language.

WITNESSING REQUIREMENTS

149. An instructional health care directive should be signed and dated by two witnesses who are present at the time the instructional health care directive is made. One of the witnesses must be a person who is authorised to witness an affidavit or a registered medical practitioner. The witnesses must be satisfied that:
- (a) the principal is at least 18 years old
 - (b) the authorised witness has seen appropriate identification documents, which confirm the principal's identity. The Act or regulations should detail what combination of documents is eligible as effective proof of identification
 - (c) the principal's decision is made voluntarily and without inducement or compulsion
 - (d) the principal understands the nature and likely effects of each direction in the instructional health care directive
 - (e) the principal understands that a direction in an instructional health care directive operates only while the principal lacks capacity to make decisions about the matter covered by the direction
 - (f) the principal understands that they may revoke a direction in the instructional health care directive at any time they have capacity

Recommendations

- (g) the principal understands that, at any time they are incapable of revoking a direction, they are unable to effectively oversee the implementation of the direction.

ENFORCEABILITY OF AN INSTRUCTIONAL HEALTH CARE DIRECTIVE

- 150. An instructional health care directive should be binding on health providers and substitute decision makers if it is valid and the direction operates in the circumstances that have arisen.
- 151. A direction in an instructional health care directive does not operate if the maker would not have intended it to apply in the circumstances that have arisen. This occurs if one of the following applies:
 - (a) Circumstances, including advances in medical science, have changed since the completion of the instructional health care directive to the extent that the principal, if they had known of the change in circumstances, would have considered that the terms of the direction are inappropriate.
 - (b) The instructional health care directive is uncertain.
 - (c) There is persuasive evidence to suggest that the instructional health care directive is based on incorrect information or assumptions.

OFFENCE OF MEDICAL TRESPASS

- 152. The offence of medical trespass in section 6 of the *Medical Treatment Act 1988* (Vic) should be extended to apply to a health provider who knowingly provides medical treatment to a person that is contrary to that person's wishes as expressed in an instructional health care directive and that is not otherwise authorised by law.

REGISTRATION

- 153. It should not be compulsory to register an instructional health care directive.

PROTECTION FOR HEALTH PROVIDERS FOR NON-COMPLIANCE WITH INSTRUCTIONAL HEALTH CARE DIRECTIVES

- 154. New guardianship legislation should provide the following protection for health providers:
 - (a) A health provider is not affected by an instructional health care directive to the extent that the health provider, acting in good faith, does not have actual knowledge that the person has an instructional health care directive.
 - (b) A health provider who—acting in good faith and without actual knowledge that an instructional health care directive is invalid—acts in reliance on the directive, does not incur any liability to the principal or anyone else because of the invalidity.
 - (c) A health provider has a duty to determine whether an instructional health care directive is in place by checking the register before providing treatment. A health provider who fails to check the register and provides treatment that is inconsistent with the directive will not be protected from liability by the provisions providing protection for a lack of actual knowledge. A health provider is not required to check the register if emergency treatment is required.

EMERGENCY TREATMENT

- 155. If emergency treatment is required and the health provider is aware of an instructional health care directive but does not have time to apply to the tribunal to determine if it is valid or if a direction in the directive is operative, and they believe on reasonable grounds that one of the following applies:

- (a) circumstances, including advances in medical science, have changed since the completion of the instructional health care directive to the extent that the principal, if they had known of the change in circumstances, would have considered the terms of the direction inappropriate
- (b) the instructional health care directive is uncertain
- (c) there is persuasive evidence to suggest that the instructional health care directive is based on incorrect information or assumptions

then the health provider does not incur any liability, either to the principal or anyone else, if the health provider does not act according to the directive.

COPIES OF INSTRUCTIONAL HEALTH CARE DIRECTIVES

156. The chief executive officer of a hospital or a nursing home must take reasonable steps to ensure that a copy of any instructional health care directive applying to a patient in the hospital or home, and of any notification of the cancellation of such a directive, is placed with the patient's record kept by the hospital or home.

TRIBUNAL DECLARATION ABOUT AN INSTRUCTIONAL HEALTH CARE DIRECTIVE

157. If a health provider, substitute decision maker or any person with a special interest in the affairs of the principal considers that an instructional health care directive is not or may not be valid, or that a direction in an instructional health care directive does not operate because the principal would not have intended it to apply in the circumstances that have arisen, they can apply to VCAT to make a determination about the effect of the directive.

RECOGNITION OF INSTRUCTIONAL HEALTH CARE DOCUMENTS MADE IN OTHER AUSTRALIAN JURISDICTIONS

158. Instructional health care documents made in other states should be recognised in Victoria to the following extent:
- (a) If a document prescribed by regulation is made in another state and complies with that state's document requirements, then, to the extent the document's provisions could have been validly included in an instructional health care directive made under the Victorian Act, the document must be treated as if it were an instructional health care directive made under, and in compliance with, this Act.

INSTRUCTIONAL DIRECTIVES—PERSONAL AND FINANCIAL MATTERS

159. A principal may create an instructional directive that provides advisory instructions about personal and lifestyle matters and financial matters. These matters should be taken into account and followed where reasonably possible but should not be legally binding.
160. A substitute decision maker who is aware of any instructional directive should be required to follow the wishes expressed in an instructional directive where reasonably possible.

ENDURING APPOINTMENTS COMBINED WITH INSTRUCTIONAL DIRECTIVES

161. A person should be able to appoint an enduring personal guardian or enduring financial administrator and combine the appointment with a personal instructional directive.

ENDURING APPOINTMENTS COMBINED WITH INSTRUCTIONAL HEALTH CARE DIRECTIVES

162. A principal who combines the appointment of an enduring personal guardian with an instructional health care directive should be able to specify if the instructional health care directive is binding for the matters it covers, or intended as a guide only.
163. If the principal specifies that the instructional health care directive is binding, the enduring personal guardian should act as an advocate to ensure that the medical treatment complies with the directive.

Recommendations

164. It should only be possible to override a binding instructional health care directive as set out in recommendation 151 above.
165. If the principal specifies that the instructional health care directive is to provide guidance only, the enduring personal guardian should consider the direction but is not bound to follow it.

ENDURING APPOINTMENTS COMBINED WITH INSTRUCTIONAL DIRECTIVES ABOUT PERSONAL OR FINANCIAL MATTERS

166. A principal who combines the appointment of an enduring personal guardian or enduring financial administrator with an instructional directive, other than an instructional health care directive, should be able to specify binding conditions or limitations on the exercise of power and non-binding instructions to guide decision making.

OUTCOMES-BASED INSTRUCTIONAL DIRECTIVES

167. People should be encouraged to write an instructional directive using outcomes-based terms. It should be possible to record personal values, ethics, religious and cultural beliefs, wishes and life goals. Any forms created should encourage this.
168. People should be encouraged to discuss their instructions, wishes and values with family, medical professionals and anyone they are appointing as an enduring personal guardian or enduring financial administrator. Any forms created should encourage these discussions.

CHAPTER 12—TRIBUNAL APPOINTMENTS OF SUBSTITUTE DECISION MAKERS

RETAINING TRIBUNAL APPOINTMENTS

169. New guardianship legislation should continue to provide for tribunal appointments of substitute decision makers.

CRITERIA FOR APPOINTMENT—DISABILITY AND INCAPACITY

170. Disability should no longer be a separate criterion for the appointment of a substitute decision maker.
171. New guardianship legislation should contain a definition of 'disability' that includes the definition in the current *Guardianship and Administration Act 1986* (Vic) and adds 'autism spectrum disorder'.
172. New guardianship legislation should provide that, before appointing a substitute decision maker, the tribunal must be satisfied that the person:
 - (a) has decision-making incapacity caused by that person's disability
 - (b) has decision-making incapacity in relation to the matters for which the appointment is sought.
173. New guardianship legislation should provide that the tribunal must apply the capacity assessment principles (discussed in Chapter 7) when determining whether a person has decision-making incapacity.

CRITERIA FOR NEED

174. New guardianship legislation should provide that the tribunal can appoint a personal guardian or a financial administrator only if it is satisfied that an appointment is needed.
175. New guardianship legislation should contain guidance about the circumstances in which a personal guardian or financial administrator may need to be appointed.

176. In determining the need for an appointment, the tribunal must be satisfied of one of the following:
- (a) There are decisions to be made now, or reasonably soon, and:
 - (i) those decisions would not be able to be made without a personal guardian or financial administrator being appointed, or
 - (ii) the personal and social wellbeing of the person can best be promoted by appointing a personal guardian or a financial administrator to make those decisions.
 - (b) There are ongoing decisions to be made in relation to the person's lifestyle or finances, and the personal and social wellbeing of the person can best be promoted by appointing a personal guardian or a financial administrator to make the decisions.
 - (c) The person's decision-making ability is so significantly impaired and enduring that they are unlikely at any time in the future to make their own decisions, even with significant support and:
 - (i) decisions are currently being made for the person by a decision maker who has been making those, or similar, decisions for a significant period of time and
 - (ii) there is broad consensus among carers and others with an interest in the person's wellbeing that the decision maker is, and is likely to continue to be, appropriate for the role and
 - (iii) the person, if able to communicate their wishes, would not object to the appointment being made.

SITUATIONS WHERE A TRIBUNAL APPOINTMENT IS INAPPROPRIATE

177. New guardianship legislation should direct the tribunal to only appoint a substitute decision maker for a person after it has considered and rejected all other reasonable means of providing that person with decision-making assistance, including whether:
- (a) the person could be supported to make the decision themselves through the appointment of a supporter
 - (b) the person could be assisted to make the decision with another person through the appointment of a co-decision maker
 - (c) other than when an appointment is being made under recommendation 176 (c) any decisions that need to be made now or in the foreseeable future are more suitably made by informal means
 - (d) the decisions that need to be made could reasonably be made through negotiation, mediation or similar means.

CONCURRENT ORDERS

178. New guardianship legislation should require the tribunal to consider the extent to which two or more proposed concurrent orders will be able to operate effectively together.

WHO SHOULD BE APPOINTED AS PERSONAL GUARDIAN OR FINANCIAL ADMINISTRATOR?

179. New guardianship legislation should include the matters set out in sections 23 and 47 of the *Guardianship and Administration Act 1986 (Vic)* as relevant considerations for the tribunal when determining whether a particular person is eligible for appointment as a substitute decision maker. The following matters should be added to the list of relevant considerations:
- (a) the desirability of preserving existing family relationships and other relationships of importance to the person

Recommendations

- (b) the desirability of preferring the appointment of someone who has an existing personal relationship with the person over a professional person or organisation that does not
- (c) the extent to which the proposed personal guardian or financial administrator will be available and able to meet and communicate with the represented person in order to make decisions that best promote their personal and social wellbeing.

POWERS OF SUBSTITUTE DECISION MAKERS

180. New guardianship legislation should permit the tribunal to appoint personal guardians and financial administrators with decision-making powers in relation to 'personal matters' and 'financial matters' as described in Chapter 10.

BROAD POWERS FOR FINANCIAL ADMINISTRATORS

181. New guardianship legislation should provide that a financial administrator may be given any of the powers currently set out in Divisions 3 and 3A of Part 5 of the *Guardianship and Administration Act 1986* (Vic) subject to the changes to those provisions proposed by the Commission.

PLENARY ORDERS

182. New guardianship legislation should not provide for the appointment of a plenary guardian.

FULL OR LIMITED POWERS

183. New guardianship legislation should include a non-exhaustive list of decision-making powers and restrictions on those powers that can and cannot be given to a personal guardian or a financial administrator. These powers and restrictions on powers are those set out in recommendations in Chapter 10.

EXCLUSIONS

184. When appointing a personal guardian or financial administrator, the tribunal should specify in the order which decision-making powers the personal guardian or financial administrator is to have along with any restrictions the tribunal imposes on those powers.
185. When appointing a personal guardian or financial administrator, the tribunal should seek to give the personal guardian or financial administrator only those powers that are necessary to promote the personal and social wellbeing of the represented person.

POWERS TO CEDE AUTHORITY TO THE REPRESENTED PERSON

186. New guardianship legislation should provide that a financial administrator has the power, unless otherwise ordered by the tribunal, to allow the represented person to exercise, either independently or with support, any of the powers vested in the financial administrator when this is consistent with the personal and social wellbeing of the represented person.
187. When allowing the represented person to exercise powers in this manner, the financial administrator must take steps that are reasonably necessary to facilitate the arrangement, including advising relevant third parties of the powers given to the represented person.

ACCESSING A REPRESENTED PERSON'S WILL

188. New guardianship legislation should provide the tribunal and a financial administrator with the powers set out in sections 54 and 58G of the *Guardianship and Administration Act 1986* (Vic) to open and read wills. The legislation should also provide that:
- (a) a financial administrator may apply to the tribunal to open and read a represented person's will that is not deposited with the financial administrator, and

- (b) the tribunal may order that the will be opened and read if it is satisfied that this is reasonable in the circumstances.

ANTI-ADEMPATION PROVISIONS

- 189. New guardianship legislation should clarify the anti-ademption provisions in section 53 of the *Guardianship and Administration Act 1986* (Vic) in order to:
 - (a) Permit a remedy from the estate to third parties for inequitable succession law consequences of the financial administrator's actions and should extend beyond bequests by will to intestacies and joint assets.
 - (b) Provide that relief should not be dependent on the knowledge or actions of the financial administrator, although the extent of the knowledge and consent of the represented person should be a relevant factor.

GIFTS

- 190. New guardianship legislation should allow a financial administrator to make a gift of a represented person's property in the circumstances set out in section 50A of the *Guardianship and Administration Act 1986* (Vic). If a financial administrator makes a gift of a represented person's property that exceeds an amount specified in the regulations to themselves or any relative or close friend of the financial administrator or to any organisation with which the financial administrator has a connection, that gift must be itemised in the financial administrator's annual report to the tribunal.

ACCESS TO PERSONAL INFORMATION BY SUBSTITUTE DECISION MAKERS

- 191. New guardianship legislation should provide that a substitute decision maker, whether appointed personally or by a tribunal, is entitled to access, collect or obtain from a public body, custodian, or organisation personal information about the represented person that is relevant to and necessary for carrying out their functions under the Act.
- 192. New guardianship legislation should authorise the disclosure of personal information about a represented person by the public body, custodian or organisation holding the information when it is satisfied that the person to whom the information is to be disclosed is a substitute decision maker for the person, and the information is relevant to and necessary for carrying out their functions under the Act.
- 193. New guardianship legislation should retain sections 58D and 58E of the *Guardianship and Administration Act 1986* (Vic) subject to one qualification. If a financial administrator wishes to deny a deceased represented person's personal guardian access to a document or other part of a file relating to the deceased represented person, the financial administrator must apply to the tribunal for an order that the document or other part of the file be withheld.
- 194. New guardianship legislation should provide that in the event of a dispute about the provision of personal information about a represented person to a substitute decision maker, any interested person may apply to the tribunal for a determination about whether information should be provided.

THE RELATIONSHIP BETWEEN PERSONAL GUARDIANS AND FINANCIAL ADMINISTRATORS

- 195. When both a personal guardian and a financial administrator have been appointed for a represented person, they should be obliged to consult with one another to the extent necessary to properly manage any overlap of their roles.
- 196. In the event of any disagreement between a personal guardian and a financial administrator:
 - (a) the parties should first seek to resolve the disagreement informally or through mediation

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- (b) either party may seek direction from the tribunal as to how the disagreement should be resolved
- (c) unless otherwise decided by the parties themselves, or otherwise directed by the tribunal:
 - (i) the decision of the personal guardian will prevail over the decision of the financial administrator to the extent of any inconsistency, and
 - (ii) the financial administrator must take such steps as are necessary to implement the personal guardian's decision unless, in doing so, the represented person's finances are likely to be seriously depleted, in which case the parties must seek direction from the tribunal about how the disagreement should be resolved, before a decision can be implemented.

SUCCESSION PLANNING

- 197. New guardianship legislation should permit a family member, carer or substitute decision maker for a person with ongoing impaired decision-making capacity to file a succession document with the tribunal that states their wishes about future decision-making arrangements for that person, including for when the family member, carer or substitute decision maker is no longer able to undertake their role.
- 198. The tribunal should be required to consider the wishes stated in a succession document when making any decisions or orders about the person's future decision-making arrangements.

CHAPTER 13—MEDICAL TREATMENT

A NEW PERSONAL APPOINTMENT FOR MEDICAL DECISION MAKING

- 199. New guardianship legislation should permit a person to appoint an enduring personal guardian to make decisions about health care matters for them when they do not have the capacity to make their own health care decisions, including the power to complete a refusal of treatment certificate in the manner in which this step can be taken by an agent appointed under the *Medical Treatment Act 1988* (Vic).
- 200. New guardianship legislation should integrate the provisions in the *Medical Treatment Act 1988* (Vic) concerning the appointment of an agent to make medical treatment decisions for a person who lacks capacity with the provisions in the new legislation concerning health decision-making powers that can be given to an enduring personal guardian.
- 201. If the provisions in the *Medical Treatment Act 1988* (Vic) concerning the appointment and powers of an agent are fully integrated with provisions in new guardianship legislation concerning the appointment and powers of an enduring personal guardian, the provisions of the *Medical Treatment Act* concerning the appointment of an agent should be repealed in so far as they apply to appointments made from the date of the commencement of new guardianship legislation.
- 202. It should be possible for the tribunal to appoint a personal guardian with the power to make decisions about health care matters for a person who does not have the capacity to make their own health care decisions.
- 203. It should be possible for a person who makes a refusal of treatment certificate for themselves in accordance with the provisions of the *Medical Treatment Act 1988* (Vic), or an enduring personal guardian with the power to make a refusal of treatment certificate for the principal, to file that certificate with the Registrar of Births, Deaths and Marriages for inclusion in the online register.

AUTOMATIC APPOINTMENT OF A HEALTH DECISION MAKER

204. New guardianship legislation should provide for the automatic (statutory) appointment of a substitute decision maker—to be known as a health decision maker—to make medical treatment decisions for a person who lacks the capacity to make their own decisions and who does not have an enduring personal guardian or a personal guardian with the power to make those decisions for them.

THE POWERS OF GUARDIANS AND HEALTH DECISION MAKERS

205. New guardianship legislation should clearly indicate that a personal guardian with the power to make health care or medical treatment decisions has the power to consent to or refuse any ‘medical treatment’, other than a ‘special procedure’, for the represented person when that person lacks the capacity to make their own decision about the matter.
206. A health decision maker should be permitted to consent or withhold consent to any ‘medical treatment’, other than a ‘special procedure’, for the represented person when that person lacks the capacity to make their own decision about the matter.
207. New guardianship legislation should contain a process similar to that set out in sections 42L, 42M and 42N of the *Guardianship and Administration Act 1986* (Vic), which permits a registered practitioner to proceed with treatment when consent has been withheld by the health decision maker after the health decision maker and the Public Advocate have been given a reasonable opportunity to seek a ruling from the tribunal about the proposed treatment.

HIERARCHY OF HEALTH DECISION MAKERS

208. The hierarchy of statutorily appointed health decision makers in new guardianship legislation should be:
- (a) the patient’s co-decision maker with authority in relation to medical treatment decisions
 - (b) the patient’s spouse or domestic partner
 - (c) the patient’s primary carer
 - (d) the patient’s nearest relative.

THE PUBLIC ADVOCATE AS DECISION MAKER OF LAST RESORT

209. The Public Advocate should be permitted to consent to or refuse any ‘medical treatment’, which is ‘significant treatment’, for a person who does not have the capacity to consent to that treatment and who does not have a personal guardian with the relevant powers, or a health decision maker, to act as the person’s substitute decision maker.

DEFINITION OF MEDICAL TREATMENT

210. New guardianship legislation should contain a definition of ‘medical treatment’ that is in similar terms to the definition of ‘medical or dental treatment’ in section 3 of the *Guardianship and Administration Act 1986* (Vic) except as follows:
- (a) The administration of pharmaceutical drugs for which a prescription is required should fall within the definition.
 - (b) Paramedical and allied health procedures which involve a touching of the person’s body and which are intrusive should fall within the definition.

SIGNIFICANT AND ROUTINE MEDICAL PROCEDURES

211. New guardianship legislation should define ‘significant treatment’ as a medical or dental procedure, other than an emergency procedure or a special procedure that:
- (a) involves a significant degree of bodily invasion, or

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- (b) involves a significant risk to the patient, or
- (c) is likely to have significantly negative or unpleasant side effects for the patient, or
- (d) is likely to result in significant distress for the patient, and
- (e) would ordinarily cause a medical practitioner to seek specific consent from a person with capacity before proceeding.

GUIDELINES TO BE DEVELOPED BY THE PUBLIC ADVOCATE

212. The Public Advocate should develop and publish guidelines in consultation with relevant professional bodies and other interested organisations to assist registered practitioners when determining whether a particular procedure is 'significant treatment'.

DEFINITION OF ROUTINE TREATMENT

213. New guardianship legislation should define 'routine treatment' as a medical or dental procedure that is not an 'emergency procedure', a 'significant procedure' or a 'special procedure'.

CONSENT TO A SIGNIFICANT MEDICAL TREATMENT

214. New guardianship legislation should provide that if a person is unable to consent to 'significant treatment', the registered practitioner may undertake that procedure only with the consent of:
- (a) a personal guardian with the power to make decisions about the matter, or if there is no such person or that person cannot be reasonably located
 - (b) a health decision maker, or if there is no such person or that person cannot be reasonably located
 - (c) the Public Advocate.

CONSENT TO A ROUTINE MEDICAL TREATMENT

215. New guardianship legislation should provide that if a person is unable to consent to a 'routine procedure', the registered practitioner may undertake that procedure:
- (a) with the consent of a personal guardian with the power to make decisions about the matter, or if there is no such person or that person cannot be reasonably located
 - (b) with the consent of a health decision maker, or if there is no such person or that person cannot be reasonably located
 - (c) in the absence of consent if the registered practitioner has taken reasonable steps to locate a personal guardian or a health decision maker and the registered practitioner believes the treatment will promote the personal and social wellbeing of the person concerned.
216. New guardianship legislation should require a registered practitioner who performs a 'routine procedure' upon a person in the absence of consent to make notes in that person's file of attempts made to locate any personal guardian or health decision maker.

ADDITIONAL CONSIDERATIONS FOR PERSONAL GUARDIANS AND HEALTH DECISION MAKERS

217. New guardianship legislation should contain a list of matters for personal guardians and health decision makers to consider when making medical treatment decisions for a represented person. Those considerations are:
- (a) any instructional directive prepared by the represented person
 - (b) whether the represented person is likely to be able to make a decision about the treatment themselves within a reasonable time, and the effect on the person's condition of waiting for the person to make the decision themselves

- (c) the extent to which the proposed treatment is likely to be of benefit to the person
- (d) the extent to which the proposed treatment is likely to cause distress to the person
- (e) alternative treatments available, and the extent to which these are likely to benefit the patient or to cause distress to the person
- (f) other likely risks associated with the proposed treatment, or any alternative treatments available, for the person.

EMERGENCY PROCEDURES

218. New guardianship legislation should continue to authorise a 'registered practitioner' to perform 'medical treatment' upon a person who does not have the capacity to consent to that treatment in emergencies. Section 42A of the *Guardianship and Administration Act 1986* (Vic) should be reproduced in new legislation.

SPECIAL PROCEDURES

219. New guardianship legislation should continue to require VCAT authorisation before a 'special procedure' can be performed upon a person who lacks the capacity to consent to that procedure.

CHAPTER 14—MEDICAL RESEARCH

MEDICAL RESEARCH THAT IS AN ADJUNCT TO MEDICAL TREATMENT

220. New guardianship legislation should clearly distinguish between a 'medical research procedure' that is an adjunct to 'medical treatment' and a 'medical research procedure' that is undertaken for the purposes of medical research and not primarily for the purpose of providing a medical intervention to treat a person's current condition.
221. When a 'medical research procedure' is carried out as an adjunct to 'medical treatment', the procedures dealing with substitute consent to 'medical treatment' should govern legal authorisation for the treatment and the requirements of the relevant ethics committee should govern ethical authorisation for the 'medical research procedure'.

NEW DEFINITIONS

222. New guardianship legislation should indicate that:
- (a) Research that is carried out as an adjunct to 'medical treatment' is not a 'medical research procedure' for the purposes of requiring authorisation when a person is unable to consent to that research.
 - (b) A procedure is not a 'medical research procedure' unless it is approved by an ethics committee.

SUBSTITUTED CONSENT FOR PARTICIPATION IN A MEDICAL RESEARCH PROCEDURE

223. It should be possible for a person to appoint an enduring personal guardian to make decisions about their participation in a 'medical research procedure' when they do not have the capacity to make their own decisions about participation.
224. It should be possible for the tribunal to appoint a personal guardian with the power to make decisions about participation in a 'medical research procedure' for a person who does not have the capacity to make their own decisions about participation.
225. New guardianship legislation should permit a health decision maker to make decisions about participation in a 'medical research procedure' for a person who lacks the capacity to make their own decisions and who does not have an enduring personal guardian or a personal guardian with the power to make those decisions for them.

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226. A personal guardian or an enduring personal guardian with 'medical research procedure' powers or a health decision maker should be permitted to authorise participation in a 'medical research procedure' for the principal when the principal lacks the capacity to make their own decision about the matter.
227. The Public Advocate should be permitted to authorise participation in a 'medical research procedure' which is a 'significant procedure' for a person who does not have the capacity to authorise their own participation and who does not have a personal guardian, an enduring personal guardian or a health decision maker to make that decision for them.
228. The 'procedural authorisation' process in the *Guardianship and Administration Act 1986* (Vic) should be reproduced in new guardianship legislation for the purpose of authorising participation in a 'medical research procedure' which is a 'routine procedure' for a person who does not have the capacity to authorise their own participation and who does not have a personal guardian, an enduring personal guardian or a health decision maker to make that decision for them.
229. The Public Advocate should develop and publish guidelines in consultation with relevant professional bodies and other interested organisations to assist registered practitioners when determining whether a particular medical research procedure is 'significant' or 'routine'.

RECOVERY WITHIN A REASONABLE PERIOD

230. Step 2 of the current four-step process for authorising the performance of a medical research procedure upon a person who is unable to make their own decisions about the matter should be reproduced in new guardianship legislation.

CRITERIA FOR CONSENTING TO A MEDICAL RESEARCH PROCEDURE

231. A substitute decision maker should only be permitted to authorise participation in a medical research procedure if they believe that it would not be contrary to the patient's personal and social wellbeing to participate in that procedure. When determining whether the procedure would not be contrary to the patient's personal and social wellbeing, the following are relevant considerations:
 - (a) the decision that the person might have made in the circumstances
 - (b) the extent to which the procedure is likely to benefit the patient, or a class of people to which the patient belongs
 - (c) the matters set out in section 42U(1) of the *Guardianship and Administration Act 1986* (Vic).

CHAPTER 15—RESTRICTIONS UPON LIBERTY IN RESIDENTIAL CARE

LEGAL PROCEDURES FOR DECISIONS INVOLVING RESTRICTIONS UPON LIBERTY

232. New guardianship legislation should permit a person with capacity to appoint an enduring personal guardian to make decisions for them about supported residential care that include authorising a restriction upon liberty in order to promote the health or safety of the person.
233. New guardianship legislation should permit the tribunal to appoint a personal guardian to make decisions about supported residential care, for a person who satisfies the criteria for the appointment of a personal guardian, that include authorising a restriction upon liberty in order to promote the health or safety of the person.

A NEW COLLABORATIVE AUTHORISATION PROCESS

234. New guardianship legislation should establish a collaborative mechanism for authorising restrictions upon the liberty of people who are living in supported residential care and who lack the capacity to consent to restrictive living arrangements that are used to promote their health or safety.

RELEVANT FACILITIES

235. New guardianship legislation should describe the residential facilities in which the collaborative mechanism for authorising restrictions upon liberty can be used.

IDENTIFYING A RESTRICTION UPON LIBERTY

236. New guardianship legislation should describe those restrictions upon liberty that can be authorised by use of the collaborative mechanism.
237. The Public Advocate should develop guidelines in consultation with appropriate professional groups that identify practices undertaken in supported residential facilities that are a restriction upon liberty and that should be authorised when imposed without consent.
238. Any person with a genuine interest in the personal and social wellbeing of a person living in a relevant facility should be permitted to apply to the tribunal for directions about whether a particular action is a restriction upon liberty that requires authorisation.

GUIDELINES FOR FACILITIES

239. New guardianship legislation should require relevant residential facilities to identify when a person is experiencing, or is likely to experience, a restriction upon liberty in their facility and take steps to seek authorisation for this restriction upon liberty.
240. New guardianship legislation should include a process to guide facilities that engage in practices that involve restrictions upon liberty:
- (a) Facilities should identify any restrictive practices that may be used for a particular individual and consider whether less restrictive options are available.
 - (b) Restrictive practices should not be used for the convenience of staff.
 - (c) Any restrictions used should be in place for the shortest possible time.
 - (d) Facilities should inform the health decision maker of any changes to accommodation arrangements that are likely to result in a restriction upon liberty or before using different restrictive practices.

A COLLABORATIVE AUTHORISATION PROCESS

241. The collaborative mechanism for authorising restrictions upon the liberty of people who are living in supported residential care and who lack the capacity to consent to restrictive living arrangements that are used to promote their health or safety should require the approval of three people, who are:
- (a) the person in charge of the residential facility
 - (b) a medical practitioner or other health practitioner approved by regulation
 - (c) the person's health decision maker.
242. If a person is eligible for more than one role they may only act in one of the decision-making roles.
243. A person is not eligible to act in the role of health decision maker or medical practitioner if they have a financial interest in the residential facility.

Recommendations

THE PERSON IN CHARGE OF THE RESIDENTIAL FACILITY

244. The person in charge of the residential facility should be responsible for identifying a proposed or current restriction upon liberty for someone living within the facility.
245. In these circumstances the person in charge of the residential facility should arrange for a medical practitioner (or other approved health practitioner) to assess the person's capacity and to consider whether the restriction upon liberty is necessary for the person's health or safety. The person in charge of the facility should provide the health decision maker with a report that:
- (a) identifies the circumstances in which the proposed restriction upon liberty is to be used
 - (b) identifies the duration of the proposed restriction upon liberty
 - (c) explains how the proposed restriction upon liberty is necessary for the health or safety of the person.

THE MEDICAL PRACTITIONER

246. The medical practitioner (or other approved health practitioner) should be required to undertake two assessments:
- (a) whether the person has the capacity to consent to the restriction upon their liberty
 - (b) whether the restriction upon liberty is necessary for the health or safety of the person.
247. When deciding if the restriction upon liberty is necessary for the health or safety of the person, the medical practitioner must determine whether:
- (a) the relevant restrictive practices that amount to a restriction of liberty are necessary to prevent harm to the person
 - (b) the restrictions are proportionate, reasonable and justified in the circumstances
 - (c) the benefits of the restrictions outweigh the risk of negative consequences to the person
 - (d) there are any less restrictive options available.

THE HEALTH DECISION MAKER

248. The health decision maker must agree to the proposed restriction upon liberty.
249. The hierarchy of health decision makers for restriction upon liberty decisions should be the same as the hierarchy for medical treatment decisions. If no-one is available to undertake this role, the Public Advocate should be the health decision maker in the collaborative authorisation process.
250. When deciding whether to agree to the proposed restriction upon liberty, the health decision maker should be required to consider the following matters:
- (a) the assessments by the medical practitioner
 - (b) whether the restriction upon liberty is necessary for the health or safety of the person
 - (c) whether there are any less restrictive options available.

APPLICATIONS TO THE TRIBUNAL

251. The collaborative mechanism for authorising restrictions upon the liberty of people who are living in supported residential care should not be used in circumstances where the person concerned consistently resists and opposes restrictions upon their liberty.

252. If the collaborative authorisation process has been used to authorise restrictions upon the liberty of a person, the three people who participated in the authorisation process should be obliged to refer the matter to the tribunal if they become aware that the person concerned is consistently resisting and opposing restrictions upon their liberty.
253. A person living in supported residential care in circumstances where they are experiencing restrictions upon their liberty or any person with an interest in their wellbeing should be permitted to apply to the tribunal for consideration of these circumstances or inform the Public Advocate of their concerns and request that she investigate the matter.

DURATION OF AUTHORISATIONS

254. Any authorisation of restrictions upon the liberty of people who are living in supported residential care made by use of the collaborative mechanism should not operate for more than 12 months in the first instance.
255. The continuing need for those restrictions should be reviewed within the 12-month period if the three people involved in the process believe that the authorisation should be extended.
256. Any review of the authorisation should follow the same process as the initial authorisation.
257. It should be possible to renew any authorisation for a period of up to five years.
258. The Public Advocate should issue guidelines to assist people involved in the collaborative authorisation process to determine the appropriate period for any authorisation of a restriction upon liberty.

CHAPTER 16—A NEW REGISTRATION SCHEME

ESTABLISHMENT OF THE REGISTER

259. New guardianship legislation should establish an online register for the following appointments and directives:
- (a) enduring personal guardians
 - (b) enduring financial administrators
 - (c) supporters for personal matters
 - (d) supporters for financial matters
 - (e) personal guardians appointed by VCAT
 - (f) financial administrators appointed by VCAT
 - (g) co-decision makers appointed by VCAT
 - (h) instructional health directives and other instructional or advance directives
 - (i) personal appointments and VCAT appointments made under earlier laws.
260. The online registration scheme should be user-friendly, cheap and easy to access, and publicly subsidised. It should aim to be the model for a similar scheme in every Australian state and territory.

COMPULSORY REGISTRATION OF PERSONAL APPOINTMENTS

261. It should be compulsory to register the personal appointments referred to in Recommendation 259. VCAT should be required to inform the holder of the register of all relevant appointments that it makes under new guardianship laws. It should not be compulsory to register an instructional or advance directive but it should be permissible to do so.

Recommendations

EFFECT OF ACTIONS TAKEN UNDER AN UNREGISTERED APPOINTMENT

262. Any act performed under a personal appointment should have no legal effect unless the document is registered. VCAT should be permitted to order that legal effect be given to any action taken by a person acting on the reasonable belief that an appointment had been validly made and registered.

THE HOLDER OF THE REGISTER

263. The Registrar of Births, Deaths and Marriages should be responsible for maintaining the Register of Appointments and Directives.

REGISTRATION TIME LIMITS

264. A document appointing a person as an enduring personal guardian, as an enduring financial administrator, or as a supporter for personal or financial matters must be registered within 90 days of being made in order to be valid unless VCAT determines that there are exceptional circumstances that justify registration beyond this time limit.

UNREGISTERED APPOINTMENTS

265. When a personal appointment is not registered within 90 days of being made, or when a document presented for registration is not registered because it was not made in accordance with the relevant statutory requirements and the principal no longer has the capacity to make the appointment in question, VCAT may:
- (a) order that the document be registered if it believes that the document is a proper record of the wishes of a principal with capacity at the time it was made
 - (b) make any other order under guardianship legislation which it believes would give effect to the wishes of the principal.

CHECKING THE VALIDITY OF DOCUMENTS

266. The Registrar of Births, Deaths and Marriages must determine whether any personal appointment appears to have been validly made in accordance with the relevant statutory requirements before accepting it for registration. The Registrar may return the document for correction or may refuse to register it if it does not appear to have been validly made. It should be possible for any interested person to seek review in VCAT of the merits of any decision by the Registrar to refuse to accept a document for registration in the register.

PROCEDURES AT THE TIME OF REGISTRATION

267. Upon accepting a personal appointment for registration the Registrar of Births, Deaths and Marriages must:
- (a) include the appointment in the online register
 - (b) give the principal a registration certificate that contains the names of the relevant parties and the nature of the appointment
 - (c) give the principal a password or PIN which enables the principal to view the appointment in the online register
 - (d) give the representative a password or PIN which enables the representative to view the appointment in the online register.

FEES

268. There should be no fee for registering a personal appointment. There should be a fee payable, subject to waiver, when a person seeks to register more than one personal appointment in any category during a calendar year.

REVOCAION BY THE PRINCIPAL

269. A principal (with capacity) may revoke or vary a personal appointment at any time by filing an appropriate notice with the Registrar. A personal appointment is revoked from the date and time at which the Registrar includes a note on the register that the appointment has been revoked.

RESIGNATION AND REVOCAION BY THE REPRESENTATIVE

270. A representative may resign and thereby revoke a personal appointment at any time when the principal has capacity by filing a notice of resignation with the Registrar. A personal appointment is revoked from the date and time at which the Registrar includes a note on the register that the appointment has been revoked.

COMMENCEMENT UPON INCAPACITY OF THE PRINCIPAL

271. If the powers of a representative commence when the principal lacks capacity to make decisions, the representative must advise the Registrar when they reasonably believe that the principal lacks capacity to make decisions and the representative proposes to commence using their powers. It should be possible for the representative to make this notification online in order to respond to situations in which quick notice is required.
272. The Registrar must include a note on the register when advised that a representative has commenced using their powers and notify the principal that the appointment has been activated.

EFFECT OF REGISTRATION

273. A registered personal appointment is presumptive evidence that the principal referred to in the document has appointed the person referred to in the document as their representative with authority to exercise the powers in relation to their personal or financial affairs in the circumstances described in the document. A registered personal appointment operates according to its terms and is effective until it is revoked by the principal, by order of VCAT, by an occurrence referred to in the document, by resignation of the representative, or by the death of the principal.

GUIDANCE ABOUT POWERS

274. A person holding a personal appointment or any other person with an interest in the affairs of the principal may apply to VCAT for directions about the extent of that person's powers or about how those powers should be exercised.

ACCESS TO THE REGISTER

275. Only authorised people and organisations should have access to the register. It should be possible for people authorised to access the register to view online those parts of the register they are permitted to view at any time. Only the Registrar of Births, Deaths and Marriages and the Public Advocate should be authorised to have access to the entire register.

ACCESS TO THE REGISTER BY THE PRINCIPAL AND THE REPRESENTATIVE

276. The principal and their representative should be able to view at any time that part of the register that concerns the principal's appointment of the representative and both should be permitted to allow any third person to view and download that part of the register.

PUBLIC ADVOCATE TO AUTHORISE REGULAR USERS

277. The Public Advocate should be permitted to authorise people and organisations that satisfy her that they will be regular, appropriate and responsible users of the register to have online access to those parts of the register that the Public Advocate believes they should be entitled to view and download.

Recommendations

ANNUAL LICENCE AND ACCESS FEE

278. Regular users should receive an annual renewable licence to view designated parts of the register and they should pay an annual licence fee.

ACCESS TO THE REGISTER BY REGULAR USERS

279. Licensed regular users should have access to those parts of the register and to a level of detail concerning particular personal appointments that the Public Advocate considers they have a legitimate interest in viewing. The register should operate in such a way that it generates an electronic record whenever licensed regular users access any part of the register. It should be an offence for a licensed regular user to access any part of the register that they do not have a legitimate interest in viewing.

PUBLIC ADVOCATE TO AUTHORISE OTHER USERS

280. The Public Advocate may grant any person authority to view any part of the register if the Public Advocate is satisfied that the person has a legitimate interest in viewing that part of the register. There should be a fee to view the register in these circumstances.

TRANSITIONAL ARRANGEMENTS—EARLIER APPOINTMENTS

281. Personal appointments made prior to the introduction of the new guardianship legislation should continue to operate according to their terms.
282. Existing personal appointments should be deemed to include a power that they be registered on the new register.
283. Existing personal appointments must be registered within five years of the commencement date of new guardianship legislation in order to be valid.

CHAPTER 17—RESPONSIBILITIES OF SUBSTITUTE DECISION MAKERS

DECISION-MAKING PRINCIPLES

284. New guardianship legislation should require substitute decision makers to exercise their powers in a manner that promotes the personal and social wellbeing of the represented person.
285. Substitute decision makers promote the personal and social wellbeing of the person when, as far as possible, they:
- (a) have paramount regard to making the judgments and decisions that the person would make themselves after due consideration if able to do so
 - (b) act in consultation with the person, giving effect to their wishes
 - (c) support the person to make or participate in decisions
 - (d) act as an advocate for the person, and promote and protect their rights and dignity
 - (e) encourage the person to be independent and self-reliant
 - (f) encourage the person to participate in the life of the community
 - (g) respect the person's supportive relationships, friendships and connections with others
 - (h) recognise and take into account the person's cultural and linguistic circumstances
 - (i) protect the person from abuse, neglect and exploitation.

ADDITIONAL GUIDANCE FOR SUBSTITUTE DECISION MAKERS

286. In determining the judgments and decisions a represented person would make after due consideration, substitute decision makers should be guided by:
- (a) the wishes and preferences the person expresses at the time a decision needs to be made, in whatever form the person expresses them

- (b) any wishes the person has previously expressed, in whatever form the person has expressed them
- (c) any considerations the person was unaware of when expressing their wishes which are likely to have significantly affected those wishes
- (d) any circumstances that have changed since the person expressed their wishes which would be likely to significantly affect those wishes
- (e) the history of the person, including their views, beliefs, values and goals in life.

ADDITIONAL FINANCIAL DECISION-MAKING PRINCIPLES: PRUDENT PERSON PRINCIPLE

287. Where exercising the power of investment, financial administrators must, to the extent that it promotes the personal and social wellbeing of the represented person:
- (a) exercise the care, skill and diligence that a reasonably prudent person would exercise in managing financial matters
 - (b) in the case of a person who is a professional financial administrator, exercise the skill and diligence that a reasonably prudent professional financial manager would exercise in a similar situation.

OTHER RESPONSIBILITIES OF SUBSTITUTE DECISION MAKERS

288. New guardianship legislation should provide that substitute decision makers must:
- (a) not exceed the powers granted under the appointment or under the statute
 - (b) act honestly, diligently and in good faith
 - (c) identify and respond to situations where the substitute decision maker's interests conflict with those of the represented person, ensure the represented person's interests are always the paramount consideration, and seek external advice where necessary
 - (d) communicate with the represented person throughout the decision-making process and explain, as far as possible, decisions being made on their behalf
 - (e) treat the person and important people in their life with dignity and respect.

RESPONSIBILITIES OF SUBSTITUTE DECISION MAKERS TO KEEP PERSONAL INFORMATION CONFIDENTIAL

289. New guardianship legislation should provide that a substitute decision maker should only collect personal information that is relevant to and necessary for carrying out their role under the Act.
290. A substitute decision maker should have an obligation not to disclose any personal information obtained in connection with the administration or execution of the Act unless the disclosure is made:
- (a) for a purpose that is relevant to and necessary for carrying out their role under the Act
 - (b) for the purposes of legal proceedings arising out of the Act or of any report of such proceedings, or
 - (c) with other lawful excuse.

It should be an offence to breach this obligation.

291. Section 17 of the *State Trustees (State Owned Company) Act 1994 (Vic)* should be repealed if new guardianship legislation contains a provision that implements recommendation 290.

ADDITIONAL FINANCIAL RESPONSIBILITIES

292. Financial administrators should also be required to:

Recommendations

- (a) keep appropriate records or accounts of dealings, transactions and investments
- (b) keep the person's property separate from that of the financial guardian's, except where jointly owned.

CHAPTER 18—ACCOUNTABILITY

ENHANCED TRAINING AND EDUCATION

- 293. New guardianship legislation should permit VCAT to appoint a person as a personal guardian or a financial administrator subject to the condition that the person undertakes a designated training program.
- 294. The Public Advocate and State Trustees should be funded to provide the community with information about the operation of new guardianship legislation.

UNDERTAKINGS BY SUBSTITUTE DECISION MAKERS

- 295. New guardianship legislation should require all substitute decision makers to undertake in writing to act in accordance with their responsibilities and duties.
- 296. Tribunal-appointed substitute decision makers should be required to sign the undertaking at the time of their appointment. Personally appointed substitute decision makers should be required to sign the undertaking at the time of invoking their powers.

REPORTS BY FINANCIAL ADMINISTRATORS

- 297. New guardianship legislation should provide that financial administrators are obliged to lodge annual financial reports with VCAT for examination, unless VCAT decides to exempt the financial administrator from this requirement.
- 298. VCAT should have a discretionary power to determine the manner in which any financial report is made, with the size of the estate and the relationship between the parties being relevant considerations.
- 299. VCAT should have the power to direct a more limited form of reporting when the financial administrator is responsible for managing a small estate. In these circumstances, it should be possible for VCAT to direct that the financial administrator file a 'short form' statement, which should include:
 - (a) a declaration that expenditure has been solely for the benefit of the represented person
 - (b) details of any gifts made by the represented person to others
 - (c) details of any individual expenditure of more than a specified amount
 - (d) details of any major changes in the represented person's income or expenditure
 - (e) details of any major changes in the represented person's assets or liabilities.
- 300. No fee should be payable for examination of a 'short form' statement.
- 301. New guardianship legislation should contain guidance about determining whether an estate is a small estate.
- 302. VCAT should have a discretionary power to direct a financial administrator to lodge accounts for examination or audit at any time.

VCAT'S POWER TO ORDER REPAYMENT OF MISUSED FUNDS

- 303. New guardianship legislation should provide that VCAT have jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties. VCAT should have the power to order any remedy that the Supreme Court could order in these proceedings.

304. VCAT should be permitted to transfer any cases of this nature to the Supreme Court or the County Court if it considers that one of these courts is a more appropriate venue for the proceedings.

CIVIL PENALTIES FOR A NEW PUBLIC WRONG

305. New guardianship legislation should provide that it is unlawful for a person with responsibility to care for a person with impaired decision-making ability because of a disability to abuse, neglect or exploit that person.
306. A person who is found to have committed this wrong should be liable to a civil penalty.
307. The Attorney-General should determine the level of civil penalties for this wrong after consulting with the Sentencing Advisory Council.
308. The legislation should contain non-exhaustive descriptions of the prohibited conduct.
309. The term 'abuse' could be defined to mean any intentional conduct involving injury to or maltreatment of a person with impaired decision-making ability and can include:
- (a) physical abuse, such as causing physical harm to the person
 - (b) sexual abuse, such as engaging in sexual activity with the person without their valid consent
 - (c) financial abuse, such as taking the person's money without their valid consent.
310. The term 'neglect' could be defined to mean any intentional or negligent conduct that amounts to failure to perform duties owed to the person and can include:
- (a) physical neglect, such as not providing the person with adequate food or attention to physical needs
 - (b) financial or property neglect, such as not taking adequate care of the person's finances or property.
311. The term 'exploitation' could be defined to mean taking advantage of the person for one's own benefit or gain, and can include:
- (a) financial exploitation, such as the use of another person's finances principally for one's own benefit
 - (b) sexual exploitation, such as allowing a person, or images of a person, to be used in a sexual manner for one's own financial gain or benefit.
312. There should be a new statutory officer with responsibility for initiating and conducting civil penalty proceedings for this new public wrong.
313. Proceedings for this new public wrong should ordinarily be conducted in the Magistrates' Court of Victoria.
314. The Public Advocate, the Chief Commissioner of Police and the new statutory officer should develop protocols dealing with their overlapping responsibilities and means of working together in those instances where it is alleged that a person with responsibility to care for a person with impaired decision-making ability because of a disability has abused, neglected or exploited that person.

CHAPTER 19—MERITS REVIEW

A RIGHT TO MERITS REVIEW

315. It should be possible to apply to VCAT for review of a decision of the Public Advocate when acting as the personal guardian or health decision maker of a person.

Recommendations

316. It should be possible to apply to VCAT for review of a decision of State Trustees, or any other person or organisation receiving remuneration for this role, when acting as the financial administrator of a person.
317. A 'decision' is reviewable if it is one made in connection with the powers and responsibilities of the Public Advocate, State Trustees or any other person or organisation receiving remuneration for this role pursuant to new guardianship legislation and the decision is final or operative and determinative of a matter requiring resolution by the substitute decision maker.

STANDING TO SEEK REVIEW

318. Standing to seek merits review of any relevant decision made by the Public Advocate or State Trustees or any other professional financial administrator should be available to the represented person and to any other person who satisfies VCAT that they have a special interest in the affairs of the represented person.

OUTCOME OF MERITS REVIEW

319. When reviewing a relevant decision of the Public Advocate, State Trustees and any other financial administrator whose decisions are subject to merits review, VCAT must decide what is the correct or preferable decision in the circumstances having regard to the material then before it and after applying the law that is applicable at the time of this decision. VCAT must seek to consider the impact that any decision may have on the legal rights or financial interests of third parties when determining the correct or preferable decision in the circumstances of the case before it.

INTERNAL REVIEW SHOULD BE REQUIRED FIRST

320. Where a person seeks merits review of a relevant decision by the Public Advocate or State Trustees, that person should be required to seek internal review of that decision before making an application to VCAT for review of the matter, unless VCAT decides that an urgent review is necessary to protect the represented person's interests.

PROCEDURAL MATTERS

321. When reviewing a relevant decision of the Public Advocate, State Trustees or any other financial administrator whose decisions are subject to merits review, the tribunal should have the powers set out in sections 45–50 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).
322. When reviewing a relevant decision of the Public Advocate, State Trustees or any other financial administrator whose decisions are subject to merits review, the tribunal should have the powers set out in section 51 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

CHAPTER 20—THE PUBLIC ADVOCATE

THE PUBLIC ADVOCATE'S INDEPENDENCE

323. The Public Advocate should continue to exist as an independent statutory official with a broad charter to promote the rights and interests of all Victorians with a disability, especially those people with impaired decision-making ability due to a disability.
324. New guardianship legislation should contain provisions designed to secure the independence of the Public Advocate based on the provisions in schedule 3 of the *Guardianship and Administration Act 1986* (Vic).

SUBSTITUTE DECISION MAKING

325. The Public Advocate should continue to act as the personal guardian of last resort under new guardianship legislation.

326. The Public Advocate should continue to have responsibility for recruiting, training and supporting volunteer personal guardians and volunteer financial administrators, and for training and supporting private personal guardians and private financial administrators appointed by VCAT.
327. New guardianship legislation should provide that the Public Advocate is the substitute decision maker of last resort for a significant medical treatment or medical research procedure when a person is unable to make their own decision about the matter and there is no personal guardian or health decision maker available to make the decision.

COMPLAINTS FUNCTION

328. Under new guardianship legislation, the Public Advocate should have the function of receiving and investigating complaints in relation to:
- (a) the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability
 - (b) the misuse of powers by private individuals or organisations appointed to substitute decision-making, co-decision-making and supporter roles.
329. New guardianship legislation should provide where the Public Advocate believes that an investigation is warranted she should be able to conduct an investigation on her own motion in relation to:
- (a) the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability
 - (b) the misuse of powers by private individuals or organisations appointed to substitute decision-making, co-decision-making and supporter roles.

EXPANDED INVESTIGATION POWERS

330. The Public Advocate should be able to exercise the following powers when conducting an investigation:
- (a) serve a written notice on a person requiring them to give the Public Advocate specified documents or other materials relevant to an investigation being undertaken by the Public Advocate
 - (b) serve a written notice on a person requiring them to give written answers to questions
 - (c) require a person to attend a conference for the purposes of seeking to resolve a matter being investigated by the Public Advocate
 - (d) access the proposed online register as necessary.
331. Under new guardianship legislation, it should be an offence for a person to refuse or fail to provide information, or to attend a conference or interview, when directed by the Public Advocate to do so.
332. The Public Advocate's powers of entry and inspection under section 18A of the *Guardianship and Administration Act 1986* (Vic) should be retained in new guardianship legislation.
333. The Public Advocate should be permitted to apply to VCAT or to the Magistrates' Court of Victoria for a warrant authorising entry to any premises when she believes that a person with impaired decision-making ability due to a disability who is on the premises is being abused, exploited or neglected.
334. VCAT or the Magistrates' Court of Victoria should be permitted to issue a warrant authorising entry to any premises in these circumstances if they are satisfied that it is appropriate to do so.

Recommendations

CONFIDENTIALITY

335. New guardianship legislation should contain provisions that prohibit disclosure of confidential information obtained by the Public Advocate and her staff in the course of performing their roles, other than when it is necessary for them to do so to perform their functions and duties.

SUPPORTING CIVIL PENALTIES

336. New guardianship legislation should permit the Public Advocate to give the new statutory officer a report concerning any investigations she conducts and allow the new statutory officer to have access to any evidence gathered during the Public Advocate's investigations if she believes the new statutory officer should consider initiating civil penalty proceedings against an alleged wrongdoer.
337. New guardianship legislation should permit the Public Advocate to give the Chief Commissioner of Police a report concerning any investigations she conducts and allow the Chief Commissioner to have access to any evidence gathered during the Public Advocate's investigations if she believes that the Chief Commissioner should consider initiating criminal proceedings against an alleged wrongdoer.

ADVOCACY

338. New guardianship legislation should provide that the Public Advocate has the function and power to advocate for the rights and interests of all Victorians with a disability, especially those people with impaired decision-making ability due to a disability. The Public Advocate should also have the power to engage in both individual and systemic advocacy.
339. The Public Advocate should be guided by the principles in new guardianship legislation when performing her advocacy functions.

INTERVENTION IN COURT PROCEEDINGS

340. To avoid doubt, new guardianship legislation should provide that the Public Advocate's advocacy powers include seeking leave in any court or tribunal proceedings when the rights and interests of a person with a disability are in question.

COMMUNITY EDUCATION

341. The Public Advocate should have primary responsibility for educating the Victorian community about guardianship laws.

REPORTING TO PARLIAMENT

342. New guardianship legislation should require the Public Advocate to report to the Minister annually on the performance of her functions during the year.
343. The Minister must table this report in both Houses of Parliament.

SKILLS AND RESOURCES

344. The Public Advocate should receive additional resources to carry out the proposed new functions.

DELEGATION OF THE PUBLIC ADVOCATE'S POWERS

345. New guardianship legislation should give the Public Advocate the power to delegate any of her statutory functions, powers and duties (other than her power of delegation) and any of her powers and duties as a personal guardian to any member of her staff.
346. The Public Advocate should also have the power to delegate any of her powers and duties as an enduring personal guardian to any member of her staff when she accepts an appointment as an enduring guardian in her capacity as the Public Advocate.

CHAPTER 21—VCAT

VCAT'S JURISDICTION

347. VCAT should continue to have exclusive jurisdiction in relation to the following matters:
- (a) hearing applications for the appointment of a personal guardian and a financial administrator
 - (b) reassessing personal guardianship orders and financial administration orders
 - (c) providing advice, either upon request or on its own motion in the course of any proceeding, to personal guardians and financial administrators and enduring appointees and health decision makers about how they should exercise their powers
 - (d) revoking personal appointments of substitute decision makers
 - (e) deciding whether to consent to a 'special procedure' in relation to medical treatment.

VCAT PRE-HEARING PROCESSES

348. VCAT's role in the preparation of Guardianship List matters should be expanded to ensure that in all cases:
- (a) matters are properly prioritised, and urgent matters are dealt with as quickly as possible
 - (b) the appropriate mechanism for dealing with the matter is chosen
 - (c) the person who is the subject of the application is able to participate in the hearing process to the extent that they are able and wish to do so, and has access to independent advocacy where needed
 - (d) all parties are adequately informed of the nature and possible outcomes of VCAT hearings
 - (e) VCAT has adequate information upon which to base its decisions.

NOTIFICATION OF VCAT PROCEEDINGS

349. New guardianship legislation should provide that any person applying for a personal guardianship or financial administration order should be required to provide VCAT with details of any other people with a direct interest in the outcome of the application, such as family members and primary carers.
350. VCAT should make a preliminary determination of potential parties to the proceeding and people entitled to notice based on information provided in the application and provide notice of the application, to these people.
351. Notification to the parties should include:
- (a) the application and copies of any information filed in support unless disclosure of this information is or might be resisted on grounds of confidentiality
 - (b) a list of the other parties and people entitled to notice
 - (c) the hearing date
 - (d) their relevant rights.
352. Notification to people entitled to notice should include:
- (a) the application
 - (b) a list of the other parties and people entitled to notice
 - (c) the hearing date
 - (d) their rights, including the procedure for applying to VCAT to be made a party in the proceedings.

Recommendations

PARTIES TO PROCEEDINGS

353. Under new guardianship legislation, the following people should be parties to any proceeding before VCAT concerning an application to make or review an order:
- (a) the applicant or the person who requested the review
 - (b) the proposed or current represented person
 - (c) the proposed or current substitute decision maker
 - (d) the proposed or current co-decision maker or supporter, to the extent that their role is relevant to the proceeding
 - (e) any other person who VCAT considers should be a party to the proceeding
 - (f) any other person who VCAT considers has a sufficient interest in the matter.

PEOPLE ENTITLED TO NOTICE

354. The following people are entitled to notice of the date upon which an application or review will be heard:
- (a) all parties in the proceeding
 - (b) the domestic partner of the proposed represented person, if in a close and continuing relationship
 - (c) the primary carer of the proposed represented person
 - (d) the nearest relative (other than the applicant, or the proposed substitute decision maker) if known
 - (e) a co-decision maker or supporter if not a party
 - (f) the Public Advocate.

INFORMING PARTIES ABOUT THE HEARING

355. VCAT should have primary responsibility for notifying all parties of the application and the hearing date, including taking steps to ensure that the parties understand what the hearing is about, and what to expect on the day of the hearing, with a particular emphasis on ensuring that the proposed represented person is made aware of:
- (a) the scheduled time and place of the hearing
 - (b) what the hearing involves
 - (c) their rights in relation to that hearing, including their right to actively participate
 - (d) the potential outcomes of the hearing
 - (e) their options in relation to obtaining independent advice and advocacy.
356. VCAT should also seek to maximise opportunities for the proposed represented person's participation in the hearing to the extent they are able to and wish to do so.

GATHERING INFORMATION ABOUT THE APPLICATION

357. VCAT should ensure that adequate information is available to members to conduct a hearing, including relevant medical or other opinion in relation to the person's capacity and personal or financial circumstances.
358. Where the application appears to involve particularly complex matters, VCAT should refer the application to the Public Advocate for investigation.

TRIAGING

359. When processing an application, VCAT should seek to identify matters that:
- (a) are urgent, and in need of a hearing immediately

- (b) are relatively clear and unproblematic, and can proceed quickly to hearing with little or no further preparation by VCAT
- (c) are more complex and require further preparatory work to be undertaken by VCAT before proceeding to hearing
- (d) are more complex and need to be referred to the Public Advocate for independent investigation
- (e) involve conflict that might be resolvable if the matter was diverted to appropriate dispute resolution processes
- (f) would be more appropriately dealt with by consent at a planning conference.

DISPUTES IN RELATION TO SERVICES

360. VCAT should develop protocols with the Disability Services Commissioner to allow applications involving disputes about the provision of disability services to be diverted to the Disability Services Commissioner complaints processes, with the consent of the parties.

PLANNING CONFERENCES

361. New guardianship legislation should provide for an appropriate member of VCAT staff to convene a planning conference in relation to any application to VCAT for the appointment of a decision-making supporter, a co-decision maker, a personal guardian or a financial administrator.
362. A planning conference may be convened by VCAT on its own motion or at the request of the applicant or other interested person at any time prior to making orders disposing of an application.
363. The aim of a planning conference should be to ascertain whether it is possible to reach a consensus among all interested people about an outcome to the application that would best promote the personal and social wellbeing of the proposed represented person.
364. The planning conference should be attended by the proposed represented person and close family members, carers, friends or advocates who have a genuine interest in the represented person's personal and social wellbeing.
365. The planning conference should be held at a place and conducted in a manner that will enable the parties, particularly the proposed represented person, to participate and identify the outcome that will best promote the personal and social wellbeing of the proposed represented person.
366. The person who convenes should prepare a report for VCAT that identifies the major issues involved in the application and the consensus view (if any) that was reached regarding the preferred outcome of the application.
367. Upon receipt of the report, VCAT may:
 - (a) make the orders sought by the people present at the planning conference, or
 - (b) proceed to determine the application following a hearing.

LOCATION OF HEARINGS

368. VCAT should continue to conduct Guardianship List hearings in appropriate settings other than courtrooms wherever possible.

DATE OF HEARING

369. New guardianship legislation should continue to require VCAT to commence hearing a guardianship or an administration application within 30 days after the application is received at the tribunal, unless VCAT refers the application to a planning conference, mediation or some other mechanism for seeking an agreed outcome.

Recommendations

PARTICIPATION IN HEARINGS

370. New guardianship legislation should provide that all initial applications in Guardianship List matters should be conducted in the presence of the proposed represented person unless VCAT is satisfied that the represented person does not wish to attend or that there is some other justifiable reason for the hearing to proceed in their absence.
371. VCAT should make reasonable arrangements to ensure that a proposed represented person who is unable to be physically present at the place where the hearing is held is able to be present through other means such as video link or telephone.

REPRESENTATION AT HEARINGS

372. Section 62 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* should be amended to provide that a represented person or a proposed represented person and any other party in a Guardianship List matter has a right to representation by a legal practitioner in those proceedings and may be represented by any other professional advocate with the leave of VCAT.
373. New guardianship legislation should require VCAT to provide the subject of a Guardianship List application with information about the availability of representation.

POWER TO APPOINT A LEGAL REPRESENTATIVE

374. VCAT should seek to enter into arrangements with Victoria Legal Aid, community legal centres, the Law Institute of Victoria, the Victorian Bar Association, and providers of pro bono legal services to enable a representative to be appointed for a person under section 62(6) of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* when required.

ENFORCEMENT OF ORDERS

375. A supporter, co-decision maker or substitute decision maker may apply to VCAT for an enforcement order against a third party who refuses to recognise or implement a valid decision made by the applicant about the personal or financial affairs of the represented person.
376. The third party should be given notice of the application for an enforcement order and an opportunity to be heard before any order is made.
377. VCAT should consider directing the use of alternative dispute mechanisms, such as mediation, before listing an application of this nature for hearing.
378. VCAT should make an enforcement order only if it is satisfied that the order would promote the personal and social wellbeing of the represented person.
379. VCAT should not be permitted to make an order enforcing a decision that the represented or supported person would not have the power to enforce.

MULTI-MEMBER PANELS

380. The President of VCAT should retain a discretionary power in relation to the composition of the tribunal for Guardianship List hearings. However, VCAT should consider making greater use of multi-member panels for more complex matters where a range of expertise would be beneficial.

MEMBER TRAINING

381. VCAT Guardianship List members should have specialised knowledge of issues associated with impaired decision-making ability and, whenever possible, members with experience and expertise in relevant disability-related issues should conduct hearings. VCAT Guardianship List member training programs should consider a broad range of disability issues.

REVIEW OF ORDERS

382. New guardianship legislation should require VCAT to review all ongoing personal guardianship and financial administration orders at regular intervals determined by VCAT, which should ordinarily be not less than annually for personal guardianship orders and not less than every three years for financial administration orders.
383. The decision to conduct a review hearing should not be dependent on the represented person or other interested people requesting a review hearing from VCAT.
384. VCAT should assess the most appropriate means for conducting each review by attempting to contact the represented person and by considering whether:
 - (a) a full review hearing is necessary
 - (b) the matter can be dealt with by a telephone hearing
 - (c) the matter can be dealt with 'on the papers' based on the information available to VCAT.
385. VCAT should also inform those people who were parties to the original application about the pending review and consider their responses when determining the most appropriate means for conducting the review.
386. When the represented person is unable to express a preference about the format of the review, VCAT should only deal with matters 'on the papers' where it is satisfied that a hearing is unnecessary.

APPLICATIONS FOR UNSCHEDULED REVIEWS

387. A represented person should be permitted to seek review of an order made by the Guardianship List at any time.
388. A person with an interest in the affairs of a represented person should be permitted to seek review of an order made by the Guardianship List at any time with the leave of VCAT.
389. Where an application for an unscheduled review by a represented person is refused because VCAT concludes that there is insufficient evidence upon which to review the order, VCAT should advise the represented person of organisations that might assist them to gather additional evidence.

APPEALS

390. The Attorney-General and the President of VCAT should consider the merits of establishing an internal appeals division within VCAT to hear appeals from Guardianship List matters.
391. If an appeals division of VCAT is established, it should be possible to appeal from an order of the Guardianship List as of right on a question of law and with leave when challenging the merits of the order.
392. If an appeals division of VCAT is established, new guardianship legislation should not reproduce the existing provisions in the *Guardianship and Administration Act 1986* (Vic) concerning rehearings.
393. If an appeals division of VCAT is not established, new guardianship legislation should reproduce the existing provisions in the *Guardianship and Administration Act 1986* (Vic) concerning rehearings.
394. It should continue to be possible to appeal to the Supreme Court from orders made in the Guardianship List on questions of law.

ACCESS TO DOCUMENTS IN VCAT FILES

395. Section 146(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should be amended to provide that it does not apply to Guardianship List matters.

Recommendations

396. To avoid doubt, new guardianship legislation should specify that people entitled to notice of a Guardianship List proceeding, who are not parties in a proceeding, do not have a right of access to documents relating to the proceeding held by VCAT.

INFORMATION PROVIDED TO VCAT

397. If VCAT or the Public Advocate requests written information from an individual or organisation to assist with a guardianship hearing or investigation, VCAT or the Public Advocate must advise the person holding the information about the use that could be made of that information. The advice must be given at the time the information is requested and include advice about:
- (a) the people who might be given access to that information
 - (b) the procedure to follow if the holder of the information requests that some or all of the information be withheld from some or all of the parties to the proceeding.
398. A person or organisation may request that information provided to VCAT in relation to a Guardianship List proceeding not be disclosed to some or all parties to the proceeding. VCAT must determine this request according to law before providing any of the information in question to any of the nominated parties.

ADVICE FUNCTION

399. New guardianship legislation should permit VCAT to provide advice to any substitute decision maker, co-decision maker or supporter about the manner in which they should or should not exercise their powers.
400. This power should be exercisable on the application of any person with an interest in the affairs of the represented person or by VCAT on its own motion.

ACCESSIBILITY FOR INDIGENOUS VICTORIANS

401. VCAT should establish a Koori Liaison Officer position to assist with Guardianship List matters where appropriate.

CHAPTER 22—AGE

CLOSING THE GAP BETWEEN THE ADULT GUARDIANSHIP AND CHILD PROTECTION JURISDICTIONS

402. The age jurisdiction for guardianship and administration should be lowered to 16 years and over in new guardianship legislation, and increased to 18 years in the *Children, Youth and Families Act 2005* (Vic). The *Children, Youth and Families Act 2005* (Vic) should be amended to enable a protection application to be made in relation to any person under the age of 18 years.
403. New guardianship legislation should allow a personal guardian or a financial administrator to be appointed for any person who has attained the age of 16 years and who satisfies the relevant criteria for appointment.

CHOICE BETWEEN CHILD PROTECTION AND ADULT GUARDIANSHIP FOR YOUNG PEOPLE

404. New guardianship legislation should define 'young person' as a person who is 16 or 17 years old.
405. The *Children, Youth and Families Act 2005* (Vic) and new guardianship legislation should contain guidance about when it is preferable to make orders under either the *Children, Youth and Families Act 2005* (Vic) or guardianship legislation for a young person who is eligible for an appointment under both systems.

406. It is appropriate to make an order under guardianship legislation when the person's primary need is substitute decision making. It is appropriate to make an order under the *Children, Youth and Families Act 2005* (Vic) when the person's primary need is the protection of a child.

VCAT AND THE CHILDREN'S COURT MAY REFER MATTERS

407. VCAT should be permitted to refer an application for the appointment of a personal guardian or financial administrator for a young person to the Children's Court if it believes that the application is better dealt with as a protection application under the *Children, Youth and Families Act 2005* (Vic).
408. The Children's Court should be permitted to refer a protection application for a young person with impaired decision-making ability because of a disability to VCAT if it believes that the application is better dealt with under guardianship legislation.

PROTOCOL BETWEEN THE PUBLIC ADVOCATE AND THE DEPARTMENT OF HUMAN SERVICES

409. The Public Advocate and the Secretary of the Department of Human Services should develop protocols regarding their respective roles in relation to young people with disabilities for whom guardianship issues arise.
410. The protocols should address:
- (a) the respective roles of the child protection, disability services and adult guardianship systems
 - (b) how to determine which system is most appropriate for a young person if a person falls within the age jurisdiction of both systems
 - (c) the role of the Department of Human Services in providing services
 - (d) the role of the Public Advocate in providing advocacy.

TRANSITION BETWEEN THE TWO SYSTEMS

411. New guardianship legislation should provide that a young person's entitlement to or eligibility for services or support under the *Children, Youth and Families Act 2005* (Vic), or the *Disability Act 2006* (Vic) should not be affected by the appointment of a personal guardian or financial administrator for that person.

TRANSITION FROM GUARDIANSHIP BY THE SECRETARY OF THE DEPARTMENT OF HUMAN SERVICES TO GUARDIANSHIP UNDER NEW GUARDIANSHIP LEGISLATION

412. The Secretary of the Department of Human Services should be required to:
- (a) identify any young person for whom she is the guardian or long-term custodian and who is likely to benefit from an appointment under guardianship legislation when they are no longer under her care and protection
 - (b) make an application to the tribunal under guardianship legislation when appropriate.

MEMORANDUM OF UNDERSTANDING ABOUT TRANSITIONING

413. The Public Advocate and the Secretary of the Department of Human Services should develop a memorandum of understanding regarding their respective roles in relation to the transition of young people from the child protection to the adult guardianship system, including the role of the Department of Human Services in providing services, formal mechanisms and obligations for communication and detailed protocols for the development of leaving care plans for young people.

Recommendations

ROLE OF THE PUBLIC ADVOCATE

414. The Public Advocate should provide advocacy for any young person under the guardianship or custody of the Secretary of the Department of Human Services who is likely to require an order under guardianship legislation.

CHAPTER 23—DISABILITY ACT

EXTENDING SUPERVISED TREATMENT ORDERS IN THE DISABILITY ACT

415. The *Disability Act 2006* (Vic) should be amended to extend the application of the supervised treatment order provisions in Part 8 to people with an acquired brain injury.

CHAPTER 24—MENTAL HEALTH ACT

POWER OF AN ENDURING PERSONAL GUARDIAN TO MAKE PSYCHIATRIC TREATMENT DECISIONS

416. New guardianship legislation should expressly permit a person with capacity (the principal) to appoint an enduring personal guardian to make decisions about psychiatric treatment for the principal when they are unable to do so because of impaired decision-making capacity, including when the principal is an involuntary patient or a person subject to an involuntary treatment order under the *Mental Health Act 1986* (Vic).
417. It should be possible for the principal to give an enduring personal guardian decision-making powers in relation to psychiatric treatment that prevail over the powers of the authorised psychiatrist under the *Mental Health Act 1986* (Vic) when the principal is either an involuntary patient or is subject to an involuntary treatment order and 'involuntary treatment of the person is necessary for [the principal's] health or safety' and the authorised psychiatrist reasonably believes that there is no significant risk posed by the person to the public.
418. The Chief Psychiatrist should develop guidelines, in consultation with the Public Advocate, for use by authorised psychiatrists when determining whether the primary reason for taking action under the *Mental Health Act 1986* (Vic) is that 'involuntary treatment of the person is necessary for [the principal's] health or safety'.
419. Sections 3A(2)(c), 3A(2)(d) and 12AD of the *Mental Health Act 1986* (Vic) should be amended so that in the circumstances set out in recommendation 417, an enduring personal guardian with psychiatric treatment powers is able to make treatment decisions for the principal's mental illness when they are an involuntary patient or are subject to an involuntary treatment order and the powers of the enduring personal guardian prevail over the powers of the authorised psychiatrist under the Mental Health Act.

TRIBUNAL POWER TO APPOINT A PERSONAL GUARDIAN TO MAKE PSYCHIATRIC TREATMENT DECISIONS

420. A person with an interest in the affairs of a person who is an involuntary patient or is subject to an involuntary treatment order under the *Mental Health Act 1986* (Vic) can apply to the tribunal for an order to appoint a personal guardian with the power to make decisions about psychiatric treatment for the person in the circumstances set out in recommendation 417.
421. The tribunal can appoint a personal guardian with prevailing psychiatric treatment powers in the circumstances set out in recommendation 417 if satisfied that:
- the criteria for appointing a personal guardian are otherwise satisfied
 - there is no enduring personal guardian with prevailing powers

- (c) an appropriate person (other than the Public Advocate) is willing and able to perform the role of personal guardian with prevailing powers
 - (d) the represented person expressed the wish to make this appointment when they had capacity.
422. The Mental Health Review Board can, on the application of an interested person or on its own motion, appoint a personal guardian with prevailing psychiatric treatment powers when conducting an appeal or review involving an involuntary patient or a person subject to an involuntary treatment order if satisfied that:
- (a) the criteria for appointing a personal guardian are otherwise satisfied
 - (b) there is no enduring personal guardian with prevailing powers
 - (c) an appropriate person (other than the Public Advocate) is willing and able to perform the role of personal guardian with prevailing powers
 - (d) the represented person expressed the wish to make this appointment when they had capacity.

WITNESSING REQUIREMENTS FOR THE APPOINTMENT OF AN ENDURING PERSONAL GUARDIAN

423. An appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment for the principal in the circumstances set out in recommendation 417 should comply with additional witnessing requirements in order to be valid. Instead of the witnessing requirements that apply to all other enduring appointments, the document should be witnessed by a medical practitioner who certifies that they:
- (a) assessed the principal shortly before witnessing the document and believe that the principal had the capacity to appoint an enduring personal guardian with the power to make decisions about psychiatric treatment for the principal when they are unable to do so because of impaired decision-making capacity
 - (b) explained to the principal and the enduring personal guardian the possible consequences of giving the enduring personal guardian powers which prevail over those of the authorised psychiatrist in the circumstances set out in recommendation 417.

CHALLENGING PSYCHIATRIC TREATMENT DECISIONS BY AN ENDURING PERSONAL GUARDIAN

424. An authorised psychiatrist should be permitted to apply to the Mental Health Review Board for an order setting aside the appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment in the circumstances set out in recommendation 417 so that the involuntary psychiatric treatment order powers of the authorised psychiatrist can be invoked.
425. Upon hearing an application by the authorised psychiatrist in these circumstances, the Mental Health Review Board may set aside the power of an enduring personal guardian to make decisions about psychiatric treatment in the circumstances set out in recommendation 417 when satisfied that:
- (a) the criteria in section 8(1) of the *Mental Health Act 1986* (Vic) apply to the principal
 - (b) decisions made by the enduring personal guardian about psychiatric treatment for the principal have been or are likely to be harmful to the personal health and wellbeing of the principal
 - (c) those decisions are likely to have been unacceptable to the principal if they had the capacity to make decisions about treatment for mental illness

Recommendations

- (d) decisions likely to be made by the authorised psychiatrist about psychiatric treatment for the principal are likely to promote the personal health and wellbeing of the principal.
- 426. An authorised psychiatrist, or any other person with an interest in the affairs of the principal, should be permitted to apply to VCAT for an order setting aside the appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment for the principal in the circumstances set out in recommendation 417.
- 427. Upon hearing an application in the circumstances set out in recommendation 417, VCAT may set aside the appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment in the circumstances set out in recommendation 417 when satisfied that:
 - (a) decisions made by the enduring personal guardian about psychiatric treatment for the principal have been or are likely to be harmful to the personal health and wellbeing of the principal
 - (b) those decisions are likely to have been unacceptable to the principal if they had the capacity to make decisions about treatment for mental illness.
- 428. If VCAT sets aside the appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment in the circumstances set out in recommendation 417 it may appoint another suitable person as the personal guardian or it may decline to make any further appointment, thereby permitting the authorised psychiatrist to invoke their treatment powers under the *Mental Health Act 1986* (Vic) if the authorised psychiatrist chooses to do so.

CHAPTER 25—CRIMES (MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT

THE ROLE OF GUARDIANS

- 429. The role of guardians should not include substitute decision making about legal proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

THE NEED FOR ADVOCACY

- 430. The role of providing advocacy for people detained under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be included in the legislation and appropriately resourced.

REVIEW OF CUSTODIAL SUPERVISION ORDERS

- 431. There should be a legislatively required regular, automatic review of each custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) at an interval of no longer than every two years.

CHAPTER 26—LITIGATION GUARDIANS

CONDUCTING LEGAL PROCEEDINGS FOR A REPRESENTED PERSON

- 432. New guardianship legislation should provide that VCAT may give a personal guardian and/or a financial administrator the power to conduct legal proceedings on behalf of the represented person.

THE DIFFERENT ROLES OF GUARDIANS AND ADMINISTRATORS

- 433. New guardianship legislation should provide that a financial administrator may be given the power to conduct legal proceedings on behalf of the represented person where the matter relates to the person's financial or property interests.

434. New guardianship legislation should provide that a personal guardian may be given the power to conduct legal proceedings on behalf of the represented person where the matter does not relate to the person's financial or property interests.

LIABILITY FOR COSTS

435. New guardianship legislation should provide that a personal guardian or financial administrator who conducts legal proceedings on behalf of a represented person need not seek appointment as a litigation guardian, unless the court or tribunal directs that this course is necessary in a particular case.
436. New guardianship legislation should provide that, ordinarily, a court or tribunal should not make an order for costs against a personal guardian or financial administrator in lieu of a costs order against the estate of the represented person, unless the court or tribunal is satisfied that the personal guardian or financial administrator has acted negligently or engaged in misconduct in conducting the proceedings.

CHAPTER 27—INTERSTATE OPERATION

RECOGNITION OF APPOINTMENTS MADE IN OTHER AUSTRALIAN STATES AND TERRITORIES IN VICTORIA

437. A personal appointment made under and compliant with the guardianship laws of another Australian state or territory should be registrable in Victoria to the extent that the powers it gives could have been validly given by a personal appointment made under Victorian guardianship legislation. The appointment should operate upon registration as if it had been made under Victorian law.
438. New guardianship legislation should provide that a personal appointment made in another state or territory must be included on the new online register in order to have effect in Victoria.
439. The provisions of Part 6A of the *Guardianship and Administration Act 1986 (Vic)* should be included in new guardianship legislation.

UNIFORMITY OF GUARDIANSHIP LAWS THROUGHOUT AUSTRALIA

440. The Attorney-General should consider appropriate means of promoting uniformity of guardianship laws throughout Australia.

Chapter 1 Introduction

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REVIEW OF GUARDIANSHIP LAWS

- 1.1 This is the Victorian Law Reform Commission's final report into Victoria's guardianship laws.¹ In May 2009 the Attorney-General asked the Commission to review the *Guardianship and Administration Act 1986* (Vic) (G&A Act) and to report on what changes are needed to the law to ensure that it responds to the needs of people with impaired decision-making ability and advances their rights.
- 1.2 The G&A Act assists people with disabilities who are unable to make, or who have difficulty making, important decisions about their lives. The current law allows for the appointment of another person to make personal, financial and medical decisions when a formal decision maker is needed. This is often referred to as substitute decision making.²
- 1.3 It is time to modernise Victoria's guardianship laws. While the G&A Act was groundbreaking legislation when first enacted over 25 years ago, the range of people who use the legislation and the social environment in which it operates are now very different.
- 1.4 This report is the final step in a three-stage law reform process. The Commission published an information paper in February 2010 and a consultation paper in March 2011. This report contains the Commission's recommendations for new guardianship laws to meet the current needs of the Victorian community.

TERMS OF REFERENCE

- 1.5 The terms of reference for this review are at the front of this review on page xi.
- 1.6 The Commission's review has been broad-ranging. We have been asked to consider what changes are needed to the G&A Act so that it:
- complies with human rights principles
 - reflects developments in policies and practices since the Act commenced
 - responds to the needs of an ageing population.
- 1.7 The terms of reference direct the Commission to look at particular aspects of the G&A Act, including:
- the role of guardians and administrators in advancing the rights of the people they represent and in assisting them to make decisions
 - whether the right balance is struck between the best interests of a represented person and their rights as set out in the United Nations' *Convention on the Rights of People with Disabilities* (the Convention)³
 - whether the powers and duties of guardians are effective, appropriate and consistent with Australia's obligations under the Convention and the Victorian Charter of Human Rights and Responsibilities⁴
 - the feasibility of different, less formal, decision-making models
 - whether the G&A Act should be extended to apply to people who are 17 years of age

¹ Refer to the glossary for how we use the term 'guardianship laws' in this report.

² There is a range of substitute decision-making appointments in current guardianship laws. A guardian or enduring guardian can make substitute decisions about personal matters for another person; an administrator or attorney can make substitute decisions about financial matters and an agent or the 'person responsible' can make substitute decisions about medical matters. We discuss these appointments in more detail in Chapter 3.

³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

⁴ *Charter of Human Rights and Responsibilities Act 1996* (Vic).

- the functions, powers and duties of the Public Advocate
- the role and powers of the Victorian Civil and Administrative Tribunal (VCAT) and whether the tribunal process for appointing guardians and administrators works well
- whether there should be additional ways to review decisions made by guardians and administrators and whether there should be a means to address unacceptable conduct by guardians and administrators
- whether laws regarding medical treatment and participation in research trials, including the 'person responsible' model,⁵ are appropriate, and how the G&A Act interacts with the *Medical Treatment Act 1988* (Vic)
- whether 'disability' should continue to be a threshold requirement for the appointment of a guardian or an administrator or whether it should be replaced by other concepts such as 'capacity' or 'vulnerability'
- whether the confidentiality provisions in the G&A Act adequately balance protection of private information and the need for transparency of decisions.

1.8 The Commission was also asked to consider appropriate interaction between the G&A Act and other relevant laws that deal with substitute decision making, or circumstances in which substitute decision making might be needed, including the:

- *Instruments Act 1958* (Vic)
- *Mental Health Act 1986* (Vic)
- *Disability Act 2006* (Vic)
- *Children, Youth and Families Act 2005* (Vic)
- *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)
- *Medical Treatment Act 1988* (Vic).

1.9 We have also been asked to consider other relevant reviews of guardianship laws throughout Australia.

1.10 The terms of reference specifically exclude consideration of end-of-life decisions beyond those currently dealt with by the *Medical Treatment Act 1988* (Vic).

OUR PROCESS

1.11 Because guardianship laws affect a broad range of people in our community, consultation about the effectiveness of those laws and discussions about how to improve them have been central to the Commission's work.

CONSULTATIVE COMMITTEES

1.12 The Commission established two advisory committees to provide ongoing assistance in the law reform process. These committees have helped the Commission draw upon the experience of people who:

- work in the field
- represent the interests of people who use guardianship laws
- have researched and written about the operation of guardianship laws.

1.13 The names of the committee members are listed in **Appendices 1** and **2** of this report.

⁵ See the glossary for a definition of 'person responsible'. Also see Chapter 13 for a description of the person responsible model.

- 1.14 Discussion with these committees has provided the Commission with important information about current practice and has provided invaluable assistance in formulating reform options.

INFORMATION PAPER

- 1.15 The Commission's first step in this review was the publication of an information paper in January 2010. That paper described existing law and practice and was designed to generate public discussion about areas of guardianship law that might need reform.
- 1.16 The Commission received 60 submissions from a wide variety of organisations and individuals in response to the information paper. The authors of these submissions are listed in **Appendix 3**. Most of these submissions are available on our website.⁶

Community consultations

- 1.17 In early 2010, the Commission consulted a broad range of people with disabilities and their carers and friends. We also met with advocate groups, health professionals, service-delivery groups, trustee organisations, the Public Advocate and VCAT. We conducted 53 consultations in metropolitan Melbourne and regional Victoria.
- 1.18 The Commission also held an open day in May 2010, which provided members of the public with an opportunity to speak to Commission staff about their views on guardianship laws. The names of people and organisations consulted are set out in **Appendix 4**.
- 1.19 The purpose of these consultations was to hear people's views about how well guardianship laws are operating and how they might be improved.

CONSULTATION PAPER

- 1.20 The second stage of the Commission's process was the publication of a consultation paper in March 2011. In this paper, the Commission explored how the law could be improved to better assist people with disabilities who have difficulty making important decisions. We expressed preliminary views about new laws and proposed a range of possible reform options. The Commission sought submissions in response to these options.
- 1.21 The Commission received 86 submissions from a wide variety of people and organisations, including many who had provided submissions in response to the information paper. The authors of these submissions are listed in **Appendix 5**. Most of these submissions are also available on our website.⁷

Community consultations

- 1.22 In early 2011, the Commission conducted a second round of community consultations to discuss the reform options contained in the consultation paper. The Commission held 64 consultations in metropolitan and regional Victoria. We also held a second open day. The names of people and organisations consulted are set out in **Appendix 6**.
- 1.23 In May 2011, the Commission used a new online public forum to invite comments on some of the consultation paper proposals. The forum provided nine case studies of how some of the proposed reforms might work in practice and asked simple questions to assist people in preparing responses.⁸

6 All public submissions are available on the website. The Commission does not place submissions on the website that are confidential, contain offensive or defamatory content, or do not relate to the guardianship project.

7 All public submissions are available on the website. The Commission does not place submissions on the website that are confidential, contain offensive or defamatory content, or do not relate to the guardianship project.

8 A total of 657 visitors made 1589 visits to the forum: email from Bang the Table to Victorian Law Reform Commission, 21 June 2011.

Additional consultations

- 1.24 The Commission held additional consultations with groups of people with specialist expertise to discuss details of complex issues that arose during the review. The Registry Working Group comprised representatives of the Victorian Registry of Births, Deaths and Marriages, State Trustees Limited, Australian Bankers' Association, ANZ Trustees Limited, the Public Advocate, Law Institute of Victoria and Royal District Nursing Service. That group explored the idea of a new online register of appointments. The Commission also convened a meeting of medical researchers, representatives from hospital ethics committees and staff of the Public Advocate to consider reform of laws dealing with authorisation of medical treatment and participation in medical research for people who are unable to make their own decisions about these matters. These expert groups assisted the Commission in developing recommendations included in Chapters 13, 14 and 16 of this report.

OTHER RELEVANT REVIEWS

- 1.25 A number of other important reviews of substituted decision-making laws have been completed recently or are still underway. Some of these reviews are directly relevant to our inquiry because they consider Victorian laws that overlap with the G&A Act. Others are useful because they examine similar laws in other Australian jurisdictions.

THE VICTORIAN PARLIAMENT LAW REFORM COMMITTEE'S INQUIRY INTO POWERS OF ATTORNEY

- 1.26 The Victorian Parliament Law Reform Committee (Parliamentary Committee) conducted an inquiry into powers of attorney from late 2008 until 2010. The Parliamentary Committee is a multi-party body comprising members of both Houses of Parliament.
- 1.27 The Parliamentary Committee's inquiry considered financial powers of attorney and enduring guardianship.⁹ It recommended streamlining and simplifying power of attorney documents so Victorians can better plan for their future financial, lifestyle and healthcare needs. The committee released its report in August 2010, and its recommendations are discussed in Chapters 10 and 11 of this report.¹⁰
- 1.28 The government response to the Parliamentary Committee's report was tabled in Parliament on 10 February 2011. The response indicates 'support' or 'support in principle' for many of the recommendations in the report.¹¹ The government response expressed support for strengthening and streamlining powers of attorney.¹² The response also stresses the need to address and prevent the likelihood of elder abuse by encouraging Victorians to make plans through these appointments and to ensure that appropriate safeguards are in place.¹³
- 1.29 Important recommendations that received support in principle include:
- consolidating the legislative framework for these laws
 - developing legislative principles
 - taking steps to increase general community awareness about the benefits of these personal appointments

⁹ The glossary defines powers of attorney and enduring guardianship.

¹⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010).

¹¹ Victorian Government, *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (10 February 2011), 2 <http://www.parliament.vic.gov.au/images/stories/committees/lawreform/powers_of_attorney/20110210.Lrc.poa.GOVRESP.pdf>.

¹² *Ibid.*

¹³ *Ibid.*



- alerting people to the potential for abuse
- strengthening the witnessing process to guard against abuse
- introducing a register of powers of attorney.¹⁴

- 1.30 The government's response notes that there is likely to be considerable overlap between recommendations in the Parliamentary Committee's report and some of the Commission's recommendations.¹⁵ For this reason, the government indicated that it would not finalise its response to some of the Parliamentary Committee's recommendations until it considers the Commission's final report on Victoria's guardianship laws.¹⁶
- 1.31 The Commission has benefited greatly from the work of the Parliamentary Committee and supports most of its recommendations. Wherever possible, the Commission has sought to ensure that our recommendations complement those of the Parliamentary Committee. In those few relatively minor instances where the Commission's conclusions differ from those of the Parliamentary Committee we have sought to provide workable alternatives.

VICTORIAN DEPARTMENT OF HEALTH REVIEW OF THE *MENTAL HEALTH ACT 1986* (VIC)

- 1.32 The *Mental Health Act 1986* (Vic) is currently being reviewed by the Victorian Department of Health. The review is examining whether the Act provides an effective legislative framework for the treatment of people with a mental illness in Victoria.
- 1.33 The former Victorian Minister for Mental Health released an exposure draft for new mental health legislation in October 2010.
- 1.34 Following the election of the Coalition government in November 2010, the new Minister for Mental Health extended the submission period until 28 February 2011 and held further consultations with the community to discuss the issues raised in those submissions.¹⁷
- 1.35 The Victorian Government has indicated that the Mental Health Bill will be redrafted to reflect policy changes in response to community engagement.¹⁸ The government anticipates the Bill will be introduced into Parliament in 2012, and become operational in 2013.¹⁹
- 1.36 The implications of that review for future guardianship laws are discussed in Chapter 24.

THE QUEENSLAND LAW REFORM COMMISSION'S REVIEW OF THE *GUARDIANSHIP AND ADMINISTRATION ACT 2000* (QLD) AND THE *POWERS OF ATTORNEY ACT 1998* (QLD)

- 1.37 The Queensland Law Reform Commission completed its review of guardianship laws in 2010. The Queensland review examined a range of issues including:
- the general principles of Queensland guardianship law
 - the powers of guardians, administrators and other appointments
 - confidentiality provisions
 - review of decisions

¹⁴ Ibid 3–4.

¹⁵ Ibid 2.

¹⁶ Ibid.

¹⁷ Hon Mary Wooldridge MP, Minister for Mental Health (Victoria), *Minister for Mental Health's Announcement* (January 2011) <http://www.health.vic.gov.au/mentalhealth/mhactreview/minister_announcement_jan2011.pdf>.

¹⁸ Department of Health (Victoria), *Mental Health Act Review: Information Sheet* (May 2011) <[http://docs.health.vic.gov.au/docs/doc/A886BEE05026CF25CA257895007C24A9/\\$FILE/Information%20sheet%20-%20May%202011.pdf](http://docs.health.vic.gov.au/docs/doc/A886BEE05026CF25CA257895007C24A9/$FILE/Information%20sheet%20-%20May%202011.pdf)>.

¹⁹ Ibid.

- access to medical treatment for people with impaired capacity
- the appropriateness of treatment provided
- whether there is a need for additional provisions to allow a parent to make a binding direction to appoint a guardian or administrator for their son or daughter who has impaired decision-making capacity.²⁰

- 1.38 The Queensland Law Reform Commission conducted its review in two stages. The first stage focused on the legislation's confidentiality provisions. The final report, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, was published in 2007.²¹ The Queensland Government implemented most of the recommendations in the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld).
- 1.39 The second stage of the review focused on the principles contained in the legislation and Queensland's guardianship laws more generally. The final report was tabled in Parliament in November 2010.²² The extensive final report, comprising four volumes, has been a useful resource for the Commission.
- 1.40 The Queensland Government published an initial response to the second stage of the Queensland Law Reform Commission review in October 2011. The Queensland Government notes that the report will be implemented in two phases.²³
- 1.41 The first phase will focus on technical amendments in areas where immediate improvements to existing systems may be achieved.²⁴ This phase is currently underway and only considers those recommendations the government supports or supports in principle.²⁵
- 1.42 The second phase, concluding at the end of 2012, will consider the remaining recommendations following further consultation with relevant stakeholders.²⁶
- 1.43 The Commission refers to the Queensland Government response where relevant in this report.

THE NEW SOUTH WALES LEGISLATIVE COUNCIL STANDING COMMITTEE ON SOCIAL ISSUES' INQUIRY INTO SUBSTITUTE DECISION MAKING FOR PEOPLE LACKING CAPACITY

- 1.44 This New South Wales Upper House committee was asked to consider whether any New South Wales legislation should be changed to better provide for the management of estates of people incapable of managing their own affairs and the guardianship of people who have disabilities.²⁷
- 1.45 The committee released its report in February 2010 and we refer to its recommendations when they are relevant to specific issues throughout this report.²⁸

20 See Queensland Law Reform Commission, <<http://www qlrc.qld.gov.au/guardianship/reference.htm>> for full terms of reference.

21 See Queensland Law Reform Commission, *Guardianship Review* (7 October 2008) <<http://www qlrc.qld.gov.au/guardianship/index.htm>>. You can access the paper at <<http://www qlrc.qld.gov.au/guardianship/publications.htm#6>>.

22 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).

23 Department of Justice and Attorney-General (Queensland), *Queensland Government Initial Response to the Queensland Law Reform Commission's Report: A Review of Queensland's Guardianship Laws* (October 2011). A full copy of the report can be accessed through the Queensland Government website: <<http://www.justice.qld.gov.au/justice-services/guardianship/review-of-queenslands-guardianship-laws>>.

24 Department of Justice and Attorney-General (Queensland), *Queensland Government Initial Response to the Queensland Law Reform Commission's Report: A Review of Queensland's Guardianship Laws* (October 2011) 3.

25 Ibid.

26 Ibid.

27 See Parliament of New South Wales, *Legislative Council Standing Committee on Social Issues: Substitute Decision-making for People Lacking Capacity* <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/EEDCC12FC63D6EC7CA2575EC00003769?open&refnavid=C04_2> for full terms of reference.

28 Standing Committee on Social Issues, NSW Legislative Council, *Substitute Decision-making for People Lacking Capacity* (2010).

- 1.46 In March 2011, the former New South Wales Government provided a response to the committee's inquiry. It broadly supported the recommendations and indicated that it would refer some issues to the New South Wales Law Reform Commission for further consideration, including defining capacity in legislation, supported decision making by public agencies and the legal authorisation of a guardian to consent to the use of restrictive practices.²⁹

STRUCTURE OF THIS REPORT

- 1.47 In Chapters 2, 3 and 4 the Commission briefly examines the history of guardianship laws and provides an overview of the current legislative scheme. We then consider changes to the setting in which the laws operate. We examine the effect of an ageing population, changing community attitudes to people with disabilities and developments in policy and practices for people with disabilities. We also consider developments in the human rights environment.
- 1.48 Chapter 5 provides an overview of the Commission's views about the public policy that should underpin the new guardianship laws. It also contains an outline of the Commission's recommendations about the structure of a new and accessible Guardianship Act.
- 1.49 Chapter 6 contains the overarching principles that should be included in new guardianship legislation. In Chapter 7, we recommend new statutory descriptions of the central concepts of capacity and incapacity and describe the principles that should guide capacity assessments.
- 1.50 The Commission's recommendation for a new continuum of decision-making assistance is then described in more detail. We begin by examining new supported and co-decision-making arrangements in Chapters 8 and 9. These mechanisms complement existing substitute decision-making arrangements by providing a broader array of legal arrangements to cater for different levels of impaired decision-making ability.
- 1.51 We then consider substitute decision making. Chapter 10 considers reforms to the personal appointments of substitute decision makers. Chapter 11 considers the mechanisms by which people can give advance written instructions about particular decisions they would like made if they lose capacity in the future.
- 1.52 Chapter 12 examines the appointment of substitute decision makers by VCAT. The Commission proposes changes to:
- the criteria that VCAT must consider before appointing a substitute decision maker and the decisions those substitute decision makers are empowered to make
 - who should be appointed to decision-making roles
 - the relationship between substitute decision makers
 - when appointments should be reassessed.
- We also consider the issue of succession planning.
- 1.53 Chapter 13 contains the Commission's proposals for refining the law of substituted consent for medical treatment. Chapter 14 deals with substituted consent for participation in medical research.

²⁹ NSW Government, *Legislative Council Standing Committee on Social Issues: Substitute Decision-making for People Lacking Capacity Government Response* (March 2011), 1–4, 15 <[http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/e00602d3c8f39ca5ca2576d500184231/\\$FILE/110303%20Government%20Response.pdf](http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/e00602d3c8f39ca5ca2576d500184231/$FILE/110303%20Government%20Response.pdf)>.

- 1.54 In Chapter 15, the Commission recommends new legal safeguards for people without capacity who experience total and on-going restraint of their liberty. These reforms apply to people living in hospitals, supported accommodation and residential facilities that are supervised to an appropriate level by a government body.
- 1.55 In Chapter 16, the Commission recommends the establishment of a new online register of personal and VCAT appointments of substitute decision makers and supporters.
- 1.56 Chapter 17 addresses the responsibilities of substitute decision makers. It recommends new principles to guide decision makers. Chapter 18 deals with accountability mechanisms for substitute decision makers. There is also a recommendation for a new public wrong to apply to all decision makers and supporters who abuse their powers. Chapter 19 contains the Commission's recommendation that, in some instances, it should be possible to seek a review of the merits of a decision made by a substitute decision maker who is either the Public Advocate or a remunerated administrator.
- 1.57 Chapter 20 recommends reforms to the functions and powers of the Public Advocate. Chapter 21 contains recommendations designed to improve the VCAT Guardianship List processes.
- 1.58 Chapters 22, 23, 24 and 25 consider the interaction of the G&A Act with other laws that deal with substitute decision making. We consider the *Children, Youth and Families Act 2005* (Vic), the *Disability Act 2006* (Vic), the *Mental Health Act 1986* (Vic) and the *Crimes (Mental Impairment Unfitness to be Tried) Act 1997* (Vic).
- 1.59 Chapter 26 contains the Commission's recommendations for clarifying the law when a substitute decision maker conducts legal proceedings on behalf of a represented person. Chapter 27 considers Victorian recognition of appointments made under the guardianship laws of other states and territories and contains recommendations for transitional provisions between existing laws and the new legislation recommended by the Commission.



Chapter 2

Historical overview

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INTRODUCTION

- 2.1 In this chapter, we consider the history of guardianship laws and provide a brief overview of the events that led to the creation of the *Guardianship and Administration Act 1986* (Vic) (G&A Act).
- 2.2 The development of modern guardianship laws accompanied the deinstitutionalisation of services for people with cognitive disabilities in Victoria during the late 1970s and the 1980s.¹ These reforms to Victorian law were part of a growing international interest in formally recognising the human rights of people with a disability.
- 2.3 The most recent United Nations instrument, the *Convention on the Rights of Persons with Disabilities* (the Convention) entered into force in May 2008.²

BEFORE 1986

- 2.4 Guardianship laws have existed in a limited form since the fifth century. The idea that a person could be appointed to protect others who were unable to manage aspects of their own lives originated in the Roman Empire.³
- 2.5 Historically, guardianship laws sought to protect the financial and private property interests of people with impaired ability to care for themselves.⁴ In the 13th century, the English sovereign took control of the property of people with a mental illness or intellectual disability, largely to prevent feudal lords from exploiting them. Over time, the English courts developed the concept of *parens patriae*—literally, parent of the country—to explain the duty of the monarch to protect the interests of those people who were unable to look after themselves.⁵ However, those people who had neither property nor family to look after them were often ignored and isolated,⁶ sometimes resulting in their confinement in prisons.⁷
- 2.6 Subsequent advances in medical thinking led to changing attitudes about people with impaired decision-making ability. In conjunction with the rise in respect for and power of the medical profession came the view that those with disabilities, including people with a cognitive impairment, were ill and needed treatment and care.⁸ This ultimately led to the development of the ‘medical model’, which characterised people with disabilities as being ‘inherently and inevitably pathological’.⁹ Under this model, mental health legislation gave medical experts the power to decide whether to detain people against their will for their own good, or for the safety of the community.¹⁰

1 See Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (The Federation Press, 1997) 15. See also Mark R Feigan, *The Victorian Office of the Public Advocate: a First History 1986–2007* (PhD Thesis, La Trobe University, 2011), 7 <http://www.publicadvocate.vic.gov.au/file/file/Research/Reports/Feigan_OPA_history_thesis_final.pdf>.

2 The United Nations established international human rights instruments concerning the rights of people with disabilities in the 1970s. These include the *Declaration on the Rights of Mentally Retarded Persons* (1971) and the *Declaration on the Rights of Disabled Persons* (1975). These instruments provided the foundation for future United Nations work on issues to do with the rights of people with disabilities: see Terry Carney, ‘Social Guardianship for Intellectually Handicapped People’ (1982) 8(4) *Monash University Law Review* 199, 201–2. The *Convention on the Rights of Persons with Disabilities* (2007) is one of nine core human rights treaties of the United Nations and the most comprehensive international human rights agreement about the rights of people with disabilities: see Office of the United Nations High Commissioner, United Nations, *International Law* (2007) <<http://www2.ohchr.org/english/law/>>.

3 Terry Carney, ‘Social Guardianship for Intellectually Handicapped People’ (1982) 8(4) *Monash University Law Review* 199, 205.

4 *Ibid.*

5 *Ibid* 205–6.

6 Standing Committee on Social Issues, NSW Legislative Council, *Substitute Decision-making for People Lacking Capacity* (2010) [2.5].

7 See Nick O’Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2011) [5.2.1]; John Regan, ‘Protective Services for the Elderly: Commitment, Guardianship, and Alternatives’ (1972) 13 *William and Mary Law Review* 569, 570–3.

8 Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (The Federation Press, 1997) 11–12, 15; See also *Substitute Decision-making*, above n 6, [2.6].

9 Luke Clements and Janet Read, ‘Introduction: Life, Disability and the Pursuit of Human Rights’ in Luke Clements and Janet Read (eds), *Disabled People and the Right to Life: The Protection and Violation of Disabled People’s Most Basic Human Rights* (Routledge, 2008) 2–3. See also *Substitute Decision-making for People Lacking Capacity*, above n 6, [2.6].

10 Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (The Federation Press, 1997) 15.

- 2.7 From the mid-19th century, institutions were established in which people with a cognitive impairment were 'confined and managed' on a long-term basis.¹¹ These institutions tended to be isolated from communities and residents were often referred to as 'lunatics' or 'insane'.¹²
- 2.8 Long-term institutionalisation of people with a mental illness and people with intellectual disabilities continued for much of the 20th century.¹³ During the 1960s the disability rights movement emerged and championed a shift in thinking from the 'medical model' to a 'social model' of disability.¹⁴ In essence:
- [At] the heart of this work lay a central and unifying set of understandings about disability: a conviction, born of experience, that some of the most restricting and debilitating features in the lives of disabled people were not a necessary or inevitable consequence of living with impairment. Rather, it was held that these restrictions were socially and politically constructed and could, therefore, be changed by social and political means.*¹⁵
- 2.9 This growing international movement gained momentum from advocacy by parents of people with a disability¹⁶ and led to widespread recognition that all people, regardless of any disability, had a right to equal treatment and to protection against discrimination.
- 2.10 Around this time, an understanding emerged that not all 'mentally disabling conditions' remained static, and that decision-making abilities could be developed, retained or, in some circumstances, exercised with assistance.¹⁷
- 2.11 While some people who moved from institutions to community care were capable of making decisions for themselves, others were vulnerable and required assistance when making or implementing decisions.¹⁸
- 2.12 Previously, staff of residential mental health facilities made decisions about medical treatment, lifestyle and education.¹⁹ Decisions about the management of finances and property were usually made by a state agency, such as the Public Trustee.²⁰
- 2.13 The movement of people with an intellectual disability or mental illness from institutions into the community prompted the modernisation of mechanisms that could be used to make legally binding decisions about health care, finances or accommodation on behalf of people who lacked capacity to make their own decisions. In the absence of a legal substitute decision maker, informal decisions had no legal status and the liability of those who were caring for and treating people with impaired capacity became a matter of concern.²¹

11 Ibid 11–12.

12 Terry Carney and Peter Singer, *Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People* (Watson Ferguson and Co, 1986) 6.

13 For Australia, see Carney and Tait, above n 10, 11; Carney and Singer, above n 12, 46–8. For Canada, see Robert M Gordon and Simon N Verdun-Jones, *Adult Guardianship Law in Canada* (Carswell, 1992) 10–13. For the United States, see A Frank Johns, 'Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century - A March of Folly? Or Just a Mask of Virtual Reality?' (1997) 27 *Stetson Law Review* 1, 20–2; Mary Joy Quinn, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety* (Springer Publishing, 2005) ch 2. See also Law Reform Commission (United Kingdom), *Mental Incapacity*, Report No 231 (1995) [2.32] for similar trends in the United Kingdom.

14 This was in part also driven by the civil rights movement, particularly in the United States: Mary Joy Quinn, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety* (Springer Publishing, 2005) 13–14; Peter David Blanck and Michael Millender, 'Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America' (2000) 52 *Alabama Law Review* 1, 3.

15 Luke Clements and Janet Read, 'Introduction: Life, Disability and the Pursuit of Human Rights' in Luke Clements and Janet Read (eds), *Disabled People and the Right to Life: The Protection and Violation of Disabled People's Most Basic Human Rights* (Routledge, 2008) 1, 3. See also Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2007) 34 *Syracuse Journal of International Law & Commerce* 563, 571–4.

16 Mark R Feigan, *The Victorian Office of the Public Advocate: a First History 1986 – 2007* (PhD Thesis, La Trobe University, 2011), 32–3. <http://www.publicadvocate.vic.gov.au/file/file/Research/Reports/Feigan_OPA_history_thesis_final.pdf>.

17 Robin Creyke, *Who Can Decide? Legal Decision-making for Others* (Department of Human Services and Health, Aged and Community Care Division (Commonwealth), 1995) 38.

18 Law Reform Commission (United Kingdom), *Mental Incapacity*, Report No 231 (1995) [2.32].

19 Carney and Tait, above n 10, 12.

20 Ibid.

21 See, eg, Robert M Gordon and Simon N Verdun-Jones, *Adult Guardianship Law in Canada* (Carswell, 1992) 1–15.

VICTORIA

- 2.14 Before 1986, Victoria had a limited number of substitute decision-making processes for people who were unable to make their own decisions due to cognitive impairment. Two of those processes overlapped. The detention and involuntary treatment of people with a mental illness or an intellectual disability could be authorised under the *Mental Health Act 1959* (Vic).²² Involuntary patients under that Act were assumed by law to be incapable of managing their financial affairs and the Public Trustee was automatically appointed the administrator of their estates.²³
- 2.15 The other two substitute decision-making processes were governed by the *Public Trustee Act 1958* (Vic). If the Public Trustee was satisfied, after considering the certificates of two medical practitioners, that an ‘infirm person’ was incapable of managing their own affairs, the Public Trustee could assume responsibility for managing that person’s estate without any court or tribunal order.²⁴ The *Public Trustee Act 1958* (Vic) also contained little-used processes by which the Supreme Court could appoint a guardian or administrator for people who were unable to make decisions for themselves due to disability.²⁵
- 2.16 Three things that characterised this body of law before 1986 were:
- a primary focus on the management of property, rather than personal decision making²⁶
 - a focus on diagnostic status, rather than functional assessments of capacity²⁷
 - an expensive and largely inaccessible Supreme Court jurisdiction.²⁸

THE COCKS COMMITTEE AND THE 1986 LEGISLATION

- 2.17 By the early 1980s, it was becoming increasingly clear that the law did not adequately cater for the many requirements of people whose decision-making ability was impaired due to disability. In response, the Victorian Government established contemporaneous reviews of the legal needs of people with intellectual disabilities and mental illness.
- 2.18 The Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee)²⁹ was asked to develop proposals in relation to guardianship of people with intellectual disabilities. The Committee’s terms of reference also specifically requested proposals for legislation independent of the *Mental Health Act 1959* (Vic).³⁰

22 See *Mental Health Act 1959* (Vic) ss 42–113. The entire Act was repealed by the *Mental Health Act 1986* (Vic) s 143(1).

23 *Public Trustee Act 1958* (Vic) s 33.

24 *Ibid* s 49.

25 *Ibid* ss 32–9.

26 That is, the law’s main interest was in establishing means by which a person’s financial and property affairs could be managed when they were unable to do so themselves. Relatively little attention was given to formal means by which decisions could be made about matters such as a person’s housing, health care or access to services. Instead, these decisions were typically made by service providers, such as institutions, usually without any formal lawful authority to do so.

27 That is, determinations about a person’s decision-making rights were connected more to the person’s diagnosis rather than to any formal assessment of their capacity.

28 See Neil Rees, ‘The Fusion Proposal: A Next Step’ in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-based Mental Health Laws* (Hart Publishing, 2010) 73.

29 This Committee was established in 1980 by the then Hamer Government Minister of Health, William Borthwick MLA, and reported in 1982 to his Cain Government successor, Tom Roper MP.

30 Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 3 (‘*Report of the Minister’s Committee*’).

- 2.19 The Cocks Committee noted that the laws of the time did not provide adequate non-institutional options to enable people with intellectual disabilities to live with dignity in the community, and that personal guardianship needed to be one part of a broad legislative reform agenda that would help provide these options.³¹
- 2.20 The Cocks Committee identified a number of problems with the existing law:
- The method for appointing a guardian was cumbersome.
 - There was no regular automatic process for reviewing an order.
 - Courts had not adopted a practice of appointing guardians with limited powers, and instead appointed plenary guardians with broad powers, regardless of the person's decision-making capacity.³²
 - The law employed old-fashioned and stigmatising labels ('committee of the person' and 'lunatic so found').
 - The law did not give any direction about the functions and duties of guardians, nor how they should exercise their authority.
 - The law did not give the court any guidance on how it should determine who a guardian should be.
 - The law was unclear about the process of revoking a guardianship order.
 - The law provided no mechanism for the replacement of a guardian who dies or becomes incapacitated.³³
- 2.21 While the Committee's report focused primarily on issues concerning people with intellectual disabilities, it expressed a strong preference for guardianship laws to be available for use by people with a range of disabilities.³⁴ The Committee accepted that some adjustments to its proposals might be required if future legislation were to benefit people other than those with an intellectual disability.³⁵
- 2.22 The Cocks Committee's recommendations for an entirely new system of guardianship were accepted by the Cain government and the Victorian Parliament passed the *Guardianship and Administration Board Act 1986* (Vic) (G&A Act). The main features of the new system included:
- the creation of an informal tribunal, the Guardianship and Administration Board, to appoint guardians and administrators³⁶
 - the establishment of 'tailor-made' guardianship orders, which would allow a guardian to be appointed to make decisions only in those areas where there was a need³⁷

31 Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 558 (Jim Kennan, Attorney-General).

32 In Chapter 3, the Commission considers the meaning of 'plenary' and 'limited' guardianship orders.

33 *Report of the Minister's Committee*, above n 30, 24–5.

34 *Ibid* 96.

35 The second reading speech, delivered in 1986 by the Attorney-General, the Hon Jim Kennan MLC, confirms that while the initial legislation had a broad application, it was largely seen as a response to the needs of people with an intellectual disability: Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 558–560 (Jim Kennan, Attorney-General). The Committee expressed the view that adjustments to the proposals contained in the report should be left in the hands of the government and wider consultation undertaken: *Report of the Minister's Committee*, above n 30, 96.

36 *Report of the Minister's Committee*, above n 30, 28–42. The Guardianship and Administration Board had more flexibility and discretion in relation to the orders it could make compared to the Tribunals already established in South Australia and Tasmania. As a result, the Guardianship and Administration Board has been referred to as the first of the 'modern' independent guardianship tribunals: Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2011) [5.3.3], [5.4.3].

37 *Report of the Minister's Committee*, above n 30, 42–6.



- the establishment of an independent statutory officer—the Public Advocate—to advocate on behalf of people with disabilities, to assist the tribunal, to investigate abuse, to educate the public and to act as guardian of last resort.³⁸
- 2.23 The G&A Act was accompanied by a new *Mental Health Act 1986 (Vic)* and the *Intellectually Disabled Persons' Services Act 1986 (Vic)*. Together they formed a trilogy of legislation that replaced the old Mental Health Act and set up an entirely new framework for disability legislation in Victoria.
- 2.24 The passage of Victorian guardianship legislation in 1986 stimulated the development of new guardianship laws throughout the country, placing Australia alongside Canada as a world leader in progressive legislative reform for people with disabilities.

ENDURING PERSONAL APPOINTMENTS

- 2.25 The notion of enduring personal appointments—allowing a person with capacity to appoint their own representative to make decisions for them if they lose capacity in the future—was not part of the new framework, and nor was it part of the Cocks Committee's brief.
- 2.26 Personal appointments of substitute decision makers have been available for centuries, with the most widely used mechanism being the general power of attorney, which enables one person to appoint another to make legally binding decisions about financial and property related matters on their behalf.³⁹
- 2.27 A general power of attorney cannot be used once the principal, or donor of the power, no longer has capacity to make their own legally binding decisions. The Victorian Parliament addressed this gap in the common law in 1981 in relation to financial decision making, when it legislated to permit a person with capacity to make an *enduring* power of attorney (financial).⁴⁰ This appointment continues, or endures, beyond the principal's loss of capacity.

CHANGES SINCE 1986

- 2.28 Victoria's guardianship legislation has been amended on 30 separate occasions since 1986. While many of these changes have been relatively minor and technical, they have contributed to a substantial decline in the readability of the legislation. Changes to legislation that interact with the G&A Act have also contributed to the growing complexity of Victoria's guardianship laws.
- 2.29 The more significant amendments to the G&A Act and other relevant legislation are discussed below.

MEDICAL TREATMENT ACT

- 2.30 The introduction of the *Medical Treatment Act 1988 (Vic)* clarified and gave statutory force to the common law right of people to refuse medical treatment.
- 2.31 This Act was amended in 1990 to allow a person with capacity to appoint an agent to make medical treatment decisions for them. The appointment—an enduring power of attorney (medical treatment)—gives the agent power to refuse treatment if the person has lost capacity to make their own decisions.⁴¹

38 Ibid 53–4.

39 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 11.

40 *Instruments Act 1958 (Vic)* pt XIA, as amended by *Instruments (Enduring Powers of Attorney Act 1981) (Vic)*.

41 *Medical Treatment Act 1988 (Vic)* s 5A.

MEDICAL TREATMENT AMENDMENTS UNDER THE G&A ACT

- 2.32 In 1999, a new mechanism allowing an automatic appointee, or ‘person responsible’, to consent to certain medical and dental procedures for a ‘patient’ incapable of giving consent, was introduced into the Act.⁴²
- 2.33 In 2002, the definition of ‘patient’ was broadened, no longer requiring that the patient’s disability be ‘permanent or long-term’ and thereby allowing people with temporary or indeterminate disabilities to come under the Act’s ‘person responsible’ provisions when they are unable to consent to medical treatment.⁴³
- 2.34 In 2006, new provisions dealing with substitute consent for participation in medical research procedures were introduced.⁴⁴

ENDURING PERSONAL APPOINTMENTS

- 2.35 It has never been possible at common law for a person with capacity to appoint another person to make personal or lifestyle decisions for them— such as consenting to medical treatment or deciding that they should live in a secure environment—when they have lost capacity. It was only in 1999 that the Victorian Parliament legislated to permit a person with capacity to appoint an enduring guardian to make personal decisions for them when they are no longer able to do so themselves.⁴⁵

PUBLIC TRUSTEE

- 2.36 The G&A Act originally provided for the Public Trustee to be a preferred administrator.⁴⁶ Parliament removed this provision in 1999. The Public Trustee has now been replaced by State Trustees, a state-owned company, set up under the *State Trustees (State Owned Company) Act 1994* (Vic).⁴⁷ We discuss State Trustees further in Chapter 3.

THE ESTABLISHMENT OF VCAT

- 2.37 In 1998, the Guardianship and Administration Board was abolished and its functions were absorbed into the newly established Victorian Civil and Administrative Tribunal (VCAT). The *Guardianship and Administration Board Act 1986* (Vic) was renamed the *Guardianship and Administration Act 1986* (Vic).⁴⁸
- 2.38 The establishment of VCAT as a ‘one stop shop’ amalgamation of a number of different tribunals sought to improve all Victorians’ access to justice by making the process more efficient, flexible and cost-effective.⁴⁹ Cases arising under the G&A Act are heard in the Guardianship List, which is one of 17 lists operating within VCAT.⁵⁰

INTERSTATE REGISTRATION

- 2.39 In 1999, new provisions to allow for the registration of interstate guardianship and administration orders were introduced into the G&A Act.⁵¹

42 *Guardianship and Administration Act 1986* (Vic) pt 4A, as amended by *Guardianship and Administration (Amendment) Act 1999* (Vic) s 14.

43 *Guardianship and Administration Act 1986* (Vic) s 36(1), as amended by *Guardianship and Administration (Amendment) Act 2002* (Vic) s 11.

44 *Guardianship and Administration Act 1986* (Vic) pt 4A div 6, as amended by *Guardianship and Administration (Further Amendment) Act 2006* (Vic) pt 2.

45 *Guardianship and Administration Act 1986* (Vic) pt 4 div 5A, as amended by *Guardianship and Administration (Amendment) Act 1999* (Vic).

46 See Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 559 (Jim Kennan, Attorney-General).

47 *State Trustees (State Owned Company) Act 1994* (Vic) pt 1.

48 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), as amended by *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) pt 8.

49 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 972–5 (Jan Wade, Attorney-General).

50 VCAT comprises three divisions under which 17 lists operate: the Civil Division, the Administrative Division and the Human Rights Division. The Guardianship List operates within the Human Rights Division: Victorian Civil and Administrative Tribunal, *Annual Report 2010–2011* (2011) 2.

51 *Guardianship and Administration Act 1986* (Vic) pt 6A, as amended by *Guardianship and Administration (Amendment) Act 1999* (Vic) s 20.



MISSING PERSONS

- 2.40 The G&A Act was amended in August 2010 to allow families, or others, to apply to VCAT for administration of a missing person's estate.⁵²
- 2.41 These amendments were introduced to provide an accessible, cost-effective mechanism for the management of a missing person's financial affairs during what may otherwise be a distressing and difficult time.⁵³
- 2.42 Before these amendments, a family member or friend of a missing person who sought to administer the financial affairs of the person was required to pursue the matter in the Supreme Court to establish a presumption of death.⁵⁴

52 *Guardianship and Administration Act 1986* (Vic) pt 5A. Administration orders for a missing person operate for up to two years, but can be revoked if the person is found to be alive or dead, or if the person themselves applies for it to be revoked: at s 60AD. As noted in the second reading speech, the amendments are small but practical with the potential to make a substantial difference to the families and friends of missing persons: Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 2010, 3271 (Bob Cameron, Minister for Police and Emergency Services and Minister for Corrections).

53 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 2010, 3271 (Bob Cameron, Minister for Police and Emergency Services, and Minister for Corrections). Similar legislation already operates in NSW and ACT that provides for the management and protection of a missing person's estate: *NSW Trustee and Guardian Act 2009* (NSW) pt 4.4; *Guardianship and Management of Property Act 1991* (ACT) ss 8AA–8AC.

54 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 2010, 3271 (Bob Cameron, Minister for Police and Emergency Services and Minister for Corrections).



Chapter 3

Current law and practice in Victoria

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A SUMMARY

- 3.1 This chapter summarises current guardianship law and practice in Victoria. We examine the law in more depth in later chapters when making recommendations for reform of particular aspects of the law.¹
- 3.2 The Commission uses the term ‘guardianship law(s)’ in this report to mean:
- the *Guardianship and Administration Act 1986* (Vic) (G&A Act)
 - those parts of the *Instruments Act 1958* (Vic) that deal with enduring powers of attorney
 - those parts of the *Medical Treatment Act 1988* (Vic) that deal with decisions by agents.

LEGISLATIVE OVERVIEW

- 3.3 As discussed in Chapter 2, the Victorian Parliament passed the G&A Act when people with intellectual disabilities were moving from state institutions into the community. The G&A Act emerged from the recommendations of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee).²
- 3.4 Guardianship laws deal with the appointment, powers and responsibilities of substitute decision makers. The current law establishes a number of different substitute decision-making arrangements to cater for different aspects of life where legally binding decisions are required. A person may be appointed to undertake one or more decision-making roles for another person. The various arrangements may be summarised as follows:

Personal or lifestyle decisions

- personally appointed enduring guardians
- Victorian Civil and Administrative Tribunal (VCAT) appointed guardians.

Financial decisions

- personally appointed enduring attorneys³
- VCAT appointed administrators.

Medical decisions⁴

- VCAT appointed guardians with medical decision-making powers
- personally appointed enduring guardians with health care powers
- Medical Treatment Act agents (pursuant to the Medical Treatment Act)
- persons responsible
- VCAT when dealing with special procedures
- medical staff when it is emergency treatment.

¹ Existing guardianship laws are also discussed in detail in the Commission’s earlier information and consultation papers for this review.

² This Committee was established in 1980 by the then Harmer Government Minister of Health, William Borthwick MLA, and reported in 1982 to his Cain Government successor, Tom Roper MP.

³ A general power of attorney differs from other substitute decision-making mechanisms because it is designed to take effect when the person creating it stipulates it should (such as when they require specific legal decisions to be made whilst they are on holiday) and it ceases to have any effect when that person loses capacity: see *Instruments Act 1958* (Vic) pt XI.

⁴ A personally appointed enduring guardian or a VCAT appointed guardian can be authorised to make medical decisions for a represented person.

PERSONAL APPOINTMENTS

- 3.5 Any person who is at least 18 years of age, and who has legal capacity, can make a personal appointment of a substitute decision maker. Broadly speaking, having capacity to make this appointment means the person is able to understand the nature and effect of the appointment. We discuss capacity in Chapter 7. The three different types of personal appointment all have their own documentary and witnessing requirements. They typically, but not always, come into effect when the person who makes the appointment loses capacity.⁵

AUTOMATIC APPOINTMENTS

- 3.6 Where a person with a disability is unable to consent to certain medical treatments, the G&A Act provides for the automatic appointment of people who can consent on their behalf (known in the Act as the 'person responsible'). Under the Act, a person is incapable of giving consent to medical treatment if they cannot understand the nature and effect of the procedure or are unable to indicate whether they consent to the treatment.⁶
- 3.7 The Commission understands that medical professionals sometimes spend considerable time and effort locating the person responsible before performing medical treatment. If the person responsible cannot be located and a medical or dental practitioner believes that the treatment is in the person's 'best interests', they may proceed by notifying the Public Advocate using a prescribed form.⁷ However, there appears to be limited compliance with this requirement and, in practice, many procedures are probably performed without notifying the Public Advocate.
- 3.8 If the person responsible does not consent to a proposed treatment, a practitioner can nonetheless proceed with the treatment if they notify the person responsible and the Public Advocate,⁸ and no application objecting to the proposed treatment is made to VCAT within seven days.⁹ A person responsible or any person who has a special interest in the affairs of the person receiving treatment can also make an application to VCAT on 'any matter, question or dispute' regarding whether treatment is in an individual's 'best interests'.¹⁰
- 3.9 The automatically appointed 'person responsible' can also authorise participation in medical research trials.¹¹

TRIBUNAL APPOINTMENTS

- 3.10 VCAT has the power to appoint a guardian or administrator for a person whose disability impairs their judgment and who needs a substitute decision maker.¹² The G&A Act defines a person with a disability as someone with an intellectual impairment, mental disorder, brain injury, physical disability or dementia.¹³ The criteria for making a VCAT appointment are discussed in more detail in Chapter 12.

5 See *Guardianship and Administration Act 1986 (Vic)* div 5A (appointment of enduring guardian); *Instruments Act 1958 (Vic)* pts XI (powers of attorney) and XIA (enduring powers of attorney); *Medical Treatment Act 1988 (Vic)* s 5A. The extent to which people have made personal appointments is not known because there is no registration system for personal appointments.

6 *Guardianship and Administration Act 1986 (Vic)* s 36(2).

7 *Ibid* s 42K.

8 *Ibid* s 42L.

9 *Ibid*.

10 *Ibid* s 42N.

11 *Ibid* s 42S.

12 *Ibid* ss 22, 46. In the financial year 2010–11, there were 10,893 initiations, 12,258 finalisations, and 174 cases pending on VCAT's Guardianship List. The vast majority of these (71%) were reassessments. Originating applications accounted for 29%: Victorian Civil and Administrative Tribunal, *Annual Report 2010–2011* (2011) 43. The Report does not indicate what percentage of the total figure relates to originating guardianship or administration applications, or to any other application made under the Act. VCAT advised the Commission in the year 2009–10 there were 1872 guardianship applications and 2772 administration applications made: email from Victorian Civil and Administrative Tribunal to Victorian Law Reform Commission, 10 February 2011. The Commission has been unable to obtain accurate data concerning the number of guardianship and administration orders made by VCAT each year.

13 *Guardianship and Administration Act 1986 (Vic)* s 3.



- 3.11 VCAT can make an order for either 'plenary' or 'limited' guardianship. A person with plenary guardianship has very broad powers to make decisions for the represented person. The G&A Act provides that plenary guardians have 'all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child'.¹⁴ Orders for plenary guardianship are rare and it is more common for VCAT to appoint someone as guardian with a limited range of powers.
- 3.12 Although the terms 'plenary' and 'limited' are not used in relation to administration orders, VCAT can make an order that an administrator has the power to make decisions about all or part of a represented person's estate. In practice, limited administration orders are rare.¹⁵
- 3.13 The duration of a VCAT appointment is specified in the order and while it is usually no more than three years, appointments can be renewed.¹⁶

POWERS OF SUBSTITUTE DECISION MAKERS

- 3.14 Guardianship laws also deal with the powers of substitute decision makers. In short, these are:
- Guardians have the power to make decisions about personal and lifestyle matters stipulated by VCAT in its order. These may include, for example, decisions relating to health care, where a person should live, or whether they should work.¹⁷
 - Administrators have the power to make decisions about financial matters and property matters stipulated in the VCAT order. These include decisions relating to expenditure of money from the person's estate and management of their property.¹⁸
 - The G&A Act provides that the decisions of a VCAT appointed guardian¹⁹ or an administrator²⁰ have the same legal effect as if the person with the disability had made them with capacity.
 - Personally appointed enduring guardians, attorneys and agents have powers respectively in relation to lifestyle matters, financial and property matters, and medical matters, which may be expressed in general terms or may be limited to decisions about specified matters.
 - Automatic appointees can make decisions only in relation to consent to particular medical treatment procedures²¹ offered by a medical practitioner.

ROLES AND RESPONSIBILITIES OF A SUBSTITUTE DECISION MAKER

- 3.15 Guardianship laws identify, in broad terms, the people who can be appointed to the various substitute decision-making roles:
- A VCAT appointed guardian can be an individual, such as a family member or friend, or the Public Advocate.²²

¹⁴ Ibid s 24(1).

¹⁵ State Trustees advised the Commission that during 2008–09 there were only 12 out of 9000 limited orders appointing State Trustees as the administrator: email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

¹⁶ *Guardianship and Administration Act 1986* (Vic) s 61(1).

¹⁷ Ibid ss 24, 25.

¹⁸ See ibid pt 5 divs 3, 3A.

¹⁹ Ibid ss 24(4), 25(3).

²⁰ Ibid s 48(3).

²¹ An automatic appointee can also consent to the represented person's participation in various medical research trials: ibid s 425.

²² VCAT made 905 orders appointing the Public Advocate as guardian during 2010–11: Office of the Public Advocate (Victoria), *Annual Report 2010–2011* (2011) 6.

- A VCAT appointed administrator can be an individual, a professional with appropriate expertise or a trustee company, such as State Trustees.²³
 - Personal appointments can be any adult person with capacity chosen by the person making the appointment provided the appointee agrees to being appointed.²⁴
 - Automatic appointments are the first willing, able and available adult person appearing on a list set out in the legislation, which includes a medical agent, a guardian, or family member or carer.²⁵
- 3.16 Guardianship laws describe the general responsibilities of the various substitute decision makers in slightly different ways. Guardians and administrators appointed by VCAT, as well as people automatically appointed to make medical treatment decisions, are required to act in the represented person's 'best interests'.²⁶ A personally appointed enduring attorney's responsibilities focus more on exercising powers with reasonable diligence to protect the donor's interests.²⁷ This report discusses the different responsibilities of the various appointees in detail in Chapter 17.
- 3.17 The duration of a substitute decision maker's appointment also depends on the type of appointment:
- The VCAT order specifies the duration of each appointment VCAT makes. The appointment is usually between one and three years.
 - Enduring personal appointments are generally ongoing, unless revoked by the person who made the appointment or by VCAT.
 - Automatic appointments usually operate only when consent is required for a particular medical treatment decision.
 - General powers of attorney operate only for the time specified by the person making the appointment or, in any event, until that person loses capacity.

INFORMAL ARRANGEMENTS

- 3.18 Many people informally assist others to make decisions. These informal arrangements exist outside of the guardianship law framework. An example of an informal arrangement is a friend, family member or neighbour requesting services on behalf of an elderly person who cannot request the services for themselves. In consultations, the Commission heard that many carers informally assist people with disabilities, often without difficulty. A guardianship or administration order can be needed when a service is denied or a third party refuses to recognise the informal role of the carer.
- 3.19 The G&A Act requires VCAT to consider whether less restrictive options are available when deciding whether a person needs a guardian or an administrator.²⁸ In many cases, this means recognising informal arrangements and allowing them to continue when they are working well. In some cases, informal arrangements may not work well because the wishes of the person represented are not respected, or because the person is experiencing abuse or neglect. These instances call for appropriate safeguards, such as VCAT formally appointing a guardian or administrator.

23 As at 30 June 2011 State Trustees provided administration services for over 9000 represented persons. In 2009–10 VCAT appointed State Trustees as administrator in 988 cases: State Trustees, *Annual Report 2010* (2010) 10. The number of private appointments of administrators made by VCAT during this period is unknown.

24 The extent to which people have made personal appointments is unknown because there is no registration system for personal appointments. State Trustees reports that during 2010–11 it prepared 742 enduring powers of attorney (financial). During the year, it acted as attorney under approximately 700 enduring powers of attorney (financial): *ibid* 13.

25 No records are kept of the number of automatic appointments of substitute decision makers that are made.

26 *Guardianship and Administration Act 1986* (Vic) ss 28(1), 49(1), 42H(2).

27 *Instruments Act 1958* (Vic) s 125B(5).

28 *Guardianship and Administration Act 1986* (Vic) ss 22(2)(a), 46(2)(a). See also: at s 4(2)(a).

KEY AGENCIES

3.20 A number of public authorities are central to the current operation of the G&A Act. These are the Public Advocate,²⁹ VCAT and State Trustees.

Public Advocate

3.21 The G&A Act established the Public Advocate as an independent statutory officer to protect and promote the rights of people with disabilities.³⁰ This report discusses the functions of the Public Advocate in detail in Chapter 20, together with our proposed options for reform. The Public Advocate's current functions include:

- acting as a guardian of last resort
- undertaking investigations relevant to guardianship hearings at the request of VCAT
- providing advocacy for people with disabilities
- community education and advice about guardianship laws.³¹

VCAT

3.22 VCAT is a large tribunal that hears and determines a broad range of cases under many different laws. It has a number of different lists that specialise in hearing particular types of cases. The Guardianship List deals with guardianship, administration, powers of attorney and related matters.³² This report discusses the function and role of VCAT and possible reforms in detail in Chapter 21.

State Trustees

3.23 The G&A Act originally provided for the Public Trustee to be a preferred administrator.³³ Parliament removed this provision in 1999. The Public Trustee has now been replaced by State Trustees, a state-owned company, set up under the *State Trustees (State Owned Company) Act 1994 (Vic)*. It provides a range of financial services, including acting as an administrator when appointed to do so by VCAT under the G&A Act.³⁴ The G&A Act does not provide for any default or last resort administrator, but State Trustees is the most commonly appointed administrator when VCAT cannot find a suitable and willing family member or friend.³⁵

3.24 State Trustees also provides community education about guardianship laws for health professionals and community workers. It also conducts research and advocacy on issues including financial elder abuse, ageing, disability, and demystifying death and homelessness by contributing to current policy debates. In 2009 it commissioned researchers at Monash University to conduct a three year research project on elder abuse. That research has generated five reports.³⁶

29 While the legislation creates the statutory position of Public Advocate (ibid s 14(1)), in practice it is common to refer to the Office of the Public Advocate (OPA).

30 *Guardianship and Administration Act 1986 (Vic)* pt 3. See also Office of the Public Advocate (Victoria), *Annual Report 2008–2009* (2009) 4.

31 Refer to the Office of the Public Advocate website for more information: <www.publicadvocate.vic.gov.au>.

32 Refer to the VCAT website for more information <www.vcat.vic.gov.au>.

33 See Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 559 (Jim Kennan, Attorney-General). A large number of State Trustees clients have a very limited income, and its administration services for these people are subsidised by the Minister for Community Services as part of the Minister's obligations under part 4 of the *State Trustees (State Owned Company) Act 1994 (Vic)*. Of the 10,197 clients State Trustees provided administration services to during 2009–10, 8978 received a component of subsidy under this agreement. This figure includes represented persons whose order was revoked, or for whom a new administrator was appointed, or who died prior to the end of the financial year (email from State Trustees to Victorian Law Reform Commission, 4 November 2010, 4).

34 State Trustees provides a range of services to its clients including: executor services, attorney services, deceased estate administration, trustee services, financial services, personal financial administration, genealogical services and the sale of property. Refer to the State Trustees website for more information <www.statetrustees.com.au>.

35 State Trustees reports that the number of VCAT orders appointing State Trustees as a percentage of total VCAT orders made increased slightly this year, from 39.1% in 2009–10 to 40.1% in 2010–11: State Trustees, *Annual Report 2011* (2011) 9.

36 Refer to the State Trustees website for more information <www.statetrustees.com.au>. For more about the Protecting Elders Assets Study prepared by Peteris Darzins et al, Faculty of Medicine, Nursing and Health Sciences, Monash University (2009–11) for State Trustees see: <<http://www.statetrustees.com.au/financial-elder-abuse/financial-elder-abuse-research-project>>.

OTHER SUBSTITUTE DECISION-MAKING REGIMES

- 3.25 There are many other substitute decision-making arrangements in Victoria. Some operate under other Victorian legislation, such as the *Mental Health Act 1986* and the *Disability Act 2006*. Some operate under Commonwealth legislation, such as Centrelink nominees in the *Social Security (Administration) Act 1999* (Cth).
- 3.26 A Centrelink ‘correspondence nominee’ can receive from, or provide information to, Centrelink about another person, while a ‘payment nominee’ receives another person’s benefits.³⁷ These arrangements operate with the consent of the person concerned, or by appointment by Centrelink, which must consider the wishes of the person when doing so.³⁸ Once appointed, the nominee must act in the person’s best interests.³⁹ As of 23 April 2010, there were 153,368 nominees of all types in Victoria and 531,838 throughout Australia.⁴⁰
- 3.27 Some substitute decision-making regimes are informal, such as the Respecting Patient Choices program, designed by the Austin Hospital in Melbourne, which deals with advanced planning for medical treatment. The program seeks to ensure that health professionals find out what treatment people want in the future, and have systems in place to ensure that a person’s wishes are respected when they are no longer able to express them.⁴¹
- 3.28 These additional substitute decision-making regimes are important because they assist a significant number of people and sometimes provide an appropriate alternative to a guardianship or administration order by VCAT.

THE COMMISSION’S VIEWS AND CONCLUSIONS

- 3.29 Victoria’s guardianship laws have played an important role in assisting many people with a range of disabilities that affect their decision-making ability, particularly those people who have moved from institutional care to a life of much greater independence in the community. The Commission believes that, generally, these laws have served our community well. However, guardianship laws must evolve to cater for the contemporary needs of the many Victorians who need assistance with decision making now, or might need assistance in the future.
- 3.30 Over the past 26 years our guardianship laws have been amended on numerous occasions, often to respond to needs that were not foreseen when the G&A Act was enacted in 1986. This constant ‘patching’ has produced the inevitable outcome of complex and inaccessible legislation. In addition, the strong policy themes that underpinned the original legislation are no longer entirely relevant to current circumstances.

NEW LAWS FOR THE 21ST CENTURY

- 3.31 In the next two chapters, we consider the changing environment in which guardianship laws operate. We also outline the Commission’s recommendations for a new legislative framework.

³⁷ *Social Security (Administration) Act 1999* (Cth) ss 123F, 123H.

³⁸ *Ibid* s 123D(2).

³⁹ *Ibid* s 123O.

⁴⁰ Consultation with Centrelink (30 April 2010). Of these 128,248 were correspondence nominees, 5663 were payment nominees and 19,457 were dual appointments.

⁴¹ Refer to the Respecting Patient Choices Program website for more information: <www.respectingpatientchoices.org.au>. Consultation with Respecting Patient Choices Team—Austin Hospital (6 April 2010).



Chapter 4

A changing environment

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INTRODUCTION

- 4.1 Both the social environment in which Victorian guardianship laws operate and the range of people who use these laws have changed markedly since the passage of the *Guardianship and Administration Act 1986 (Vic)* (G&A Act). We consider these changes in this chapter.
- 4.2 New guardianship laws must evolve to cater for the contemporary needs of the many Victorians who require assistance with decision making now, or will do so in the future. While the G&A Act was groundbreaking legislation when first enacted, the law must now respond to new challenges that include:
- changes to the profile of people relying on these laws, particularly an increase in people with age-related disabilities who have become major users of guardianship laws
 - new international human rights laws that emphasise participation in decision making and equal rights for people with disabilities
 - changes to service delivery for people with disabilities in our community
 - a new emphasis on risk management within the service sector leading to growing unease with informal arrangements
 - the increasing use of mechanisms that allow people to plan ahead by nominating a person they trust to make decisions for them in the future if they are unable to do so themselves
 - growing concerns about abuse of people with disabilities in the community.
- 4.3 Chapter 5 provides an overview of the Commission's recommendations for responding to these challenges by modernising our guardianship laws.

AN AGEING POPULATION

- 4.4 As discussed in Chapter 2, the G&A Act sought to implement the recommendations of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee), which reported to the Victorian Government 30 years ago about the legal needs of people with an intellectual disability who were moving from institutional life to community living.¹ Although the G&A Act applies to people with a broad range of disabilities, the second reading speech for the Bill reveals that it was largely seen as legislation for people with an intellectual disability.² Over time, many people with other reasons for their impaired decision-making ability—most notably, age-related disabilities—have become major users of guardianship legislation.

SOME DATA

- 4.5 Australia's population is ageing.³ The average life expectancy of Australians is almost 84 years for women and 79 years for men.⁴ In 2010, about 800,000 Australians, or 3.7 per cent of the total population, were aged 80 or more. Nearly two-thirds of those people over 80 are female.⁵

1 Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) ('*Report of the Minister's Committee*').

2 Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986 (Jim Kennan, Attorney-General).

3 Population ageing is a result of sustained low fertility and increasing life expectancy, resulting in proportionally fewer children (under the age of 15 years) and proportionally more older people (over the age of 65 years): Australian Bureau of Statistics, *Australian Demographic Statistics*, June 2011, cat no 3101.0, ABS, Canberra <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3101.0Jun%202011?OpenDocument>>.

4 Australian Institute of Health and Welfare, *Australia's Health 2010* (2010) x. The median age of Australians is 36.9—this figure is the same for Victoria: Australian Bureau of Statistics, *Population by Age and Sex, Australian States and Territories*, Jun 2010, cat no 3201.0, ABS, Canberra <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3201.0Main+Features1Jun%202010?OpenDocument>>. The median age of Australia's population is projected to increase to between 38.7 years and 40.7 years in 2026: Australian Bureau of Statistics, *Population Projections, Australia, 2006 to 2101*, August 2008, cat no 3222.0, ABS, Canberra <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3222.0>>.

5 Australian Institute of Health and Welfare, *Australia's Health 2010* (2010) 5.

- 4.6 The proportion of the Australian population over 65 has been rising since the 1970s. In 1971, 8.3 per cent of the population were aged over 65.⁶ In 2009 this figure had risen to 13.3 per cent of the population, or over 2.9 million people.⁷
- 4.7 In Victoria, the number of people aged over 60 is expected to grow from one million in 2010, to 1.4 million in 2020, and to 2.4 million in 2050, representing 19, 23 and 29 per cent of the population respectively.⁸
- 4.8 The number of older Australians over the age of 85 years is projected to grow more rapidly than any other age group.⁹ This figure has doubled over the past 20 years with an estimated 1.1 million Australians expected to be over the age of 85 years in 2036.¹⁰ People aged 85 years and over are projected to increase their share of the total older population from 12 per cent of older Australians in 2006 to 18 per cent in 2036.¹¹

CHANGING INCIDENCE OF DISABILITY IN OUR COMMUNITY

- 4.9 The ageing profile of the population is the main factor affecting the incidence of disability in the community.
- 4.10 The results of the Australian Bureau of Statistics *Survey of Disability, Ageing and Carers 2009* showed that the rate of disability increases with age.¹² It is estimated that of the population over 90 years of age, 96 per cent have some form of disability.¹³
- 4.11 Without the impact of the ageing population the overall incidence of disability in the population has remained constant for some time.¹⁴
- 4.12 Dementia¹⁵ is now the leading cause of disability in Australians aged 65 and over.¹⁶ The prevalence of dementia doubles every five years from the age of 65.¹⁷ Access Economics reported that around 257,000 Australians had dementia in 2010.¹⁸ This is expected to increase to just over 981,000 people in 2050.¹⁹ There are currently

6 Ibid 20.

7 Ibid.

8 Department of Planning and Community Development (Victoria), *Ageing in Victoria: A Plan for an Age-friendly Society 2010–2020* (2010) 6 (*Ageing in Victoria*).

9 Australian Institute of Health and Welfare, *Older Australia at a Glance* (2007) 5–6.

10 Ibid 5.

11 Australian Bureau of Statistics, *Population Projections, Australia, 2004 to 2101 Reissue*, 25 November 2005, cat no 3222.0, ABS, Canberra <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3222.02004%20to%202101?OpenDocument>>. 'Older Australians' refers to those people aged 65 years and over.

12 Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings 2009*, 16 December 2010, cat no 4430.0, ABS, Canberra <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4430.02009?OpenDocument>> (*Ageing and Carers: Summary of Findings 2009*).

13 *Ageing in Victoria*, above n 8, 57.

14 The ABS says that 'after removing the effects of different age structures there was little change in the disability rate between 1998 (20.1%), 2003 (20%)': Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings 2003*, 15 September 2004, cat no 4430.0, ABS, Canberra <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12003>>. The rate stayed fairly consistent in 2009 (18.4%): *Survey of Disability, Ageing and Carers: Summary of Findings 2009*, above n 12. The decline experienced in the last 6 years is primarily due to the drop in disability caused by physical conditions. The ABS also says 'the rate of profound or severe core-activity limitation remained relatively stable between 1998 (6.4%), 2003 (6.3%)': Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings 2003*, 15 September 2004, cat no 4430.0, ABS, Canberra <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12003>>. The rate stayed consistent in 2009 (6.2%): *Survey of Disability, Ageing and Carers: Summary of Findings 2009*, above n 12. These figures relate to all kinds of disability, and are not limited to disabilities that might lead to incapacity in some areas of decision making. For the purposes of the survey, disability was defined as 'any limitation, restriction or impairment, which has lasted, or is likely to last, for at least six months and restricts everyday activities': Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings 2003*, 15 September 2004, cat no 4430.0, ABS, Canberra <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12003>>.

15 The term 'dementia' is regularly used with two different meanings. It is sometimes used as a shorthand plural term (dementias) to refer to a range of diseases, such as Alzheimer's, that cause progressive and diffuse cerebral damage. It is also used to refer to the clinical syndrome of 'an acquired global impairment of intellect, memory and personality, but without impairment of consciousness'. (see John-Paul Taylor and Simon Flemenger, 'The management of dementia' in Michael Gelder, Nancy Andreasen, Juan Lopez-Ibor and John Geddes, *New Oxford Textbook of Psychiatry* (Oxford University Press, 2nd ed, 2009) 411.

16 Access Economics, *Keeping Dementia Front of Mind: Incidence and Prevalence 2009–2050* (2009) v (*Keeping Dementia Front of Mind*).

17 Alzheimer's Disease International, *World Alzheimer Report 2009* (2009) 6; Australian Institute of Health and Welfare, *Australia's Health 2010* (2010) 172; *Keeping Dementia Front of Mind*, above n 16, 4.

18 Access Economics, *Caring Places: Planning for Aged Care and Dementia 2010–2050* (2010) 1 (*Caring Places*).

19 Due to changes made by ABS to population parameters, revising mortality upwards and lowering annual migration figures, the estimation of the prevalence of dementia in 2050 has decreased from 1.1 million to 981,000: *ibid* i.



approximately 65,000 Victorians with dementia.²⁰ This figure is projected to increase to over 141,000 people in 2030 and to more than 246,000 people by 2050.²¹ Dementia prevalence in Victoria is expected to grow by an extraordinary 278 per cent between 2010 and 2050.²²

- 4.13 The growing incidence of dementia-related illnesses is evident worldwide, leading to significant budget allocations and planning at national government levels.²³
- 4.14 People with dementia often require decision-making assistance, especially as their condition progresses. Some people make personal appointments of substitute decision makers when they still have the capacity to do so, while others are able to cope with informal assistance. People who have not made a personal appointment might need a tribunal-appointed guardian or administrator to assist them with important decisions that cannot be resolved informally.
- 4.15 A person with an age-related disability, such as dementia, is likely to experience gradual loss of decision-making ability over time. Many people with dementia are able to make decisions with assistance from others for some time. Often, the life history of these people can serve as a useful guide for those people who assist them with decisions or make decisions for them when they are no longer able to do so.

CHANGING PROFILE OF PEOPLE USING GUARDIANSHIP LAWS

- 4.16 The increase in the incidence of age-related disability, particularly dementia, is reflected in the people being assisted by guardianship laws. People with dementia, people with mental illness and people with acquired brain injury are now the major users of legislation designed initially with the needs of people with intellectual disabilities primarily in mind. People with dementia are likely to be the major users of guardianship laws over the next 20 years.

THE PUBLIC ADVOCATE'S CLIENTS

- 4.17 During 2010–11, the Public Advocate was guardian for 1730 people.²⁴ There were 905 new guardianship cases, up from 749 during 2009–10.²⁵

²⁰ *Caring Places*, above n 18, 15–6.

²¹ *Ibid.*

²² *Ibid.*

²³ Worldwide, the annual economic cost of dementia has been estimated as US\$604 billion: Alzheimer's Disease International, *World Alzheimer Report 2011* (2011) 59–60. The *New York Times* reported that an estimated 13.5 million Americans will suffer from Alzheimer's disease by 2050, up from five million in 2010 (Alzheimer's disease is the most common form of dementia). Currently, the United States spends US\$172 billion a year to care for people with Alzheimer's disease. By 2020, it is estimated that this cost will rise to US\$2 trillion, and by 2050 will increase to US\$20 trillion: Sandra O'Connor, Stanley Prusiner and Ken Dychtwald, 'The Age of Alzheimer's', *The New York Times* (New York City), 28 October 2010, A33. Legislation has recently been passed to establish an Office of the National Alzheimer's Project which will create an 'integrated national plan to overcome Alzheimer's': *National Alzheimer's Project Act*, USC § 3036 (2011). Australia was the first country to make dementia a national health priority. However, the 2011 budget did not commit any additional funding to combat dementia and therefore terminated the Dementia Initiative: *Helping Australians with Dementia, and their Carers – Making Dementia a National Health Priority* (2005). The dementia initiative was funded as a five year program in the 2005 Federal budget. Following Australia's initial lead, national dementia strategies have been launched in France, South Korea, England, Norway and the Netherlands and the European Commission has created an international action plan on dementia: Alzheimer's Disease International, *World Alzheimer Report 2009* (2009) 2.

²⁴ Office of the Public Advocate (Victoria), *Annual Report 2010–2011* (2011) 6. The Public Advocate is appointed as guardian by VCAT in approximately 65% of cases. In the other 35% of cases a family member or friend is appointed. The total number of new orders appointing the Public Advocate for people over the age of 65 during 2009–10 was 386: Office of the Public Advocate (Victoria) *Guardianship and the Ageing Population: Profile of Victorian Guardianship Clients Aged Over 65 years* (2011) 3–5.

²⁵ Note adjustments have been made to the way guardianship matters are counted from 2009–10 to 2010–11. Client matters rather than clients are now counted: Office of the Public Advocate (Victoria), *Annual Report 2010–2011* (2011) 6. In the first year of operation, the Public Advocate was appointed guardian in 225 cases: Office of the Public Advocate (Victoria), *Guardianship Trends in Victoria 1988–2008* (2009) 2–3.

- 4.18 In 2010–11, 16 per cent of the Public Advocate’s clients had an intellectual disability.²⁶ Approximately 33 per cent had dementia, making it the single largest client group.²⁷ The next largest user groups were people with acquired brain injury (18 per cent) and mental illness (17 per cent).²⁸
- 4.19 In 2010–11, 36 per cent of the Public’s Advocate’s clients were 80 years of age or older,²⁹ whereas in 1988 this figure was 26 per cent.³⁰ People over the age of 65 account for 60 per cent of clients represented by the Public Advocate.³¹

STATE TRUSTEES’ CLIENTS

- 4.20 As at 30 June 2011, State Trustees provided administration services for over 9000 represented persons, managing assets in excess of \$800 million.³²
- 4.21 The number of new VCAT orders appointing State Trustees accounted for 40.1 per cent of the total number of administration orders made during 2010–11, a slight increase from 2009–10.³³
- 4.22 Clients over 60 years account for 39 per cent of those represented by State Trustees.³⁴ People aged between 31 and 60 account for 53 per cent of clients and people under the age of 30 account for 8 per cent of clients.³⁵
- 4.23 The profile of those people who are represented by State Trustees differs from those represented by the Public Advocate. In 2009–10, the most significant client group by disability type were people with a mental illness, accounting for approximately 30 per cent of clients, followed by intellectual impairment (approximately 18 per cent), dementia (approximately 12 per cent), and acquired brain injury (approximately 8.5 per cent).³⁶

PROJECTIONS OF FUTURE USE OF GUARDIANSHIP LAWS

- 4.24 In order to gauge the number of people who might require the assistance of a guardian or an administrator³⁷ in the future—and, in particular, the numbers who might need the services of the Public Advocate and State Trustees—the Commission engaged Monash University’s Centre for Population and Urban Research (CPUR),

26 Office of the Public Advocate (Victoria), *Annual Report 2010–2011* (2011) 7 (‘OPA, *Annual Report 2010–2011*’).

27 Ibid. The Office of the Public Advocate reports that the greatest demand for services—guardianship, advocacy and investigations—during the first 10 years of operation was for people with an intellectual disability or mental illness. People with dementia have always comprised a considerable proportion of the Public Advocate’s guardianship clients: Office of the Public Advocate (Victoria), *Guardianship Trends in Victoria 1988–2008* (2009) 9, 11.

28 OPA, *Annual Report 2010–2011*, above n 26, 7.

29 Ibid 6.

30 Office of the Public Advocate (Victoria), *Guardianship Trends in Victoria 1988–2008* (2009) 9 (‘*Guardianship Trends in Victoria*’).

31 While the Public Advocate notes that the implementation of a slightly different statistical recording system based on matters and not clients may explain this shift to an extent, the current figures now more accurately reflect the age demographic of clients under guardianship: OPA, *Annual Report 2010–2011*, above n 26, 6.

32 State Trustees, *Annual Report 2011* (2011) 51 (‘*State Trustees, Annual Report 2011*’).

33 Ibid 9. While the Commission does not have the specific number of new orders appointing State Trustees as administrator during 2010–11, the figure as at June 30 2010 was 988: State Trustees, *Annual Report 2010* (2010) 10.

34 State Trustees, *Annual Report 2011*, above n 32, 51.

35 Ibid.

36 A more detailed breakdown of State Trustees clients during 2009–10 is as follows: Alzheimer’s disease 2.32%, Huntington’s disease 0.57%, Parkinson’s disease 0.35%, depression 0.04%, paranoid schizophrenia 4.54%, intellectual impairment 17.18%, bi-polar disorder 1.15%, no capacity, unspecified reason 1.21%, ABI 4.85%, Munchausen’s disease 0.01, stroke 0.64%, schizophrenia 14.13%, dementia 9.38%, multiple sclerosis 0.21%, vascular dementia 0.76%, physical disability 1.48%, ABI (motor vehicle) 1.67%, ABI (alcohol) 1.90%, ABI (drug induced) 0.08%, mental illness 9.48%, Korsakoffs disease 0.17%, Prader-Willy syndrome 0.01%: email from State Trustees to Victorian Law Reform Commission, 4 November 2010. The Commission does not have 2010–11 data.

37 In Chapter 5, the Commission recommends that the term ‘personal guardian’ replace ‘guardian’ and ‘financial administrator’ replace ‘administrator’. For ease of discussion, we continue to use the terms ‘administrator’ and ‘guardian’ in this chapter because the discussion primarily deals with existing or past events.



headed by demographer Dr Bob Birrell.³⁸ The Commission asked the Centre to provide estimates of the numbers of Victorian residents likely to be experiencing 'severe' or 'profound' cognitive impairment in 2020 and 2030.³⁹ These research categories were chosen because they are categories used by the Australian Bureau of Statistics (ABS), the main data source for this exercise,⁴⁰ and because it is likely that people with this level of cognitive impairment may need some form of decision-making assistance.⁴¹

PROJECTIONS FOR SEVERE OR PROFOUND COGNITIVE IMPAIRMENT

- 4.25 The rate of cognitive impairment increases with age. CPUR applied the rates of people with severe or profound cognitive impairment to projections of Victoria's population to determine the likely increase in the number of people who may need a guardian or administrator in the future.⁴²
- 4.26 CPUR expects the number of Victorians who are likely to have severe or profound cognitive impairment to increase over the next two decades. CPUR estimated that in 2010, 78,379 Victorians over the age of 19 had a severe or profound cognitive impairment.⁴³ CPUR suggests that this will increase to 97,897 in 2020 and 124,280 in 2030, increases of 25 per cent and a further 27 per cent respectively.⁴⁴

38 The exercise of estimating the number of guardians and administrators likely to be appointed in the future has been difficult because VCAT's IT system has been unable to identify the number of orders made. VCAT data appears to be limited to the number of applications and finalisations made. The Commission has been unable to link the information provided by VCAT to the information provided by the Public Advocate and State Trustees about the number of orders in which those agencies have been appointed. It has therefore been difficult to draw any definite conclusions from the data provided by VCAT.

39 CPUR used the data provided by the Australian Bureau of Statistics (ABS) *Survey of Disability, Ageing and Carers: Summary of Findings 2003* (DAC 2003) ABS cat no 4430.0, ABS, Canberra to establish the future projections contained in their report. This report was provided to the Commission in December 2010. In early 2011, the ABS published the 2009 survey of the same name and staggered data cubes throughout 2011. The Commission has considered the data contained in the 2009 survey and notes the future projections contained in our report are based on the results of the 2003 survey as the 2009 survey findings were not released in time for inclusion in the CPUR report. The 2009 survey was largely a repeat of the 2003, with the only notable differences being content in the areas of unmet demand for assistance, social inclusion, and labour force participation. The Commission notes CPUR used a series of projections prepared by the ABS and published in 2008 for the Victoria population projection: Australian Bureau of Statistics, *Population Projections, Australia, 2006 to 2101*, 2008, cat no 3222.0, ABS, Canberra <<http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>>. This series of projections is similar to those used by the Victorian Government in the Department of Planning and Community Development publication *Victoria in Future 2008: Victorian State Government Population and Household Projections 2006–2036* (September 2009). Only adults aged 20-plus are shown for the projection of those with CI shown in Table 3. The projection starts with 20–24 year olds because there was no data for the years 18 or 19 in the ABS projection: Bob Birrell, Dharma Arunachalam and Ernest Healy, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 6.

40 Using the definitions contained in the DAC 2003, CPUR included the following 'main conditions' as potentially leading to cognitive impairment: dementia, Alzheimer's disease, Parkinson's disease, multiple sclerosis, cerebral palsy, other diseases of the nervous system, stroke, head injury/acquired brain damage, complications/consequences of surgery and medical care n.e.c. (not elsewhere classified), schizophrenia, depression/mood affective diseases (excluding postnatal depression), mental retardation/intellectual disability, autism and related disorders (including Retts syndrome), intellectual and development disorders n.e.c., mental and behavioural disorders n.f.d. (not further defined), other mental and behavioural disorders and intellectual and development disorders: Bob Birrell, Dharma Arunachalam and Ernest Healy, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 3.

41 The DAC 2003 survey classified the conditions potentially leading to cognitive impairment into four stages: those experiencing profound limitation, severe limitation, moderate limitation and mild limitation. For the purposes of the CPUR study only those with profound or severe limitation/disablement were regarded as likely to experience a level of cognitive impairment that may likely lead to the need for the appointment of a guardian or administrator: Bob Birrell, Dharma Arunachalam and Ernest Healy, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 3.

42 The number of people in supported residential care is also likely to grow substantially over the next two decades as the community ages and life expectancy increases. Projections prepared for the Commission by Monash University's Centre for Population and Urban Research project that by 2030 there will be a 76% increase in the number of people with a cognitive impairment living in cared accommodation relative to 2010. This is higher than the total increase in the numbers projected to be cognitively impaired. The reason for this outcome is the relatively rapid growth in the numbers of persons in the retirement ages: Bob Birrell, Dharma Arunachalam and Ernest Healy, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 7.

43 Based on data from DAC 2003 CPUR estimates that approximately 2% of Victorians have severe or profound cognitive impairment: Bob Birrell, Dharma Arunachalam and Ernest Healy, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 8.

44 These percentages have been derived by the Commission and are based on projections formulated by CPUR. CPUR used figures from the DAC 2003 multiplied by the projected population of Victoria in 2020 and 2030. See also Australian Bureau of Statistics, *Population Projections, Australia, 2006 to 2101*, 2008, cat no 3222.0, ABS, Canberra <<http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>> .

IMPLICATIONS AND PROJECTIONS FOR GUARDIANSHIP CASES

- 4.27 It is difficult to assess with any precision the number of people who may need a tribunal-appointed guardian or administrator in the future because of the challenge in predicting the prevalence of various alternate strategies—most notably, the personal appointment of an enduring guardian or attorney—that would minimise the need for a VCAT appointment. It is also difficult to predict actions that might increase need, such as insistence by aged care homes and financial institutions that they will only deal with a formally appointed substitute decision maker of a person without capacity.
- 4.28 CPUR calculates that approximately two per cent of Victorians with severe or profound cognitive impairment have the Public Advocate as their guardian. This calculation is based on a figure of 1574 Victorians who were under the guardianship of the Public Advocate during 2009–10 as a percentage of the estimated total number of Victorians who were severely or profoundly cognitively impaired in 2010 (78,379).⁴⁵
- 4.29 This percentage is probably conservative as the demand for guardians and administrators is likely to grow as more government agencies and private sector organisations insist upon dealing with a formally appointed substitute decision maker in order to minimise their own exposure to risk.
- 4.30 CPUR suggests that the number of people under the guardianship of the Public Advocate is likely to increase to 1958 people in 2020 and to 2486 in 2030, an increase of 25 per cent from 2010 to 2020 and an increase of 27 per cent from 2020 to 2030.⁴⁶

Table 1: Projected number of guardianship cases in Victoria in 2020 and 2030

	2010	2020	2030
Number of cognitively impaired	78,379	97,897	124,280
Share in guardianship	2.01%	2.01%	2.01%
Number in guardianship	1574	1958	2486

Source: Calculated from projections of those with cognitive impairment contained in Bob Birrell, Dharma Arunachalam and Ernest Healy, Centre for Population and Urban Research, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010).

Implications for VCAT applications

- 4.31 According to VCAT, there were 1872 guardianship applications and 2772 administration applications in 2009–10.⁴⁷ The Commission has estimated the number of guardianship and administration applications VCAT might receive in 2020 and 2030.⁴⁸

45 Office of the Public Advocate, *Annual Report 2009–2010, (2010)* 5. This figure relates to the number of people under the guardianship of the Public Advocate during 2009–10 and includes the number of new appointments made and active appointments carried over from the previous financial year. The Public Advocate reports that she was guardian for 1730 people during 2010–11, an increase of 156 from 2009–10: OPA, *Annual Report 2010–11*, above n 26, 6. The most recent figure was not available for inclusion in the CPUR report. See also Bob Birrell, Dharma Arunachalam and Ernest Healy, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 9.

46 Data provided by the Public Advocate detailed the age distribution and disability type of those people represented by the Office during 2009–10. Clients of the Public Advocate over the age of 80 account for 41 percent of cases: Office of the Public Advocate (Victoria), *Annual Report 2009–2010* (2010) 5. The age distribution is comparable to the estimate of the share of cognitively impaired persons in Victoria in 2010 in the 80 years plus age group. This can be interpreted to imply that for the guardianship group the characteristics of the Victorian population with a cognitive impairment is reflected in the demographic of clients of the Public Advocate: Bob Birrell, Dharma Arunachalam and Ernest Healy, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 8.

47 The present IT system at VCAT is only able to establish how many applications are made in a given period. From that information VCAT is not able to identify how many orders were made, or how many people were the subject of orders: email from Victorian Civil and Administrative Tribunal to Victorian Law Reform Commission, 10 February 2011. The Public Advocate and State Trustees provide information about the number of VCAT orders appointing those respective agencies.

48 To arrive at these figures the Commission applied the projected increase of the number of Victorians with a severe or profound cognitive impairment between 2010 and 2020 (25%) and 2030 (27%) to the number of guardianship and administration applications VCAT received during 2009–10.

- 4.32 VCAT can expect to receive 5796 guardianship and administration applications in 2020 and 7357 applications in 2030, an increase of approximately 25 and 27 per cent during each 10-year period.⁴⁹ While these figures are broad estimations only, they provide a useful indication of future workload.

IMPLICATIONS AND PROJECTIONS FOR ADMINISTRATION CASES

- 4.33 State Trustees is the administrator for a very different group of people than those who have the Public Advocate as their guardian. State Trustees' clients are younger than the Public Advocate's and the reasons for their impaired decision making capacity differ. The average age of clients of State Trustees is 56 years.⁵⁰ People over the age of 81 years account for only 13 per cent of total clients. Unlike people represented by the Public Advocate, 30 per cent of the people represented by State Trustees have a mental illness.⁵¹
- 4.34 CPUR suggested that it is not advisable to use the projected figures for Victorians with severe or profound cognitive impairment when seeking to provide estimates of the number of people State Trustees could expect to represent in 2020 and 2030.⁵² However, in line with the growth in the population of Victoria, and the accompanying increase in the incidence of age-related disability, State Trustees can expect to manage a considerably larger number of clients in the future.

SUMMARY OF DATA

- 4.35 In summary, the data relating to severe and profound cognitive impairment in Victoria reveals that:
- The rate of severe and profound cognitive impairment increases as people age. In the age bracket 70–79 there are more men than women who experience severe or profound cognitive impairment. This changes in the 80 plus age group, presumably because women generally outlive men.
 - The number of Victorians with that level of impairment is likely to increase by approximately 25 per cent between 2010 and 2020.
 - The number of people under guardianship of the Public Advocate is likely to increase by approximately 25 per cent between 2010 and 2020.
 - Victorian Civil and Administrative Tribunal (VCAT) applications for guardianship or administration orders are likely to increase by approximately 25 per cent between 2010 and 2020.
 - It is anticipated that State Trustees will also be called on to manage a much larger number of clients in the future.

OTHER FACTORS INFLUENCING THE PROFILE OF PEOPLE USING GUARDIANSHIP

- 4.36 Many other factors are likely to affect the content and operation of guardianship laws in the future. Some relevant issues are:
- The growing number of people in Victoria from culturally and linguistically diverse backgrounds, particularly among older people, means that the future system

49 These calculations are derived from the number of guardianship and administration applications VCAT received during 2009–10 (4644) multiplied by the approximate increase in the number of Victorians with severe or profound cognitive impairment in 2020 (25%) and 2030 (27%) as projected by CPUR.

50 This figure is for the 2009–10 financial year. The average age of female clients is 60 years and 53 years for males: email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

51 This figure is for the 2009–10 financial year. By condition type, mental illness accounts for approximately 30 per cent of State Trustees clients. Conditions are classified as follows: depression 0.04%, paranoid schizophrenia 4.54%, bi-polar disorder 1.15%, Munchausen's disease 0.01%, schizophrenia 14.13%, mental illness 9.48%, Korsakoffs disease 0.17%: email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

52 Bob Birrell, Dharma Arunachalam and Ernest Healy, *Guardianship Arrangements and Demographic Trends, 2010–2030* (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 9.

will need to be more accessible to people from a range of linguistic and cultural backgrounds.⁵³

- An ageing population in regional areas will put greater pressures on a system that is currently largely centralised.⁵⁴
- The growing awareness of a lack of engagement of Indigenous Victorians with guardianship laws, and their overall under-representation as users of disability services, highlights the need for the system to be more accessible and relevant to Aboriginal and Torres Strait Islander people.⁵⁵
- There have been calls by the families of people with lifelong decision-making disabilities to be appointed as guardians even when there is no immediate need for a formal substitute decision maker.⁵⁶
- There have been calls by and on behalf of some people with a mental illness to have the choice of using guardianship laws when they are unable to make decisions for themselves about psychiatric treatment and place of residence.⁵⁷

4.37 This report contains many recommendations that seek to make guardianship laws more accessible and responsive to the varying needs of a diverse Victorian community.

DIFFERENT EXPERIENCES OF CAPACITY

4.38 The difficult concept of 'capacity' lies at the centre of Victoria's guardianship laws. 'Capacity' is used throughout the law as a shorthand term to refer to a level of cognitive ability that a person must have before they can make a decision that is recognised as being legally valid, such as entering into a binding contract, or before they can lawfully participate in various activities of adult life, such as marrying or having a sexual relationship with another person.

4.39 Guardianship law currently draws a convenient, but artificial, distinction between those people who have capacity and those who do not. At present, the law only has one response to the needs of someone with impaired decision-making ability: the appointment of a substitute decision maker to make decisions on that person's behalf.

4.40 Issues of capacity can be very different, however, for the many groups of people who now use guardianship laws. A person with an age-related disability, for example, is

53 The culturally and linguistically diverse (CALD) population is ageing more rapidly than the Australian-born population. According to the Australian Institute of Health and Welfare, people aged 65 years and older from CALD backgrounds are expected to increase by 66% over a 15-year period, while the corresponding increase for the Australian-born population is projected to be 23%: Diane Gibson et al, Australian Institute of Health and Welfare, *Projections of Older Immigrants: People from Culturally and Linguistically Diverse Backgrounds 1996–2026, Australia* (2001) 12. Based on these projections, AIHW estimates that by 2011, one in every five people aged 80 and over will be from CALD backgrounds: at 12. Access Economics reports that there are currently no epidemiological data on dementia incidence and prevalence rates among CALD populations in Australia: *Keeping Dementia Front of Mind*, above n 16, 11.

54 Although VCAT currently conducts regular hearings throughout regional Victoria, the Office of the Public Advocate is based only in Melbourne. State Trustees has offices in Melbourne, Glen Waverley, Dandenong and Bendigo. The proportion of older people in rural and regional Victoria is greater than in metropolitan Melbourne. According to the Department of Planning and Community Development (Victoria), in 2006, 21% of regional Victorians were aged 60 years or over, compared to 17% in metropolitan areas. By 2020, it is predicted that 28% of the regional population will be over 60, estimated to increase to 35% in 2050: *Ageing in Victoria*, above n 8, 6. As at 22 July 2010, the Managers of the Advocate Guardian program within the Office of the Public Advocate estimate that 30–40% of their guardianship clients are in regional and rural areas (principally the regional centres such as Shepparton, Ballarat, Geelong and the Mornington Peninsula): email from Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.

55 While the 2006 census data indicated that 2.4% of the total Australian population are Indigenous, they represent only 0.6% of people using disability services in Victoria. The Census revealed that Indigenous Australians aged under 65 years were 2.4 times as likely as non-Indigenous Australians of the same age to need assistance with activities of daily living: see Australian Bureau of Statistics, *Experimental Estimates of Aboriginal and Torres Strait Islander Australians*, June 2006, cat no 3238.0.55.001, ABS, Canberra. See also Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander people with Disability: Wellbeing, Participation and Support* (2011) 2; Australian Institute of Health and Welfare, *Australia's Welfare 2009* (2009) 8; Parliament of Victoria, *Inquiry into Supported Accommodation for Victorians with a Disability and Mental Illness* (2009) 32. The Commission heard from a representative from the Victorian Aboriginal Disability Network that many Aboriginal people have very little knowledge of the guardianship system after their child turns 18 or what services they are entitled to. There is a need for more education and better transitioning between the youth system and adult guardianship systems: consultation with Jody Saxton-Barney, Project Coordinator 2009–2011, Victorian Aboriginal Disability Network (3 August 2011).

56 Submission CP 59 (Carers Victoria).

57 See Chapter 24.



likely to experience a gradual loss of capacity over time. A person with an acquired brain injury might recover important areas of capacity over time. A person with a mental illness might experience fluctuating capacity.

- 4.41 The Cocks Committee did not consider people's different experiences of impaired decision-making ability. In Chapter 7, the Commission proposes a more sophisticated response to impaired decision-making ability: there should be a spectrum of measures to support people to participate in those activities where legal capacity is required.

A DIFFERENT DISABILITY POLICY ENVIRONMENT

- 4.42 New guardianship laws must also respond to the significant changes to public policy concerning people with disabilities since the G&A Act was enacted in 1986.
- 4.43 The notion of 'protection' was a central part of the task set for the Cocks Committee. It was asked 'to formulate proposals for legislation to deal with the protection of intellectually handicapped persons'.⁵⁸ The Committee was acutely aware, however, of the 'possibility that [guardianship] legislation ... can be used to restrict as well as to protect an individual'.⁵⁹ In response, the Committee sought to ensure that guardianship would become a last resort, for use after other less restrictive options had been considered.
- 4.44 The Cocks Committee said that new legislation should ensure
 that a guardian is appointed to make decisions only in those areas in which a person cannot make decisions for himself [*sic*]. A concept of limited guardianship would help to ensure that the protective service is 'tailor-made' to accommodate the strengths and weaknesses of the individual and would be consistent with an important principle which first arose in the educational context (that of the least restrictive alternative).⁶⁰
- 4.45 While notions of vulnerability and protection should continue to influence public policies concerning some people with disabilities, the human rights perspectives of equality and citizenship of people with disabilities are now influential. These matters are reflected in the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention), which is discussed below. They are also reflected in changes to policy underpinning the provision of services for people with disabilities. There is now much greater emphasis upon people with disabilities being supported to be active, participating members of our community.

A DIFFERENT APPROACH TO THE WAY DISABILITY SERVICES ARE DELIVERED

Deinstitutionalisation

- 4.46 The movement of people with intellectual disabilities and mental illness from large-scale institutions into community-based living during the 1970s and the 1980s⁶¹ was accompanied by important changes to the way in which services associated with daily living were provided to these people.⁶² These profound changes meant that a single institutional service no longer exercised day-to-day decision-making control over the

⁵⁸ *Report of the Minister's Committee*, above n 1, 3.

⁵⁹ *Ibid* 25.

⁶⁰ *Ibid* 25–6.

⁶¹ In 1988, there were 2700 people with intellectual disabilities living in residential institutions, and 685 in shared supported accommodation in the community. By 1998, there were 941 people with an intellectual disability in state-run institutions and 4365 people in shared supported accommodation: Auditor General Victoria, *Services for People with an Intellectual Disability* (2000) 21. According to the Family Community Development Committee, in 2008 there were approximately 200 people living in Victoria's two remaining institutions, and 4590 people in shared supported accommodation: Family Community Development Committee, Parliament of Victoria, *Inquiry into Supported Accommodation for Victorians with a Disability and Mental Illness* (2009) 80–2.

⁶² Victoria's capacity to fund and regulate services for people with disabilities other than intellectual disabilities was provided for in the *Disability Services Act 1991* (Vic), later repealed, along with the *Intellectually Disabled Persons' Services Act 1986* (Vic), by the *Disability Act 2006* (Vic) s 222. From 1991, the focus of service policy and delivery in Victoria was on people with all disabilities.

lives of most people with an intellectual disability or a mental illness. People with disabilities were more likely to be interacting with local shops and services in the same way as other members of the community.

Service reorientation

- 4.47 Over time, the service system for many people with a disability has changed to a more individualised approach. The system has gone from one dominated largely by government, which either funded or directly provided services, to one that is principally concerned with individual package funding.⁶³
- 4.48 This approach saw funds allocated, either directly or notionally, to the person with the disability. The person with the disability could then use those funds in flexible ways to meet their needs, either by 'buying' disability services, or through other channels, such as buying in extra support within their ordinary community networks, rather than relying on a more formal disability service system.
- 4.49 The number of people receiving individual support packages from the Department of Human Services' Disability Services program has grown from 6920 in 2003–04 to 14,852 in 2010–11.⁶⁴
- 4.50 Two recent reports by the Productivity Commission⁶⁵ suggest that the delivery of services for aged people in Australia and for those with a disability might be re-structured over the next few years. Any changes might increase the need for formal substitute decision-making arrangements.
- 4.51 In August 2011 the Productivity Commission produced a report concerning disability care and support throughout Australia.⁶⁶ The Productivity Commission noted that 'current disability support arrangements are inequitable, under funded, fragmented, and inefficient and give people with a disability little choice'.⁶⁷ The Commission's recommendation to establish a National Disability Insurance Scheme,⁶⁸ which has received bi-partisan support, seeks to provide Australians with a guarantee of support if they acquire a significant disability.⁶⁹
- 4.52 The Productivity Commission also recently released a report containing options for reforming Australia's aged care system.⁷⁰ It recommended structural reform of the aged care system to ensure the wellbeing of older people is protected and promoted. The terms of reference directed the Productivity Commission to address issues arising from Australia's ageing and increasingly diverse population, increasing demand for aged care services and a significant shift in the types of care expected.⁷¹

63 Department of Human Services (Victoria), *Individual Support Packages* (10 November 2011) <http://www.dhs.vic.gov.au/disability/supports_for_people>.

64 Department of Human Services (Victoria) *Annual Report 2010–11* (2011) 46. email from Department of Human Services, Disability Services Division to Victorian Law Reform Commission, 13 September 2010.

65 The Productivity Commission is an independent research and advisory body to the Australian Government. For more information, see the Productivity Commission website <<http://www.pc.gov.au/>>.

66 Productivity Commission, *Disability Care and Support*, Inquiry Report No 54 (2011) ('*Disability Care and Support*').

67 *Ibid* vol 1, 5.

68 For example, people with permanent or significant disability would receive an entitlement to particular supports, and would be able to decide what service providers they wanted, or indeed if they wanted a service provider to coordinate services for them. The person could elect to receive an individualised budget under self-directed funding if they wanted to manage their budget directly, and were able to do so. *Disability Care and Support*, above n 66, vol 1, 19, 63. While the Productivity Commission's recommendation for a non-means tested national insurance scheme received a commitment from government and bi-partisan support, the proposed 7 year timeframe for the full introduction of the scheme has raised concern from unions: see Australian Council of Trade Unions, 'National Disability Insurance Scheme is a Reform Whose Time has Come' (Media Release, 10 August 2011) <<http://www.actu.org.au/Images/Dynamic/attachments/7357/acturelease110810-disability.pdf>>.

69 *Disability Care and Support*, above n 66, vol 1, 10–17.

70 Productivity Commission, *Caring for Older Australians*, Inquiry Report No 53 (2011).

71 *Ibid* v–vii.

- 4.53 A single national care co-contribution regime was recommended, involving private and government contributions which would apply across the aged care system—in the community or in a residential aged care facility.⁷² A focus of the report is on providing older people with a choice of care that is individualised and enabling.⁷³

New laws and changes to service delivery

- 4.54 The *State Disability Plan 2002–2012* (2002) (State Plan) brought a new focus on building accessible and supportive communities and a whole-of-government approach to disability planning supports and service regulation. This shift away from facility-based services was subsequently reflected in the *Disability Act 2006* (Vic). While the earlier legislation, the *Intellectually Disabled Persons' Services Act 1986* (Vic) (IDPS Act), was essentially an Act to regulate disability service provision, the Disability Act (which replaced the IDPS Act and *Disability Services Act 1991* (Vic)) has a broader focus. It includes, for example, provisions for Disability Action Plans across government departments and establishes a Disability Advisory Council to provide whole-of-government advice to the Minister.⁷⁴
- 4.55 The introduction of the Disability Act expanded the service focus of the IDPS Act. While the IDPS Act provided a framework to plan and access services to meet a person's needs⁷⁵ in specific areas of their life—such as work, education and community participation—the Disability Act sought to place much greater emphasis on supporting families, informal networks and local communities to respond to the needs and goals of the person with the disability.⁷⁶
- 4.56 All of these differences reflected changes in approaches to people with disabilities and to the services they use. They represent a shift from seeing people with a disability as recipients of services to recognising them as people who are active, participating members of society. This change is an important consideration in the development of any new laws.

A CHANGING LEGAL CLIMATE

UNITED NATIONS' CONVENTION

- 4.57 Australia is a state party to a number of international conventions concerned with protecting and promoting human rights,⁷⁷ including the rights of people with disabilities.⁷⁸ The United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention) is the most comprehensive international human rights statement of the rights of people with disabilities. It protects and promotes a broad range of civil, political, economic, cultural and social rights for people with disabilities, almost all of which are directly or indirectly relevant to guardianship laws.⁷⁹

⁷² Ibid xxxvi–ii.

⁷³ Ibid xxii.

⁷⁴ *Disability Act 2006* (Vic) ss 11–12, 38.

⁷⁵ *Intellectually Disabled Persons' Services Act 1986* (Vic) ss 3, 9, as repealed by *Disability Act 2006* (Vic) s 222(1).

⁷⁶ *Disability Act 2006* (Vic) s 52(2).

⁷⁷ Australia is a party to seven of the nine core international human rights treaties including: the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, *Convention Against Torture*, the *International Covenant on Economic, the Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of Persons with Disabilities*: Attorney-General's Department (Commonwealth), *Human rights* (12 December 2011) <<http://www.ag.gov.au/humanrights>>.

⁷⁸ The United Nations first adopted international human rights instruments about the rights of people with disabilities in the 1970s. These included the *Declaration on the Rights of the Mentally Retarded Persons* (1971) and the *Declaration on the Rights of Disabled Persons* (1975).

⁷⁹ Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others: *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1.

- 4.58 Although many of the rights protected by the Convention were already protected by other United Nations human rights treaties, such as the *International Covenant on Civil and Political Rights*⁸⁰ and the *International Covenant on Economic, Social and Cultural Rights*,⁸¹ these conventions make few specific references to the rights of people with disabilities.⁸² A disability-specific convention was seen as necessary to increase the visibility of people with disabilities as holders of human rights, to provide more targeted statements and protections relevant to people with disabilities, and to improve research and monitoring of the status of people with disabilities.⁸³ It has been described as ‘the first international instrument which looks at people with disabilities from the perspective of human rights and not from a perspective of medical or social politics’.⁸⁴
- 4.59 When Australia ratifies an international convention, it accepts an obligation in good faith to implement its provisions in domestic laws.⁸⁵ The Convention was ratified by Australia on 17 July 2008. On 21 August 2009, Australia ratified the Convention’s Optional Protocol, which allows individual citizens to make a complaint to the Committee on the Rights of Persons with Disabilities about violations of the Convention by state parties. The Committee oversees the implementation of the Convention.⁸⁶ The Convention’s overall purpose is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.⁸⁷
- 4.60 The Convention represents a movement beyond providing protection for people with disabilities to taking positive steps to maximise their participation in all aspects of life. It stresses a state’s obligation to promote active participation by championing equal access to different aspects of community life,⁸⁸ and recognising the right of people with disabilities to enjoy legal capacity on an equal basis with other people.⁸⁹ In the Commission’s view, this means that disability alone should never constitute a ‘capacity disqualification’ and that all reasonable efforts should be made to assist people with impaired capacity to participate to the fullest extent possible in decisions about themselves.

VICTORIAN CHARTER

- 4.61 Victoria is one of two Australian jurisdictions to have a charter of rights.⁹⁰ The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) establishes a legislative framework for the protection and promotion of human rights in Victoria.⁹¹ The Charter came into full operation on 1 January 2008.⁹²

80 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

81 *International Covenant on Economic, Cultural and Social Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

82 Anna Lawson, ‘The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?’ (2006–07) 34 *Syracuse Journal of International Law and Commerce* 563, 575–6.

83 *Ibid* 583–5.

84 Volker Lipp, ‘Autonomy and Guardianship—Foes or Friends?’ (Paper presented at World Congress on Adult Guardianship, Yokohama, 2 October 2010).

85 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980): ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’.

86 While one of the main roles of the Committee is to deal with complaints made under the Optional Protocol, the role of interpreting the Convention will be undertaken by courts at both a national and international level: consultation with Professor Ron McCallum AO (15 March 2011).

87 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1 (‘*Convention on the Rights of Persons with Disabilities*’).

88 *Ibid* art 9.

89 *Ibid* art 12.

90 The other is the ACT. See the *Human Rights Act 2004* (ACT).

91 The Charter gives statutory recognition to 20 civil and political rights and freedoms primarily derived from the *International Covenant on Civil and Political Rights: International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1.

92 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2.



- 4.62 The Charter establishes a 'dialogue model' of human rights protection in which the government, courts and parliament are assigned specific roles to ensure that human rights are protected and promoted in Victoria. The Charter provides that new Victorian laws should be, as far as possible, consistent with human rights⁹³ and that, whenever possible, existing laws should be interpreted so that they are compatible with the Charter.⁹⁴
- 4.63 Some of the rights recognised by the Charter that are particularly relevant to the content of new Victorian guardianship laws are:
- the right to recognition as a person before the law⁹⁵
 - equal protection before the law and protection from discrimination⁹⁶
 - protection from cruel, inhuman, degrading treatment or punishment and not being subjected to medical or scientific experimentation or treatment without consent⁹⁷
 - freedom of movement and a person's right to choose where they live⁹⁸
 - the right to privacy⁹⁹
 - protection against the removal of a person's property without lawful reason¹⁰⁰
 - the right to liberty and security, including freedom from detention without lawful reason¹⁰¹
 - the right to have a proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.¹⁰²
- 4.64 The Charter applies to the actions of government departments and public authorities, but not to private individuals or groups.¹⁰³ The Charter makes it
unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right.¹⁰⁴
- 4.65 A public authority that acts in a way that is incompatible with a Charter right cannot be sued for that conduct alone. However, the breach of the Charter may be used as an additional ground in a non-Charter cause of action relating to the other unlawful conduct of the authority.¹⁰⁵ In other words, a breach of the Charter does not give rise to a freestanding cause of action, but may be used as part of an existing cause of action.¹⁰⁶ There is no entitlement to damages for breach of the Charter.¹⁰⁷

93 Ibid s 28 requires that a statement of compatibility must be prepared in respect of any new Bill that is introduced into the Victorian Parliament, outlining the Bill's compatibility or incompatibility with human rights.

94 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2) says that '[i]nternational law and the judgments of domestic courts and tribunals relevant to a human right must be considered in interpreting a statutory provision'.

95 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(1).

96 Ibid ss 8(2)–(4).

97 Ibid s 10.

98 Ibid s 12.

99 Ibid s 13.

100 Ibid s 20.

101 Ibid s 21.

102 Ibid s 24.

103 Ibid s 6.

104 Ibid s 38(1).

105 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(1); Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 28.

106 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3); Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 28.

107 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

- 4.66 While the actions of the Public Advocate are directly subject to the Charter, including when the Public Advocate is acting as guardian of last resort for a represented person, the actions of a private guardian are not. Similarly, the Charter does not apply to private administrators, but probably does apply to State Trustees.
- 4.67 The Charter binds VCAT in relation to the general administration of the Guardianship List and otherwise binds VCAT to the extent that it has certain functions under the Charter.¹⁰⁸ The Charter right to a fair hearing applies to VCAT when making decisions under the G&A Act.¹⁰⁹
- 4.68 The Charter expanded the rights of the Victorian Ombudsman to include ‘the power to enquire into or investigate whether any administrative action is incompatible with the Charter’.¹¹⁰
- 4.69 The Charter acknowledges that human rights, in general, are not absolute, but may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.¹¹¹
- 4.70 When determining whether any limitations on rights are reasonable, the relevant factors to consider include:
- the nature of the right
 - the importance of the purpose of the limitation
 - the nature and extent of the limitation
 - the relationship between the limitation and its purpose
 - whether there is a less restrictive way that is reasonably available to achieve the purpose of the limitation
 - any other relevant factors.¹¹²
- 4.71 The Charter rights have served as a helpful guide for the Commission when designing new guardianship laws. Along with the Convention, the Charter has informed the development of principles to underpin new guardianship laws.

Recent High Court consideration of the Charter

- 4.72 The Charter was recently considered by the High Court in *Momcilovic v The Queen*.¹¹³ A majority of the High Court effectively upheld Victoria’s dialogue model of human rights. Six of the seven High Court justices held that section 32 was constitutionally valid,¹¹⁴ and four of the seven held, for different reasons, that although a declaration of inconsistent interpretation is a non-judicial function, it too is constitutionally valid.¹¹⁵

¹⁰⁸ *Kracke v Mental Health Review Board* [2009] VCAT 646, [263], [282].

¹⁰⁹ *Ibid* [851].

¹¹⁰ *Ombudsman Act 1973* (Vic) s 13(1A).

¹¹¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

¹¹² *Ibid* s 7(2).

¹¹³ *Momcilovic v The Queen* [2011] HCA 34 (8 September 2011).

¹¹⁴ *Ibid* [95] (French CJ), [171] (Gummow J), [280] (Hayne J), [537] (Crennan and Kiefel JJ), [684] (Bell J); *Charter of Human Rights and Responsibilities Act 2004* (Vic) s 36(2).

¹¹⁵ *Momcilovic v The Queen* [2011] HCA 34 (8 September 2011) [92]–[97] (French CJ), [661] (Bell J), [600]–[603] (Crennan and Kiefel JJ). Justices Gummow, Hayne and Heydon held that section 36 conferred a non-judicial power on a state court that was incompatible with its exercise of federal judicial power, and therefore offended the *Kable* principle and was invalid: [140] (Gummow J), [280] (Hayne J), [457] (Heydon J).



Government review of the operation of the Charter

- 4.73 The Attorney-General announced a review of the Charter in April 2011.¹¹⁶ The Parliamentary Scrutiny of Acts and Regulations Committee was directed to consider options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.¹¹⁷
- 4.74 The *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* final report was tabled in Parliament on 14 September 2011.¹¹⁸ The Victorian Government has six months to prepare a response to the Charter review.

RISK MANAGEMENT

THE ROLE OF INFORMAL ARRANGEMENTS

- 4.75 As noted in Chapter 2, the Cocks Committee was concerned about the ‘possibility that [guardianship] legislation ... can be used to restrict as well as to protect an individual’.¹¹⁹ The Committee therefore sought to ensure that guardianship would be a last resort, for use only after other less restrictive options had been considered. This view was subsequently reflected in the G&A Act.
- 4.76 The G&A Act provides that VCAT must consider arrangements less restrictive of a person’s freedom of decision and action before appointing a guardian or an administrator.¹²⁰ In practice, VCAT is unlikely to find there is a need to appoint a guardian or administrator if informal arrangements, such as family members making decisions on behalf of a person with a disability, appear to be operating successfully.¹²¹ The Commission supports the continued use of informal arrangements where they are operating fairly and effectively.
- 4.77 The Cocks Committee envisaged that guardianship and administration orders would be needed relatively rarely.¹²² A growing concern with risk management throughout society generally has subsequently eroded those early intentions. It is now much more common for third parties, such as financial institutions, medical professionals and disability service providers, to seek authorisation from formally appointed decision makers, rather than to rely upon informal arrangements, when providing services to a person who lacks capacity.
- 4.78 The Cocks Committee suggested that there would be no need for ‘parents of an intellectually handicapped person’ to apply for guardianship as a matter of course once their child approaches 18 years of age.¹²³ The Committee observed that seeking consent from a parent in relation to personal matters was standard practice and while this consent is ‘informal’, it is considered functionally adequate.¹²⁴ The Committee believed that this authority would not be challenged and therefore an application for guardianship in the great majority of these cases would serve no real purpose.¹²⁵

¹¹⁶ Victoria, *Gazette: Special*, No S 128, 19 April 2011. The review is in accordance with s 44(1), which calls for the Attorney-General to cause a review to be made of the first four years of operation of the Charter and to lay a copy before each House of Parliament on or before 1 October 2011: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44(1).

¹¹⁷ Victoria, *Gazette: Special*, No S 128, 19 April 2011.

¹¹⁸ Parliament of Victoria, *Charter Review Report* (20 September 2011) <<http://www.parliament.vic.gov.au/sarc/article/1446>>.

¹¹⁹ *Report of the Minister’s Committee*, above n 1, 25.

¹²⁰ *Guardianship and Administration Act 1986* (Vic) ss 4(2)(a), 22(2)(a), 46(2)(a).

¹²¹ Springvale Legal Service, Thomson Reuters, *Lawyer’s Practice Manual Victoria*, vol 1 (at Update 133) [8.2.201] [8.8.201].

¹²² The Cocks Committee anticipated that, in most situations, informal arrangements would be sufficient to respond to the needs of people whose decision-making abilities were impaired: *Report of the Minister’s Committee*, above n 1, 19.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

- 4.79 Informal arrangements have sometimes provided a person with limited decision-making ability an opportunity to participate in decisions that affect their lives.¹²⁶ There is now strong anecdotal evidence, however, that an increasing emphasis upon risk management throughout our community is making it much more difficult for people to rely upon informal arrangements when a decision needs to be made, or an authorisation given, on behalf of a person who is unable to do so themselves.
- 4.80 Community responses suggest that service providers often play a 'de facto' substitute decision-making role.¹²⁷ This can create tension between family members of the person in question and service providers. Some community responses also noted an increased concern with risk management in the service and banking systems.¹²⁸ There also appears to be a growing unwillingness by services to rely on informal arrangements that are not legally binding.¹²⁹
- 4.81 Some carers expressed frustration about their dealings with utilities providers in attempts to negotiate bills, or connect or transfer services without formal legal authority to do so.¹³⁰
- 4.82 Carers Victoria argued that there is an increasing need for the formalisation of previously informal supported and substitute decision-making arrangements involving parents/carers and their adult child with a disability. They maintain that this is due to changes in Victoria since 1986, particularly the introduction of privacy laws and the increasing focus on risk minimisation by service providers, corporate organisations and government agencies that challenge informal arrangements.¹³¹

INCREASING USE OF PERSONAL APPOINTMENTS

- 4.83 In recent years, there has also been increased emphasis upon creating new legal mechanisms that permit people with capacity to appoint another person to make decisions for them when they are no longer able to do so. These appointments remove the need for a court or tribunal to appoint a substitute decision maker for a person who has lost capacity.
- 4.84 In Victoria, it is now possible for an adult with capacity to appoint another person to make decisions for them about financial,¹³² medical¹³³ and a range of personal matters¹³⁴ once they lack the capacity to make these decisions. Most of this body of law has developed quite separately from other guardianship laws. While these appointments should be encouraged, there is now a great need for the laws concerning personal appointments of substitute decision makers to be more closely aligned with laws dealing with tribunal and automatic appointments.
- 4.85 The Commission's recommendations for better integration of the personal appointment and tribunal appointment schemes are discussed in Chapter 10. Many, but not all, of these personal appointments were considered by the Victorian Parliament's Law Reform Committee in the report of its *Inquiry into Powers of Attorney* published in August 2010.¹³⁵ The Committee's views have influenced the Commission's recommendations about new guardianship laws.

126 Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (The Federation Press, 1997) 3.

127 See, eg, roundtable with carers in Hastings (in partnership with Carers Victoria) (29 March 2011); Submission IP 3 (Stephanie Mortimer).

128 See, eg, consultations with Australian Bankers' Association (16 March 2010), Julian Gardner (26 March 2010) and Royal District Nursing Service (9 March 2011); Submission CP 27 (Catholic Archdiocese of Melbourne).

129 Roundtable with carers in Hastings (in partnership with Carers Victoria) (29 March 2011), consultation with Robyn Brown (3 May 2011).

130 Roundtables with metropolitan carers (in partnership with Carers Victoria) (24 March 2011) and carers, service providers and advocates in Bendigo (in partnership with Regional Information & Advocacy Council) (30 March 2011).

131 Submission CP 59 (Carers Victoria).

132 *Instruments Act 1958* (Vic) pt XI.A.

133 *Medical Treatment Act* (Vic) s 5A.

134 *Guardianship and Administration Act* (Vic) pt 4 div 5A.

135 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010).



ABUSE OF VULNERABLE VICTORIANS

4.86 The Commission is also aware of increasing community concerns about abuse of vulnerable people and the misuse of substitute decision-making powers. State Trustees has commissioned research about financial abuse of elderly people.¹³⁶ We discuss the issue of abuse further in Chapter 10, where we consider personal appointments, and in Chapter 18, where we consider accountability mechanisms for substitute decision makers.

THE FOCUS OF NEW GUARDIANSHIP LAWS

- 4.87 The many changes to the demographic, policy, service and legal environment must be considered when designing new guardianship laws that will serve the current and future needs of the Victorian community.
- 4.88 The Commission believes that new guardianship laws should:
- be more flexible to better reflect the reality that people’s experiences of decision-making impairment differs
 - offer a greater range of mechanisms to assist people with decision-making difficulties
 - be integrated so that they become one coherent body of legal rules
 - involve people with impaired decision-making ability in decisions that affect them to the greatest extent possible
 - more clearly articulate roles and responsibilities of those providing decision-making assistance under legislation
 - provide better safeguards against abuse of vulnerable members of our community.
- 4.89 In the following chapter the Commission identifies policies we believe should guide new guardianship legislation and provides an overview of the recommended structure of a new Guardianship Act.

¹³⁶ For more about the Protecting Elders Assets Study prepared by Peteris Darzins et al, Faculty of Medicine, Nursing and Health Sciences, Monash University (2009–2011) for State Trustees see: <<http://www.statetrustees.com.au/financial-elder-abuse/financial-elder-abuse-research-project>>.

Chapter 5

A new Guardianship Act

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INTRODUCTION

- 5.1 This chapter provides an overview of the Commission’s views about the public policy that should underpin new guardianship laws. It also contains an outline of the Commission’s recommendations about the structure of a new and accessible Guardianship Act.
- 5.2 The changes to the social, policy and legal environment described in Chapter 4 are, in the Commission’s view, sufficiently far-reaching to require a new legislative framework rather than further modification of the existing *Guardianship and Administration Act 1986* (Vic) (G&A Act) and related legislation.
- 5.3 As explained in Chapter 4, the G&A Act was designed primarily to assist people with intellectual disabilities. It now assists a much broader range of people. The need for a new Guardianship Act is pressing because an increasing number of Victorians will require decision-making assistance in the next few decades as the population ages.
- 5.4 Many people and organisations have stressed the need to create a new system that is sensitive to the complex issues of disability and capacity, yet sufficiently straightforward to permit easy understanding and use. It is not easy to design a new legislative regime that achieves all of these goals.
- 5.5 The greatest challenge in designing new guardianship laws is to develop a coherent body of legal rules that responds to the needs of all people with impaired decision-making ability and does so in a way that respects their dignity, enhances their participation in decisions that affect them and contains appropriate safeguards against abuse. This task is difficult because new guardianship laws must cater for people with:
- different levels of impairment to their decision-making ability and with levels of impairment that may fluctuate
 - decision-making impairments that have different causes, are of different duration and have different chances of alleviation
 - different decision-making needs
 - different levels of support within the community.
- 5.6 This review provides an opportunity to develop new, consolidated legislation that deals with a broad range of assisted decision-making matters that are currently located in three separate Acts.¹ The current law is unnecessarily dense and unclear at times. It is also poorly integrated, as there is little cohesion among the many different substitute decision-making regimes that have developed over time and for different reasons.
- 5.7 While the Commission believes that Victoria’s guardianship laws need renewal, many successful features of the current system should be retained. Those features include:
- the emphasis on the right of people with impaired decision-making ability to participate in decisions about their own lives
 - the availability of a system of personally appointed substitute decision makers that is relatively inexpensive
 - the system of tribunal appointed substitute decision makers that is relatively quick and inexpensive
 - the Public Advocate’s advocacy, educational and guardianship roles.

¹ *Guardianship and Administration Act 1986* (Vic), *Instruments Act 1958* (Vic) and *Medical Treatment Act 1988* (Vic).

PUBLIC POLICY UNDERPINNING A NEW ACT

A MORE REALISTIC VIEW OF CAPACITY

- 5.8 As we noted in Chapter 4, guardianship laws now assist a broad range of people with different experiences of impaired decision-making ability and different needs. There is a growing awareness that people have different levels of impairment to their decision-making ability and these levels of impairment can fluctuate over time and in different circumstances. There is also growing acceptance of the fact that there is no simple way of defining capacity to make important decisions and of testing whether a person has that attribute.
- 5.9 Capacity is a complex legal issue. The numerous legal rules concerning capacity have developed over time and without coordination. While there is no uniform test for legal capacity, the level of cognitive ability required to satisfy a court that a person has capacity has generally been low. The medical understanding of capacity has evolved over time, from being first seen as something that exists, or is absent, completely, to a modern recognition that capacity is a state that can vary from one time to another and from one decision to another. Understood in this way, the assessment of capacity has become more sophisticated and specific in order to identify, with some precision, the particular decisions a person is unable to make.²
- 5.10 It is clearly beyond the scope of this reference to deal with reform of all of the instances where the law stipulates that capacity is a prerequisite to participation. It is possible, however, to design a greater range of guardianship mechanisms that permit people who have impaired decision-making ability to respond to ‘capacity disqualifications’ by enabling them to participate, to the greatest extent possible, in decisions that affect them.
- 5.11 New laws should reflect the reality that some people will need only a small amount of assistance to make decisions, while others will need a substitute decision maker. New laws must also be sufficiently flexible to accommodate changing levels of decision-making ability. Some people may move along a decision-making continuum, depending on both the nature of their disability and the complexity or novelty of the decisions they must make.
- 5.12 The Commission believes that the modern capacity standard and the principles to guide assessments of incapacity recommended in this report³ offer a more realistic understanding of capacity. The new range of assisted decision-making mechanisms recommended by the Commission seeks to reflect this understanding.

MAXIMISING PARTICIPATION IN DECISION MAKING

- 5.13 Community attitudes and government policies towards people with disabilities have changed dramatically since the G&A Act was enacted 26 years ago. While protecting vulnerable people remains an important part of public policy, there is now a much greater emphasis on promoting autonomy of and participation by people with disabilities in decisions that affect them as well as in community life. This change is exemplified by the United Nations’ *Convention on the Rights of Persons with Disabilities* (the Convention), which focuses upon the equal participation of people with disabilities in all aspects of life.⁴

2 See Peteris Darzins, William Molloy and David Strang, ‘What is Capacity?’ in Peteris Darzins, William Molloy and David Strang (eds), *Who Can Decide?—The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 4–5.

3 See Chapter 7.

4 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1 (‘*Convention on the Rights of Persons with Disabilities*’).



5.14 The Convention, which is evidence of a significant shift in community views about people with disabilities, has greatly influenced the Commission's thinking about new guardianship laws.

5.15 The theme of participation embodied in article 9 of the Convention is central to all of the Commission's reform recommendations. The rights and freedoms contained in article 3 of the Convention are reflected in the legislative principles underpinning new guardianship legislation that are recommended in Chapter 6. Article 12 of the Convention has direct relevance to guardianship laws. It recognises the right of people with disabilities to be recognised as people before the law, their right to enjoy legal capacity on an equal basis with others, and their right to the support and assistance necessary for them to exercise their legal capacity.⁵ The Convention requires that this support:

- respects the rights, will and preferences of the person
- is free from conflict of interest and undue influence
- is proportional and tailored to the person's circumstances
- applies for the shortest time possible
- is subject to regular review by a competent, independent and impartial authority or judicial body.⁶

5.16 As well as shaping the underlying principles of new laws, these ideas have influenced the Commission's recommendations for:

- the creation of new supported decision-making arrangements that are discussed in Chapters 8 and 9
- a greater emphasis on personal control of future decision making in Chapters 10 and 11
- new responsibilities for substitute decision makers in Chapter 17 that aim to encourage substitute decision makers to make the decision that the person would themselves make if they were able to, and which put greater emphasis on the wishes of a person with impaired decision-making ability
- enabling a person to appoint an enduring guardian who can make psychiatric treatment decisions for them if they become an involuntary patient under mental health legislation in chapter 24.

A WIDER RANGE OF DECISION-MAKING ASSISTANCE

5.17 In view of the growing understanding of the complex issue of capacity and of the diversity of need, the Commission proposes an expanded range of mechanisms to assist people with impaired decision-making ability. The new decision-making arrangements allow assistance to be tailored to the needs of very different user groups and to be a more proportionate response to those different needs.

⁵ Ibid arts 12(1)–(3).

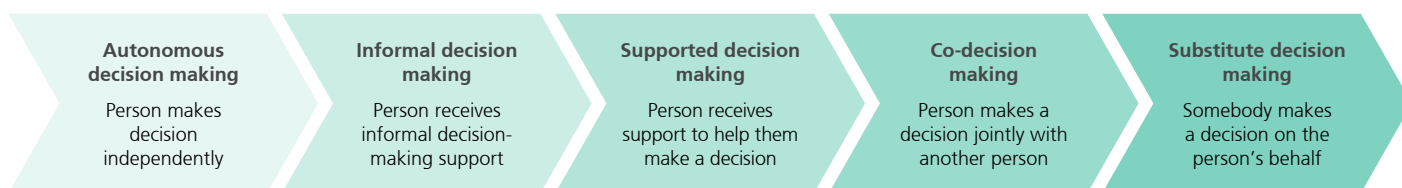
⁶ Ibid art 12(4).

5.18 The range of decision-making assistance recommended by the Commission comprises:

- **new supported decision-making** arrangements that are designed to assist people to make their own decisions. These mechanisms provide a supporter with access to the information that is held by third parties about the person they are supporting, before helping that person to make their own decision about an important matter. The supporter could also help the person they are supporting to communicate and implement any decisions. It is proposed that these arrangements can be made both personally and by the Victorian Civil and Administrative Tribunal (VCAT). We discuss supported decision making in Chapter 8.
- **new co-decision-making** arrangements that enable a person with some impairment to their decision-making ability to make a decision *with* another person, rather than having a decision made *for* them by a guardian or administrator. It is proposed that these appointments can be made only by VCAT (Chapter 9).
- **existing substitute decision-making** arrangements that permit one person to make decisions for another person. At present, substitute decision makers are guardians, administrators, enduring guardians, medical treatment agents, enduring financial attorneys and ‘persons responsible’ for medical treatment decisions. It is proposed that substitute decision-making appointments should continue to be made both personally and by VCAT, and that people should be automatically be appointed to make medical treatment decisions in some circumstances (Chapters 10 and 12).
- **existing informal arrangements** by which family members and friends of a person with impaired decision-making ability assist them to gather information, make decisions and implement them. It is proposed that informal arrangements that are working fairly and effectively should continue.

5.19 The diagram below summarises the Commission’s recommendations for a continuum of decision-making assistance in new guardianship legislation.

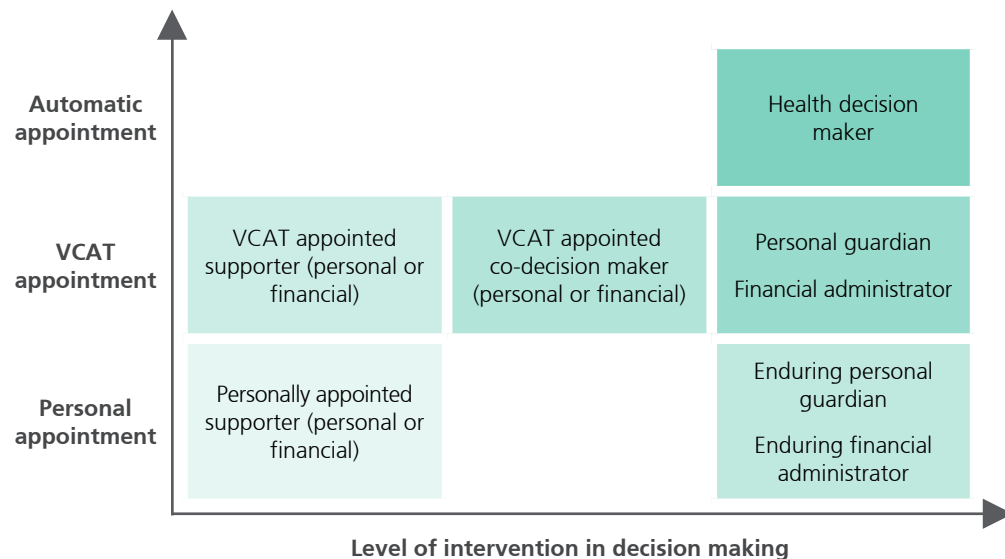
Continuum of decision-making support



Need for decision-making support

5.20 The next diagram indicates how the level of intervention increases with each different type of proposed decision-making arrangement as a person moves along the continuum from a support relationship to a substitute decision-making arrangement. An automatic appointment has the highest level of intervention because it is an appointment where neither the person with impaired capacity nor a tribunal has any say about who is appointed to the role of substitute decision maker.

Summary of decision-making mechanisms



- 5.21 While the Commission's recommendations seek to promote decision-making autonomy whenever possible, they also recognise that the decision-making ability of some people is impaired to such an extent that autonomy, at least in its more conventional sense, is impossible.
- 5.22 However, by introducing a wider range of decision-making arrangements, and by encouraging people to consider the decisions that the assisted person would make, guardianship laws can be seen as a positive means of promoting the participation of people whose decision-making ability is impaired, rather than solely as a protective mechanism that restricts freedom of decision and action.

A PREFERENCE FOR PERSONAL APPOINTMENTS

- 5.23 Current Victorian law provides for a number of personally appointed substitute decision-making arrangements that usually come into effect when a person is no longer able to make their own decisions. This is done through the various enduring appointments provided for under the G&A Act (enduring guardians), the *Medical Treatment Act 1988* (Vic) (medical treatment agent) and the *Instruments Act 1958* (Vic) (enduring power of attorney). While there is no information about how many of these appointments have been made, community responses to the consultation and information papers suggest that there has been only moderate use of them.⁷
- 5.24 The Commission agrees with the Public Advocate that personal appointments provide greater autonomy for many people whose capacity is impaired, because a trusted person is well placed to know and implement the wishes of the person when it becomes necessary for someone else to make decisions.⁸
- 5.25 The Commission believes that new guardianship laws should encourage people to make their own personal appointments of supported and substitute decision makers whenever possible. To encourage greater use, the Commission recommends reform to the personal appointments scheme to ensure that it is as simple and accessible as possible, accompanied by more community education about the benefits of making these appointments.

⁷ For eg, consultations with Mental Health Legal Centre (7 April 2010) and Mildura Principal Aged Care (28 April 2010); Submission CP 23 (Dr Kristen Pearson).

⁸ Submission IP 8 (Office of the Public Advocate).

- 5.26 The Commission recommends consolidation of two of the existing personal appointments. At present, both an enduring guardian and a Medical Treatment Act agent can be appointed to make medical treatment decisions for a person when they lose capacity. This overlap is unnecessary. The Commission recommends that these appointments should be combined so that an enduring guardian can be appointed to do anything that a Medical Treatment Act agent can now do.
- 5.27 Throughout the course of the review, the Commission has heard concerns about the complexity of guardianship laws. This response is unsurprising given that the relevant law is spread among three different pieces of legislation—the G&A Act, the Medical Treatment Act and the Instruments Act. Each of these statutes was introduced at different times and in response to different calls for change. Together, they provide for seven different substitute decision-making mechanisms,⁹ which do not always operate harmoniously as they were not designed as parts of an integrated scheme.
- 5.28 In order to deal with the overlapping problems of complexity and lack of cohesion, the Commission recommends a new consolidated Act that:
- integrates the many different statutory substitute decision-making regimes involving both personal and state appointments in order to create a coherent and unified legal framework
 - provides a logical framework for the different roles of those providing assistance under the Act
 - provides for supported and substitute decision-making arrangements to be activated in consistent ways, regardless of the nature of the appointment
 - describes the roles and responsibilities of people who provide decision-making assistance under guardianship legislation consistently, regardless of the manner of appointment.

A NEW ONLINE REGISTER OF APPOINTMENTS

- 5.29 The Commission recommends the establishment of an online register of all appointments of substitute decision makers, co-decision makers and supporters. The online register would be an important step in the modernisation of Victoria's guardianship laws. It would play an important part in promoting widespread understanding and acceptance of the various decision-making arrangements available, both in the community generally and among people who regularly engage with people with impaired decision-making ability and their carers.
- 5.30 The Commission's detailed proposals for an online register of appointments complement the recommendation by the Victorian Parliament's Law Reform Committee in 2010 that there be a register for power of attorney documents.¹⁰
- 5.31 The Commission believes that there is widespread support within the community for the establishment of an online register. The Victorian Parliament Law Reform Committee reached a similar conclusion.¹¹

9 'Guardian', 'enduring guardian', 'administrator' and 'person responsible': see *Guardianship and Administration Act 1986* (Vic) pt 4, pt 4 div 5A, pt 5 and s 37 respectively. 'General power of attorney' and 'enduring power of attorney': *Instruments Act 1958* (Vic) pts XI and XII respectively. Agent see *Medical Treatment Act 1988* (Vic) s 5A. See also 'administrator for missing persons': *Guardianship and Administration Act 1986* (Vic) pt 5A.

10 See recommendation 66 of the Victorian Parliament Law Reform Committee Inquiry into Powers of Attorney final report: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 232–6. The Government Response indicates 'support in principle [for] the development and implementation of a register for POA documents to help establish the existence, location and validity of POAs': Victorian Government, *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (2011) 30.

11 Victorian Government, *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (2011) 230 ('*Government Response to the Parliament of Victoria Law Reform Committee*').



- 5.32 The Commission also believes that the public benefit of an online register would more than justify the financial commitment required for its establishment. Registration will promote recognition and acceptance of both personal and VCAT decision-making appointments. It will also assist in locating, verifying and validating personal appointments.¹²
- 5.33 Encouraging personal appointments is particularly important. As the Commission seeks to emphasise throughout the report, the public system of appointing substitute decision makers for people with impaired decision-making ability will struggle to cope with demand over the next few decades unless many people choose to make their own appointments when they have the capacity to do so.
- 5.34 The Commission makes recommendations about an online register in Chapter 16.

RETAINING TRIBUNAL APPOINTMENTS OF PERSONAL AND FINANCIAL DECISION MAKERS

- 5.35 Tribunal appointments of substitute decision makers should continue to be available because some people will need others to make decisions for them. Not all people needing decision-making assistance will have appointed a substitute decision maker before they lose capacity. Some people will never have the capacity to make a personal appointment. In Chapter 12, we outline our reform proposals for VCAT appointments and discuss the responsibilities of these appointees in Chapter 17. New legislative principles aim to maximise the participation of the represented person when someone else makes decisions for them.
- 5.36 The appointment of substitute decision makers by an inexpensive and reasonably accessible tribunal has been a positive aspect of Victoria's guardianship laws. Because matters in the Guardianship List at VCAT are deeply personal and quite different from most other cases dealt with by VCAT, they call for unique responses. In Chapter 21, we propose recommendations for further improving VCAT processes to ensure that while guardianship matters remain inexpensive, they are also dealt with as sensitively and informally as possible.

RETAINING THE LINK BETWEEN IMPAIRED DECISION-MAKING ABILITY AND DISABILITY

- 5.37 At present, a guardian or administrator can be appointed only when a person has impaired decision-making ability because of a 'disability'. That term is broadly defined in the G&A Act to mean 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.¹³
- 5.38 The Commission recommends that the link between a person's disability and their impaired decision-making ability should be retained in new legislation for the purposes of determining whether a person lacks capacity to make their own decisions. The link adds an important objective element to the process of assessing capacity. It is a way of ensuring that guardianship laws are used beneficially and not to manage people who engage in harmful behaviour that is not the direct result of disability. This matter is discussed in Chapter 7 and Chapter 12.

REFINING THE CRITERIA FOR APPOINTMENT—NEED

- 5.39 The Commission recommends a number of reforms to respond to issues raised for people with profound intellectual disabilities.
- 5.40 At present, the G&A Act provides that a guardian or administrator can be appointed only when needed.¹⁴ In practice, these provisions have been interpreted to mean that there must be an existing need for a decision by a guardian or administrator, and not

¹² Ibid 226–234.

¹³ *Guardianship and Administration Act 1986* (Vic) s 3.

¹⁴ Ibid ss 22(1)(c), 46(1)(a)(iii).

just the possibility that a person might need a substitute decision maker at some time in the future.¹⁵

- 5.41 This practice has led to the suggestion that the current regime is crisis driven and does not encourage effective advance planning for people with seriously impaired decision-making ability who might need a guardian or administrator in the future and who cannot plan ahead for themselves due to their impaired capacity.
- 5.42 Some people are highly unlikely to attain the capacity to make their own decisions at any stage of their life, even with significant support. The Commission believes that it should be possible to appoint a substitute decision maker for people in this position in some circumstances, even when there is no immediate need to make an important decision.
- 5.43 The Commission believes that it should be possible to appoint a substitute decision maker in situations where:
- the person’s decision-making incapacity is of a nature that they are unable, and are unlikely to be able in the future, to make their own decisions, even with significant support, and
 - decisions are currently being made for them by a decision maker who has been making those, or similar, decisions for much of the person’s life, and
 - that decision maker is likely to continue to be appropriate for the role.
- 5.44 Appointing a personal guardian or financial administrator in these circumstances would provide formal recognition of an arrangement that is currently operating informally. In this situation, the person’s need for a decision maker is clear, but the need for a formal arrangement might not yet have arisen. The appointment would complement an existing informal substitute decision-making arrangement and allow the appointed person to act in the formal role when required in the future. We discuss this further in Chapter 12. That chapter also considers the issue of succession planning for carers.

RETAINING THE DISTINCTION BETWEEN PERSONAL (OR LIFESTYLE) DECISIONS AND FINANCIAL DECISIONS

- 5.45 The Commission believes that the existing legislative distinction between substitute decision making for financial decisions and personal (or lifestyle) decisions should continue for both tribunal appointments and personal appointments.
- 5.46 The Commission acknowledges that the reality of most people’s lives is that lifestyle and financial decisions are seldom completely separate. Financial decisions invariably affect lifestyle, and lifestyle decisions often affect a person’s finances. However, the Commission believes, as the Cocks Committee did 30 years ago, that substitute decision making about financial and personal matters often requires significantly different skills.¹⁶
- 5.47 For example, different skills are often needed when making decisions about someone’s financial affairs from those that are needed when making decisions about where that person will live or whether to authorise medical treatment for them.¹⁷ This matter is discussed further in Chapter 12, together with recommendations about how to manage this overlap better.

¹⁵ *BWW* [2003] VCAT 121 (28 February 2003).

¹⁶ Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 87 (*Report of the Minister’s Committee*).

¹⁷ This reflects the continuing relevance of Attorney-General Kennan’s observation in 1986, during the second reading speech for the G&A Act, that the qualities needed for an administrator are different from those of a guardian, Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 559 (Jim Kennan, Attorney-General).



RETAINING SUPPORT FOR FAIR AND EFFECTIVE INFORMAL ARRANGEMENTS

- 5.48 New guardianship laws must be sufficiently flexible to cater for the modern emphasis upon risk management that results in a growing number of organisations declining to deal with people who are not formally appointed as substitute decision makers for people who are unable to transact on their own behalf. Formal arrangements are also necessary where a person is experiencing abuse or neglect by informal decision makers.
- 5.49 The Commission believes that informal decision-making arrangements should continue to operate in many circumstances as an important adjunct to new guardianship laws. Many organisations and individuals willingly provide goods and services to a person with impaired decision-making ability by making informal arrangements with that person's family members and friends. It should be possible for these arrangements to continue without the need for the formal appointment of a substitute decision maker, or supporter, when they are operating fairly and effectively.

PROPER AUTHORISATION FOR RESTRICTIONS UPON LIBERTY

- 5.50 Some people with impaired decision-making ability who live in residential care facilities have their liberty restrained—usually for their own safety. A person with impaired decision-making ability may be locked in a room or ward to prevent them from leaving and exposing themselves to harm, or they may be strapped in their beds or in chairs to prevent a fall. Currently, carers are sometimes asked to provide informal consent to these practices or the decision to adopt them is taken by staff at a residential facility. Neither approach provides any legal authorisation for these actions, which operate with few checks and balances.
- 5.51 The Commission believes that it is important to establish an appropriate means of authorising these practices because liberty, or freedom of movement, is a value of fundamental importance in our community. Although it will sometimes be necessary and proper to restrict the movements of some people with impaired decision-making ability for their own safety, these decisions should not be taken lightly or merely for the convenience of carers. Sensible and cost-effective safeguards are required.
- 5.52 In Chapter 15, the Commission recommends the introduction of a new tripartite authorisation process for use by some hospitals, supported accommodation and residential facilities when action is taken to restrict a person's liberty to an extent that would ordinarily be unlawful.

AUTHORISATION OF MEDICAL TREATMENT

- 5.53 There appears to be a widespread lack of understanding about how the law provides for the authorisation of medical treatment for people who lack capacity to make their own decisions. The current law is complex. This is largely because it is sometimes necessary to consider a number of overlapping statutes, as well as the common law, in order to determine the legal rules that apply when a person is unable to make their own decisions about medical treatment.
- 5.54 The Commission believes that it is possible to simplify the law and to improve community understanding of its operation. One way of doing so is, as we mentioned earlier, to streamline the law regulating personal appointments of substitute decision makers for medical treatment by replacing the two existing mechanisms with one new process.

- 5.55 The Commission also recommends a number of improvements to the process of the automatic appointment of a person to become the substitute decision maker for medical treatment when there is no personal guardian with the power to make these decisions. One of those improvements involves making the Public Advocate the substitute decision maker of last resort in some instances. These matters are discussed at length in Chapter 13.

AUTHORISATION OF PARTICIPATION IN MEDICAL RESEARCH

- 5.56 Separate provisions for authorising participation in medical research procedures by people who lack capacity to make their own decisions about the matter were introduced in 2006.¹⁸ Not surprisingly, these provisions are complex because they seek to balance the need to protect vulnerable people from involuntary participation in procedures that may be intrusive with the need to encourage research about new treatments that might benefit the person concerned and the broader community.
- 5.57 Six years experience with these provisions has revealed some unnecessary overlap between the medical treatment provisions in the G&A Act and the ethical guidelines that also govern these procedures. The Commission's recommendations seek to streamline the steps that must be followed to secure participation in a medical research procedure by reducing the overlap with these other laws and guidelines. These matters are considered in Chapter 14.

ACCOUNTABILITY AND SAFEGUARDS

- 5.58 Any system of substitute decision making requires proper accountability to ensure that powers are exercised responsibly. The checks and balances in current guardianship laws vary considerably, depending upon the nature of the appointment. There is concern in the community that some substitute decision makers abuse their powers.¹⁹ While the actual extent of abuse is unknown, it is important that members of the community have faith in the integrity of the substitute decision-making process and feel confident that abuses of power are both detectable and uncommon.²⁰
- 5.59 There is a wide range of views about the effectiveness of current accountability mechanisms. Some people find them too heavy-handed, some find them too light-touch, while others find them to be confusing and inconsistent.
- 5.60 The Commission believes that accountability mechanisms should be clear, consistent and balanced. Achieving an appropriate balance is probably the greatest challenge. Guardianship laws permit the creation of formal substitute decision-making relationships, which ultimately rely upon trust and confidence to operate effectively. While it is important to encourage family members and friends to accept the difficult, unpaid role of making important decisions for a person who is unable to make their own decisions, it is also important to ensure that these people do not abuse their powers or neglect a vulnerable person they have promised to assist.
- 5.61 The Commission's recommendations for a more coherent system of accountability and safeguards are set out in Chapter 18 and complement the proposed comprehensive statement of responsibilities of substitute decision makers in Chapter 17 and the responsibilities of supporters and co-decision makers outlined in Chapters 8 and 9.

18 *Guardianship and Administration (Further Amendment) Act 2006* (Vic).

19 For eg, roundtable with self advocates (in partnership with Self Advocacy Resource Unit); Submission CP 19 (Office of the Public Advocate).

20 State Trustees Limited commissioned a group of academics at Monash University to undertake a study to explore the issue of financial elder abuse and how it can be combated. The three year research project, comprising five separate reports, entitled *Protecting Elders Assets Study (PEAS): Ethical Management of Older Persons' Financial Assets (2009–2010)* is aimed at the reduction and prevention of financial elder abuse across Victoria: State Trustees Limited, *Financial Elder Abuse Research Project* (2011) <<http://www.statetrustees.com.au/financial-elder-abuse/financial-elder-abuse-research-project>>. See also Aged Rights Advocacy Service, *Annual Report 2010–2011* (2011) 8.



They also complement additional decision-making responsibilities for people appointed to make medical treatment decisions in Chapter 13.

- 5.62 New accountability mechanisms and safeguards include:
- requiring appointees to make declarations regarding compliance with their legal duties
 - broadening the investigative role and powers of the Public Advocate
 - introducing a new public wrong of abusing, neglecting or exploiting a person with impaired decision-making ability
 - expanding VCAT's jurisdiction to allow it to respond more effectively to instances of abuse, neglect or exploitation.
- 5.63 The Commission proposes that a new public wrong of abusing, neglecting or exploiting a person with impaired decision-making ability should be enforceable by civil penalty. This provision would complement existing criminal laws and could be used where criminal proceedings would be unlikely to succeed or might not be appropriate. Civil penalty offences are easier to enforce than criminal sanctions because of their greater procedural flexibility.²¹ The Commission recommends that a new independent statutory officer be responsible for initiating the proposed civil penalty proceedings. These provisions are discussed in more detail in Chapter 18.
- 5.64 The Commission also recommends that VCAT's jurisdiction be expanded to allow it to hear and determine any cause of action for damages or any claim for equitable relief brought by or on behalf of the represented person against their personal or financial guardian, co-decision maker or supporter that would be available to the represented person in the Supreme Court. This additional jurisdiction would make VCAT a 'one stop shop' for responding to most instances of abuse, neglect and exploitation. This proposal is discussed in Chapter 18.

A STRONGER ROLE FOR THE PUBLIC ADVOCATE

- 5.65 People with impaired decision-making ability are among the most vulnerable members of our community. They are open to abuse, or neglect, by residential facility staff, service providers, substitute decision makers and, sadly, sometimes by their own family members and friends. People with impaired decision-making ability need a strong champion to protect their interests. The Public Advocate has played this role with broad support for the past 26 years.
- 5.66 The Commission believes that the Public Advocate should continue to perform most of her existing functions and that she should be given a range of additional responsibilities. A stronger supervisory, regulatory and investigative role fits well with the Public Advocate's existing responsibilities to protect and promote the rights of people with disabilities.
- 5.67 In Chapter 20, we discuss these new functions for the Public Advocate in more detail, but also stress the importance of complementing them with an enhanced community education and training role, including the training of substitute decision makers, supporters, and co-decision makers to promote understanding of their statutory responsibilities.

²¹ See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) [2.81].

INTERACTION WITH OTHER RELEVANT LEGISLATION

- 5.68 The manner in which guardianship legislation interacts with other legislative schemes that provide for the appointment of substitute decision makers is a complex and delicate matter. The Commission believes that these different schemes should not operate in isolation and that the policy objective should be to ensure that the various statutes operate as an integrated body of law that is capable of responding to the individual needs of people who require decision-making assistance.
- 5.69 The Commission makes recommendations about the relationship between new guardian legislation and the *Mental Health Act 1986 (Vic)*, the *Children, Youth and Families Act 2005 (Vic)*, the *Disability Act 2006 (Vic)*, and the *Crimes (Mental Impairment and Unfitness to be Tried Act) 1997 (Vic)*.
- 5.70 The most significant recommendations are those concerning the relationship and appropriate boundaries between new guardianship laws and mental health and child protection legislation. In both instances, the Commission recommends overlap between the legislative schemes rather than continuation of the current rigid dividing lines.
- 5.71 The Commission proposes steps to decrease the isolation of substitute decision making about treating people with a mental illness. It should be possible for a person with capacity to appoint an enduring personal guardian to make decisions about psychiatric treatment for them when they are unable to do so themselves. In some instances, an enduring personal guardian with these powers should become the primary substitute decision maker for a person who is unable to make their own decisions about treatment. This matter is discussed in some detail in Chapter 24.
- 5.72 The Commission also proposes that new guardianship laws and child protection legislation should overlap so that both substitute decision-making schemes are available for use by young people between the ages of 16 and 18. This step would enable a young person with impaired decision-making ability to have access to the scheme that best suits their needs. The Commission makes recommendations about these changes in Chapter 22.
- 5.73 The interaction between new guardianship legislation and the *Disability Act 2006 (Vic)*, and the *Crimes (Mental Impairment and Unfitness to be Tried Act) 1997 (Vic)* is dealt with in Chapters 23 and 25 respectively.

THE IMPORTANCE OF ACCESSIBLE CASE LAW

- 5.74 It is widely accepted that an accessible body of case law enhances development and understanding of complex statutory schemes, such as the G&A Act, which contain numerous broad concepts and discretionary powers. The new legislation proposed by the Commission also takes this form.
- 5.75 The diversity of circumstances that fall within guardianship law means that it is not well suited to highly detailed provisions that seek to cater for every possible occurrence. It is, however, an area of law that is well suited to clear rules of general application that are amplified by a body of case law that applies those rules to the facts of individual cases.



- 5.76 With few exceptions, a useful body of case law has not emerged to help users of Victoria's guardianship laws. Since 1986, there have been very few Supreme Court decisions that have undertaken a detailed analysis of parts of the G&A Act.²² In addition, few decisions of the Guardianship List at VCAT are published, and this has been the case particularly over the past few years.
- 5.77 Despite this history, the Commission believes that new guardianship laws should be developed on the understanding that an accessible body of case law will add greatly to the content of these laws. It is impossible for the Commission, and for those people who will draft any new guardianship laws, to anticipate the many circumstances in which they will be used. The Commission encourages VCAT and the courts to play an important role in the development of new Victorian guardianship law.

CREATING A MODERN AND ACCESSIBLE ACT

- 5.78 In its consultation paper, the Commission made a number of suggestions about how to make guardianship laws more accessible and widely understood, including:
- creating a new consolidated Act dealing with all forms of substitute decision making
 - improving the names used to describe the roles of people who are formally appointed to provide assistance
 - improving community education about guardianship laws
 - ensuring that better and more coordinated data is collected about the use of guardianship laws.

COMMUNITY RESPONSES

Accessible laws

- 5.79 Carers Victoria made the following comments:
- The overwhelming theme of all our consultations in preparing this submission was one of confusion. The current *Guardianship and Administration Act 1986* is poorly understood by many within its orbit. Individuals and professionals that we consulted including solicitors, employees of, and contractors to the Department of Human Services (DHS), members of caring families who have been appointed to act as Guardians or Administrators, all offered competing interpretations of the Act and its operation.²³
- 5.80 This lack of understanding of the guardianship system is extremely widespread.²⁴ The Commission was told there was confusion about the system in many sectors of the community, including people with disabilities, families and carers, the medical and health care profession, the police, disability services staff, and legal and financial advisors.
- 5.81 This confusion partly arises because of the complexity and number of guardianship laws. Complexity also arises because of the many ways in which people experience impaired capacity and the differing expectations people have about the ability of guardianship laws to respond to their needs.

²² The most significant recent Victorian Supreme Court decisions which have considered the G&A Act in detail include: *PJB v Melbourne Health & Anor*; *Patrick's Case* [2011] VSC 327, *Re BWV*; *Ex Parte Gardner* [2003] 7 VR 487; and *XYZ v State Trustees Ltd* [2006] VSC 444.

²³ Submission IP 1 (Carers Victoria).

²⁴ For eg, roundtables with seniors groups (Aged and Community Care Victoria; Council on the Ageing Victoria; Seniors Information Victoria; Elder Rights Advocacy; National Seniors (Victoria)) (8 April 2011), Seniors Rights Victoria (2 May 2011); Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 43 (Alfred Health), CP 57 (Aged Care Assessment Service in Victoria), CP 70 (State Trustees Limited) and CP 77 (Law Institute of Victoria).

5.82 There is clear tension between competing objectives when designing new laws. Guardianship laws should be able to respond to the different needs and circumstances of a diverse population. Issues associated with impaired decision-making ability might vary markedly, depending, among other things, on the nature of a person's disability, their social supports, the sorts of decisions that need to be made and their living arrangements. Guardianship laws should also be as simple as possible in order to encourage use by people who might be experiencing stress and confusion, and to provide third parties, such as doctors, service providers and financial institutions, with a clear understanding of who has authority to make particular decisions.

A single accessible Act

5.83 There was general support for the Commission's suggestion that all provisions relating to alternative decision-making arrangements for people with impaired capacity should be integrated and included within the one piece of legislation.²⁵ The Catholic Archdiocese did not support the proposal, arguing that issues around medical treatment are substantially different to those around other matters and should be dealt with separately.²⁶

5.84 Many people and organisations stressed the importance of clear and consistent substitute decision-making laws.²⁷ The Australian Medical Association (Victoria) argued that reducing the number of Acts would clarify the law and simplify the rules for those dealing with them on a daily basis.²⁸

5.85 Alfred Health provided examples from hospital staff of confusion about the roles and powers of a medical agent under the Medical Treatment Act and those of the person responsible under the G&A Act.²⁹ It was suggested that there are also times where those acting in the decision-making roles do not know the extent of their powers. Staff are also not aware of the legal responsibilities of each role,³⁰ or of their own obligations.³¹

5.86 Responses from the medical profession suggested that those working in the field often face family conflict that may arise when a decision needs to be made to consent to medical treatment.³² The law should be as clear as possible in these complex situations so that hospital staff are not forced to seek legal advice to understand their responsibilities.³³

The names of appointments under guardianship laws

5.87 There is a widespread view that the terms used to describe the various substitute decision makers are unclear and unhelpful.

25 For eg, consultations with Anita Smith (21 February 2011), Julian Gardner (21 March 2011) and roundtable with seniors groups (Aged and Community Care Victoria; Council on the Ageing Victoria; Seniors Information Victoria; Elder Rights Advocacy; National Seniors (Victoria)) (8 April 2011); Submissions CP 20 (Epworth HealthCare), CP 22 (Alzheimer's Australia Vic), CP 24 (Autism Victoria), CP 28 (Financial Ombudsman Service), CP 43 (Alfred Health), CP 45 (Scope Vic), CP 57 (Aged Care Assessment Service in Victoria), CP 59 (Carers Victoria), CP 65 (Council on the Ageing Victoria), CP 67 (Trustee Corporations Association of Australia), CP 70 (State Trustees Limited), CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria).

26 Submission CP 27 (Catholic Archdiocese of Melbourne).

27 Submissions CP 22 (Alzheimer's Australia Vic), CP 39 (Peninsula Community Legal Centre), CP 63 (Shih-Ning-Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)) and CP 69 (Australian Medical Association (Victoria)).

28 Submission CP 69 (Australian Medical Association (Victoria)).

29 Submission CP 43 (Alfred Health).

30 Ibid.

31 Submission 68 (Australian Nursing Federation).

32 For eg, Submission CP 43 (Alfred Health).

33 Ibid.



- 5.88 There was broad support for retaining the term ‘guardian’ as it is generally accepted and understood.³⁴ Different views were expressed about use of the qualifying terms ‘adult’ or ‘personal’.
- 5.89 There was widespread support for the Commission’s proposal to replace the term ‘administrator’ with another term that more clearly indicates the role performed by this person.³⁵ Different views were expressed about whether ‘financial guardian’ or ‘financial manager’ would be more appropriate. State Trustees Limited and the Public Advocate expressed reservations about the term ‘financial guardian’ because they thought it might be confused with the existing ‘guardian’ and ‘enduring guardian’ appointments.³⁶ State Trustees Limited noted that ‘financial manager’ is used in other Australian jurisdictions.³⁷
- 5.90 There was widespread agreement that the term ‘person responsible’ for authorising medical treatment is not widely known or understood in the community and by health professionals. Responses were divided about whether the term ‘health decision maker’ or ‘medical decision maker’ is more appropriate. ‘Medical guardian’³⁸ and ‘health representative’ were also suggested.³⁹ The Public Advocate expressed concern that the term ‘medical decision maker’ might imply a broader range of powers for the decision maker than are actually available.⁴⁰ There was support for the Commission’s preferred option of ‘health decision maker’, as it does not imply the decision is strictly medical, or that the person undertaking the role is a medical professional.⁴¹
- 5.91 It was suggested that any changes to terminology must be consistently applied across all appointments to avoid confusion.⁴² Many responses highlighted that it is important to retain the descriptor of ‘enduring’ for personal appointments to reflect the different source of these appointments and the different scope of these roles compared to tribunal appointments.⁴³

Community education

Improved education and awareness about guardianship laws

- 5.92 There was broad agreement that more education of the community and professionals about guardianship laws is needed.⁴⁴ Many people and organisations stressed the importance of community education to raise awareness of substitute decision-making arrangements, the roles and responsibilities involved, and the importance of planning by use of personal appointments.

34 Submissions CP 19 (Office of the Public Advocate), CP 57 (Aged Care Assessment Service in Victoria), CP 68 (Australian Nursing Federation) and CP 70 (State Trustees Limited).

35 For eg, consultation with Trustee Corporations Association of Australia (15 March 2011); Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer’s Australia Vic), CP 23 (Dr Kristen Pearson), CP 24 (Autism Victoria), CP 45 (Scope Vic), CP 55 (Office of the Health Services Commissioner), CP 70 (State Trustees Limited) and CP 73 (Victoria Legal Aid).

36 Submissions CP 19 (Office of the Public Advocate) and CP 70 (State Trustees Limited). See also Submission CP 33 (Eastern Health).

37 Submission CP 70 (State Trustees Limited).

38 Submission CP 23 (Dr Kristen Pearson).

39 Submission CP 27 (Catholic Archdiocese of Melbourne).

40 Submission CP 19 (Office of the Public Advocate).

41 For eg, Submissions CP 20 (Epworth HealthCare), CP 49 (Respecting Patient Choices—Austin Health) and CP 57 (Aged Care Assessment Service in Victoria).

42 Submissions CP 24 (Autism Victoria) and CP 68 (Australian Nursing Federation).

43 For eg, Submissions CP 19 (Office of the Public Advocate), CP 27 (Catholic Archdiocese of Melbourne), CP 59 (Carers Victoria) and CP 78 (Mental Health Legal Centre).

44 For eg, consultations with Alzheimer’s Australia Vic (8 March 2011), Max Campbell—Association of Independent Retirees (25 March 2011), Australian & New Zealand Society for Geriatric Medicine (7 April 2011) and roundtable with seniors (in partnership with Council on the Ageing Victoria) (5 May 2011); Submissions CP 44 (Leadership Plus), CP 47 (Dr Michael Murray), CP 59 (Carers Victoria), CP 65 (Council on the Ageing Victoria), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria) and CP 73 (Victoria Legal Aid).

- 5.93 The Council on the Ageing observed that without a comprehensive awareness raising campaign and a targeted education and information strategy, the benefits of any reform to guardianship legislation might not be realised.⁴⁵
- 5.94 Many responses highlighted the need for more community education about powers of attorney,⁴⁶ in particular:
- encouraging people to make them⁴⁷
 - clarification of the different appointments available⁴⁸
 - specific responsibilities of donors and appointees⁴⁹
 - responsibilities of parties who interact with powers of attorney.⁵⁰
- 5.95 The Victorian Aboriginal Disability Network noted that the concept of ‘guardian’ is culturally specific. Therefore, regardless of the word used to refer to guardianship, some communities that have a more collective approach to decision making, support and community contribution may find it difficult to understand what it means.⁵¹ Despite cultural differences, however, the Victorian Aboriginal Disability Network suggested that there would still be situations in which independent guardianship arrangements could be helpful for Indigenous communities and families.⁵²
- 5.96 A number of responses highlighted that education will only be effective if it is targeted and delivered in a way that is relevant, simple and accessible.⁵³ It was suggested that the internet and social media sites should be used to raise community awareness about guardianship.⁵⁴ Others suggested use of newspapers and radio stations.⁵⁵ Many responses agreed that educational material, both online and in print, should be produced in a variety of formats and community languages to enhance accessibility.⁵⁶
- 5.97 Responses also suggested that increased training and education is needed for those who work in the field and who have regular interaction with guardianship laws, or with those who use or may need to use them.⁵⁷ It was proposed that education about powers of attorney should be provided to professionals, for example doctors and lawyers, or those who work in health or community services, as they are likely to have contact with people who use the legislation.⁵⁸

45 Submission CP 65 (Council on the Ageing Victoria).

46 Consultations with Australian & New Zealand Society for Geriatric Medicine (7 April 2011) and roundtable with seniors (in partnership with Council on the Ageing Victoria) (5 May 2011); Submission CP 44 (Leadership Plus).

47 Submissions CP 65 (Council on the Ageing Victoria), CP 70 (State Trustees Limited) and CP 71 (Seniors Rights Victoria). State Trustees directed the Commission to research it commissioned Monash University to conduct into financial elder abuse: see State Trustees Limited, *Financial Elder Abuse Research Project* (2011) <<http://www.statetrustees.com.au/financial-elder-abuse/financial-elder-abuse-research-project>>.

48 Roundtable with seniors (in partnership with Council on the Ageing Victoria) (5 May 2011).

49 Consultation with Max Campbell–Association of Independent Retirees (25 March 2011).

50 Consultation with Alzheimer’s Australia Vic (8 March 2011).

51 Consultation with Jody Saxton-Barney, Victorian Aboriginal Disability Network (3 August 2011).

52 Ibid.

53 Submissions CP 47 (Dr Michael Murray), CP 59 (Carers Victoria) and CP 73 (Victoria Legal Aid).

54 Submissions CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

55 Submissions CP 32 (Ethnic Communities’ Council of Victoria) and CP 47 (Dr Michael Murray).

56 Submissions CP 32 (Ethnic Communities’ Council of Victoria), CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

57 For eg, roundtable with service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (27 March 2011); Submissions CP 19 (Office of the Public Advocate), CP 33 (Eastern Health) and CP 69 (Australian Medical Association (Victoria)).

58 Submissions CP 19 (Office of the Public Advocate), CP 27 (Catholic Archdiocese of Melbourne), CP 47 (Dr Michael Murray) and CP 73 (Victoria Legal Aid).



An expanded educative role for the Public Advocate

- 5.98 There was broad support for expanding the Public Advocate’s education function to provide more information about substitute decision making.⁵⁹ The Public Advocate’s submission outlined campaigns and programs currently undertaken by her Office in order to educate the community about guardianship laws.⁶⁰ The submission recognised the need for additional community education to be provided about substitute decision making, and noted that it would be logical for the Public Advocate’s role to be expanded.⁶¹
- 5.99 Support for a greater educational role for the Public Advocate was matched with widespread calls for the Office to be adequately funded to provide additional information and support.⁶² There was also recognition that, in order to educate effectively, more expertise needs to be developed within the Office of the Public Advocate in relation to the needs of different user groups.⁶³
- 5.100 Consultations also highlighted the value of continuing to rely on existing community networks, particularly in culturally and linguistically diverse (CALD) communities, to provide community education about guardianship laws.⁶⁴ Several responses also referred to the work of organisations other than the Public Advocate who provide educational resources to the community including: the Law Institute of Victoria, Victoria Legal Aid, State Trustees, Seniors Rights Victoria, the Council on the Ageing, Women with Disabilities Victoria, Action Disability Ethnicity Community, Spectrum Migrant Resource Centre, the Victoria Disability Advocacy Network and community legal centres.⁶⁵ The Commission acknowledges that these organisations play a significant educational role and it is important that they continue to do so.

Data collection

- 5.101 Many people and organisations suggested that there is a need for better collection of data about the use of guardianship laws and for that data to be publicly available.⁶⁶ Reference was made to the need for VCAT to collect more extensive data about the operation of the Guardianship List.⁶⁷
- 5.102 A number of responses suggested that information collected through the proposed register of appointments, discussed in Chapter 16, could assist to calculate the use of personal appointments and the effectiveness of educational campaigns and policy initiatives.⁶⁸

59 For eg, consultation with Women with Disabilities Victoria (11 March 2011); Submissions CP 22 (Alzheimer’s Australia Vic), CP 57 (Catholic Archdiocese of Melbourne), CP 29 (STAR Vic), CP 33 (Eastern Health), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 59 (Carers Victoria) and CP 71 (Seniors Rights Victoria).

60 For example, the Public Advocate and Victoria Legal Aid co-produce *Take Control*, a DVD and kit for making powers of attorney: Submission CP 19 (Office of the Public Advocate).

61 Submission CP 19 (Office of the Public Advocate).

62 Submission CP 46 (Victorian Coalition of ABI Service Providers), CP 58 (The Australian Psychological Society), CP 59 (Carers Victoria) and CP 71 (Seniors Rights Victoria).

63 For eg, consultations with mental health consumers (in partnership with Mental Health Legal Centre and Victorian Mental Illness Awareness Council) (5 April 2011) and Jody Saxton-Barney—Victorian Aboriginal Disability Network (3 August 2011).

64 For eg, Submission CP 32 (Ethnic Communities’ Council of Victoria) and CP 73 (Victoria Legal Aid).

65 For eg, roundtables with Turkish and Vietnamese groups (in partnership with Advocacy Disability Ethnicity Community) (10 May 2011), members of Migrant communities (in partnership with Spectrum Migrant Resource Centre) (19 May 2011); Submissions CP 19 (Office of the Public Advocate), CP 56 (Disability Discrimination Legal Service), CP 64 (Women with Disabilities Victoria), CP 65 (Council on the Ageing Victoria), CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

66 For eg, Submissions CP 19 (Office of the Public Advocate), CP 33 (Eastern Health), CP 59 (Carers Victoria), CP 71 (Seniors Rights Victoria), 74 (PILCH Homeless Persons’ Legal Clinic) and CP 78 (Mental Health Legal Centre).

67 Submissions CP 24 (Autism Victoria) and CP 78 (Mental Health Legal Centre).

68 For eg, Submissions CP 19 (Office of the Public Advocate), CP 23 (Dr Kristen Pearson) and CP 67 (Trustee Corporations Association of Australia).

THE COMMISSION'S VIEWS AND CONCLUSIONS

A SINGLE ACT

- 5.103 The Commission believes that all laws governing personal, tribunal and statutory appointments of substitute decision makers, as well as the other assisted decision-making arrangements recommended in this report, should be integrated and included in one piece of legislation.
- 5.104 This proposal complements and extends the recommendation by the Victorian Parliament Law Reform Committee that all laws governing personal appointments of substitute decision makers should be include in one Act. While personally appointed substitute decision makers sometimes exercise different functions and powers to those people appointed to this role by a tribunal or by operation of a statutory appointment scheme, these differences are often of little or no importance to the many third parties with whom the substitute decision maker interacts. Guardianship law must become more accessible to the many people and organisations within the community who engage in transactions with people with impaired decision-making ability through those people who have been appointed to make decisions for them.
- 5.105 Importantly, the law must also be more accessible for people with disabilities and for their families, friends and carers, so that they are able to better understand their rights and responsibilities.
- 5.106 The new Act should provide for:
- all of the areas of decision making currently provided for in the *G&A Act*, including tribunal appointed guardians, tribunal appointed administrators, personally appointed enduring guardians and automatically appointed persons responsible for medical treatment
 - the personal appointment of substitute decision makers for financial matters currently covered by the enduring power of attorney provisions of the *Instruments Act*
 - the personal appointment of substitute decision makers for medical treatment decisions currently covered by the enduring power of attorney (medical treatment) provisions of the *Medical Treatment Act*
 - the new co-decision-making and supporter mechanisms described in this report
 - the functions and powers of the Public Advocate
 - the establishment of an online register
 - a range of associated and ancillary matters outlined in this report.
- 5.107 This report contains recommendations that seek to provide a comprehensive blueprint for new guardianship legislation. In undertaking this task, the Commission has sought to review all of the relevant provisions in the *G&A Act*, the *Instruments Act* and the *Medical Treatment Act*. In those instances where the Commission does not deal directly with a provision in existing legislation, it intends that it should be reproduced in new legislation with appropriate modifications as required.
- 5.108 The Commission suggests that the new legislation be called the *Guardianship Act*.



RECOMMENDATIONS

A single Act

1. A new single statute should be created to provide for supported decision making and substitute decision making for people with impaired decision-making ability.
2. The new statute should replace the *Guardianship and Administration Act 1986* (Vic) and those provisions of the *Instruments Act 1958* (Vic) and of the *Medical Treatment Act 1988* (Vic) that provide for substitute decision making for people with impaired capacity.
3. The new statute should also include provisions for:
 - (a) general principles that reflect the values upon which the statute is based and guide interpretation of the Act
 - (b) principles to guide the assessment of incapacity and decisions about medical treatment
 - (c) a continuum of decision-making arrangements and the mechanisms for putting these in place, including processes for personal appointment, tribunal appointments, and automatic appointments
 - (d) the roles and responsibilities of decision makers
 - (e) mechanisms for ensuring accountability of decision makers, including monitoring and review of orders and decisions
 - (f) the functions and powers of the Public Advocate
 - (g) an online register of appointments.
4. The new statute should be called the Guardianship Act.
5. The new statute should provide for supported and substitute decision makers to be appointed personally, by tribunal and automatically.
6. The new statute should include separate provisions in relation to personal, financial and medical decisions.

AN ACCESSIBLE STATUTE

- 5.109 For the reasons discussed earlier in this chapter, it is important that new guardianship legislation is as accessible as possible. The language used and the structure should be as clear and as simple as possible. Clarity will be promoted by using concepts consistently throughout the legislation.
- 5.110 The Commission proposes new terms for the various appointments available under new legislation. These proposals have been developed with a number of considerations in mind:
- the need to have terms that are relatively easily understood
 - the desirability of using terms consistently in Victorian law
 - the desirability of national uniformity.

- 5.111 All Australian jurisdictions use different terms to distinguish people with financial decision-making powers from those with decision-making powers about personal or lifestyle matters. The terms ‘administrator’, ‘manager’ or ‘financial manager’ are used to describe substitute decision makers for financial and property matters. The term ‘guardian’ is used throughout Australia to describe a substitute decision maker for personal or lifestyle matters, although the Queensland legislation uses the expanded term ‘adult guardian’.⁶⁹
- 5.112 The Commission believes that it is desirable to retain, but amplify, the terminology that has been used for the past 26 years. It proposes that a person who is appointed as a substitute decision maker for financial and property matters should be known as a ‘financial administrator’ and a person appointed to make personal or lifestyle decisions should be known as a ‘personal guardian’.
- 5.113 While the term ‘guardian’ implies a relationship of parent and child,⁷⁰ it is used in guardianship law throughout Australia and appears to be reasonably widely understood. The addition of the qualifying term ‘personal’ should help to distinguish the role from that of a person who is appointed to make decisions for a child. Although the term ‘administrator’ is not a particularly informative description of a person who is responsible for ‘the general care and management of the estate’⁷¹ of another person, the addition of the descriptive term ‘financial’ should promote wider awareness of the role of this person.
- 5.114 The Commission believes that the advantages of using the same terms to describe personal and tribunal appointments of substitute decision makers outweigh the disadvantages. While the sources of power for the appointments are different and the functions given to the appointees sometimes differ, the role they play in facilitating formal transactions between the represented person and the rest of the world is the same. Community understanding of these roles and confidence in dealing with one person who makes decisions for another is likely to be enhanced if substitute decision makers have the same name, regardless of the source of their appointment.
- 5.115 The Commission suggests one difference in the terminology used to describe personally appointed substitute decision makers from that used to describe tribunal appointments. It is desirable to continue to use the term ‘enduring’ to describe a person who has been appointed by a principal to be their substitute decision maker and the nature of the appointment is such that it proceeds beyond, or endures, the principal’s loss of capacity.
- 5.116 The term ‘person responsible’ is used in the G&A Act to describe a person who is automatically appointed by statute to make medical treatment decisions for a person who is unable to make their own decisions. The person responsible is appointed to this position by virtue of their relationship to the person who is unable to make their own decisions. The term does not appear to be well understood and it is not a particularly informative description of the precise role played by that person. The Commission suggests that it be replaced by ‘health decision maker’.
- 5.117 The Commission suggests that there be further discussion with interested groups about these proposed new terms.

69 *Guardianship and Administration Act 2000* (Qld) s 173.

70 The authority of a plenary guardian is set out in section 24(1) of the *Guardianship and Administration Act 1986* (Vic): ‘A guardianship order appointing a plenary guardian confers on the plenary guardian in respect of the represented person all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child’.

71 *Guardianship and Administration Act 1986* (Vic) s 58B(1)(a).



RECOMMENDATIONS

An accessible statute

7. New guardianship legislation should contain language and a structure that are as simple and as accessible as possible.

Names of appointments

8. A person appointed by the tribunal to make substitute decisions about another person's lifestyle and personal matters should be known as that person's 'personal guardian'.
9. A person appointed by the tribunal to make substitute decisions about another person's financial affairs should be known as that person's 'financial administrator'.
10. When someone appoints another person to make substitute decisions about their lifestyle and personal matters, that person should be known as their 'enduring personal guardian'.
11. When someone appoints another person to make substitute decisions about their financial affairs, that person should be known as their 'enduring financial administrator'.
12. A person appointed automatically by statute to make substitute decisions about another person's medical or dental treatment should be known as that person's 'health decision maker'.

COMMUNITY EDUCATION

5.118 The apparent widespread lack of awareness about guardianship laws contributes to a number of difficulties including:

- limited use of personal appointments
- limited understanding within the community of substitute decision-making arrangements
- confusion among some users of guardianship laws about their roles, rights and responsibilities.⁷²

5.119 The G&A Act gives the Public Advocate an important role in arranging, coordinating and promoting informed public awareness of guardianship laws.⁷³ The Commission believes that this role should be retained and extended, with the Public Advocate having primary responsibility for developing and delivering community education programs about new guardianship legislation. However, these programs should be delivered in partnership with other organisations that interact with the many different user groups of guardianship laws.

5.120 The Commission's recommendations contain a number of suggestions about target groups and the content of particular programs. These suggestions are drawn from comments made to the Commission throughout the reference. A number of responses highlighted the need for education to be targeted and delivered in a way that is relevant, simple and accessible to different user groups and their supporters, for it to be effective.

⁷² For example, the Commission has heard that people sometimes try to use financial powers of attorney in hospital settings to make decisions about medical treatment. For eg, roundtable with service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (22 March 2011).

⁷³ *Guardianship and Administration Act 1986* (Vic) s 15(c).

- 5.121 There is a particular need for educational programs for health professionals because of the many challenges in understanding and applying the law that governs substitute decision making for medical treatment. The Commission suggests that consideration be given to devising materials and programs that form part of the ongoing professional development of medical practitioners.

RECOMMENDATIONS

Community education

13. The Public Advocate should have primary responsibility for developing and delivering community education programs about new guardianship legislation.
14. Community education programs about the new statute should be delivered in a variety of ways that will maximise their accessibility and relevance to diverse audiences and communities, including:
 - (a) people with disabilities
 - (b) older people
 - (c) families and carers of people with disabilities and older people
 - (d) Indigenous communities
 - (e) CALD communities
 - (f) health care professionals
 - (g) financial sector professionals
 - (h) police.
15. Community education programs for people with disabilities and older people should emphasise:
 - (a) the value of making personal appointments and instructional directives wherever possible
 - (b) the operation of new supported decision-making and co-decision-making arrangements
 - (c) the rights of a person whose decision making is impaired, particularly when a supporter, co-decision maker or substitute decision maker has been appointed for them
 - (d) the rights of a person whose decision-making ability is impaired.



16. Community education programs for the general community should emphasise:
 - (a) the value of people making personal appointments and instructional directives wherever possible
 - (b) the operation of the proposed new online register and relevant transitional arrangements
 - (c) the new civil penalties applying to abuse, neglect or exploitation of a person with a disability.
17. Community education programs for families and carers of people with disabilities should emphasise:
 - (a) the importance of considering supported decision-making and co-decision-making arrangements wherever possible
 - (b) the proposed new arrangements for people with lifelong impaired decision-making ability.
18. Community education programs for third party users of guardianship laws, such as health professionals and financial sector employees, should emphasise:
 - (a) the different roles and responsibilities of the various decision-making arrangements
 - (b) the different ways in which a person with a disability can be supported to make their own decisions, without the need for a formal appointment to be made
 - (c) the operation of the proposed new online register.

DATA COLLECTION

- 5.122 The Commission has found it difficult to locate reliable data about the operations of many aspects of Victoria's guardianship laws. This lack of data impedes the development of evidence-based law reform proposals and makes it difficult for the major public agencies—VCAT, the Public Advocate and State Trustees—to evaluate their performance and to benchmark with relevant interstate agencies.
- 5.123 These major public agencies collect and compile their own data using different categories and terminology. A coordinated approach to data collection and presentation would be of great benefit to all people and organisations with an interest in the operations of Victorian guardianship legislation.

RECOMMENDATION

Data collection

19. VCAT, the Public Advocate and State Trustees should liaise in the collection and publication of data about the operations of Victoria's guardianship laws including:
 - (a) the numbers, duration and types of orders being made at the tribunal
 - (b) the numbers and types of personal appointments (following the introduction of the online register)
 - (c) the areas of decision making for which appointments are made
 - (d) the relationship of the person appointed with the represented person
 - (e) details of the people for whom tribunal appointments are made, including types of disability, age, living arrangements, cultural and linguistic background
 - (f) outcomes of reassessments and reviews of orders.

Chapter 6

Principles of new laws

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INTRODUCTION

- 6.1 Modern legislation often starts with a statement of principles. These principles serve two broad purposes: they provide parliament with an opportunity to highlight policies that the legislation seeks to apply and they provide guidance to those who exercise power under the legislation.
- 6.2 Because of the challenges in balancing, and sometimes prioritising between, the fundamental values of autonomy and beneficence, guardianship legislation should include principles that clearly explain the policies implemented by the law. Those principles would also guide people—such as tribunal members, the Public Advocate, State Trustees, and guardians and administrators—when applying that legislation and exercising power over the lives of others.
- 6.3 The Commission believes that the existing principles in Victorian guardianship legislation should be modernised to reflect the changes discussed in Chapters 4 and 5.
- 6.4 In this chapter, we consider the overarching principles that could be included in new guardianship legislation. In Chapter 7, we consider principles in relation to the assessment of decision-making capacity, and in Chapter 17, we consider more detailed decision-making principles to guide substitute decision makers in exercising their powers.

CURRENT LAW

- 6.5 The core principles of the current *Guardianship and Administration Act 1986 (Vic)* (G&A Act) can be found in the ‘Objects’ section. The ‘Purpose’ of the Act merely describes the Act’s primary legal function—the appointment of guardians and administrators.¹

OBJECTS OF THE *GUARDIANSHIP AND ADMINISTRATION ACT 1986 (VIC)*

- 6.6 Section 4 describes the objects of the G&A Act as:
- to enable the appointment of a Public Advocate
 - to enable the making of guardianship and administration orders
 - to ensure people with a disability and represented persons are informed of and make use of the Act
 - to provide for the appointment of enduring guardians
 - to provide for consent to special procedures, medical research procedures and medical and dental treatment on behalf of persons incapable of giving consent
 - to provide for the registration of interstate guardianship and administration orders.²

INTERPRETATIVE PRINCIPLES

- 6.7 Section 4 also contains three core principles that provide a framework for use when invoking and exercising the substitute decision-making mechanisms established in the Act. They are that:
- The means that are **least restrictive** of a person’s freedom of decision and action as is possible in the circumstances are adopted.
 - The **best interests** of a person with a disability are promoted.
 - The **wishes** of a person with a disability are, wherever possible, given effect to.³

¹ *Guardianship and Administration Act 1986 (Vic)* s 1.

² *Ibid* s 4(1).

³ *Ibid* s 4(2).

- 6.8 These principles apply to ‘every function, power, authority, discretion, jurisdiction and duty conferred or imposed’ by the G&A Act.⁴ However, they are not a comprehensive statement of the principles that underpin the legislation for others emerge from some of the substantive provisions in the Act. These include:
- the preservation of existing family relationships⁵
 - the avoidance of conflicts of interests⁶
 - encouragement of participation in the life of the community⁷
 - encouragement of the person becoming capable of managing their affairs⁸
 - advocacy⁹
 - protection from abuse, neglect and exploitation.¹⁰
- 6.9 While the three core principles apply to all decisions made under the G&A Act,¹¹ in practice they are applied primarily in two contexts:
- decisions by the Victorian Civil and Administrative Tribunal (VCAT) about whether to appoint a substitute decision maker
 - the exercise of powers by a substitute decision maker.
- 6.10 The ‘least restrictive’ principle is most commonly associated with the decision to appoint a substitute decision maker, while the ‘wishes of the person’ and their ‘best interests’ are primary considerations when a substitute decision maker exercises their powers. However, decision makers are required to apply all three principles in each of these circumstances.¹²
- 6.11 In addition to considering the three core principles, decision makers under the current Act are sometimes required to apply principles set out in other parts of the Act.¹³ This means that people exercising power under the Act can be required to consider many separate, but overlapping, principles in order to act according to law.

‘Least restrictive’ principle

- 6.12 The least restrictive principle is a key feature of modern guardianship regimes.¹⁴ In essence, it means that if there is more than one option available for the person with impaired capacity, the decision maker should choose the one that is less restrictive.

4 Ibid s 4(2).

5 Ibid ss 22(2)(c), 23(2)(b).

6 Ibid ss 23(1)(b), 47(1)(c)(ii).

7 Ibid s 28(2)(b).

8 Ibid ss 28(2)(c), 49(2)(a).

9 Ibid s 28(2)(a).

10 Ibid s 28(2)(d).

11 The application of these principles was considered in detail in the case of *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [34–7], where Cavanough J held that the matters set out in s 4(2) apply to every function, power, authority, discretion, jurisdiction and duty conferred or imposed by the Act.

12 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006).

13 For example, medical decisions must be made in the ‘best interests’ of the patient, and this involves taking into consideration a variety of legislative considerations outlined in s 38(1) of the *Guardianship and Administration Act 1986* (Vic), in addition to the overarching objects in s 4(2).

14 Robin Creyke, *Who Can Decide? Legal Decision-Making for Others* (Department of Human Services and Health, Aged and Community Care Division (Commonwealth), 1995) 40–1; Minister’s Committee Considering Rights and Protective Legislation for Intellectually Handicapped Persons, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 25; Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 29; Robert M Gordon and Simon N Verdun-Jones, *Adult Guardianship Law in Canada* (Carswell, 1992) 6–49–6–50; Marshall B Kapp, ‘Legal Basis of Guardianship’ in George H Zimny and George T Grossberg (eds), *Guardianship of the Elderly* (Springer Publishing, 1998) 16, 22; Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010) vol 1, 40–1; Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.4].



- 6.13 Although not explicitly stated in the G&A Act, it is generally accepted that the ‘least restrictive’ principle means that both guardianship and administration should be used as a last resort, and less formal arrangements should be preserved where they are working satisfactorily.¹⁵
- 6.14 In determining whether there is a ‘need’ to appoint a guardian or an administrator,¹⁶ VCAT must consider ‘whether the needs of the person ... could be met by other means less restrictive of the person’s freedom of decision and action’.¹⁷ For example, VCAT might decide that existing informal family support arrangements are working effectively and no formal order is needed.
- 6.15 If VCAT decides to make a guardianship or administration order, this order must also be ‘the least restrictive of that person’s freedom of decision and action as is possible in the circumstances’.¹⁸ In practice, this means the scope of the order should be limited to the areas where formal substitute decision making is needed.

‘Best interests’ principle

- 6.16 Acting in the best interests of a represented person is the predominant guiding consideration for substitute decision makers when exercising their powers under the G&A Act.¹⁹
- 6.17 While ‘best interests’ is not defined in the G&A Act, the legislation provides some guidance about what it means for a substitute decision maker to act in the best interests of a person. This guidance is different for guardians²⁰ and administrators,²¹ and different again for medical treatment decisions²² and medical research decisions.²³ In all these circumstances, the guidance includes a requirement to consider the wishes of the person.
- 6.18 When appointing a guardian or administrator, VCAT must also be satisfied that the appointment is in the person’s best interests,²⁴ and that the appointed person will act in the best interests of the represented person.²⁵

Wishes of the person

- 6.19 One of the three core principles in the G&A Act is that ‘the wishes of a person with a disability are wherever possible given effect to’.²⁶ However, fulfilling a person’s wishes is just one of a number of matters that a substitute decision maker must consider when deciding whether a proposed decision is in a person’s best interests.
- 6.20 In acting in the best interests of a person, guardians and administrators are required to act ‘in consultation with the represented person, taking into account as far as possible, the wishes of the represented person’.²⁷

15 This was certainly the intention of the Cocks Committee Report that led to the G&A Act: see Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 19 (*Report of the Minister’s Committee*).

16 *Guardianship and Administration Act 1986* (Vic) ss 22(1)(c), 46(1)(a)(iii).

17 *Ibid* ss 22(2)(a), 46(2)(a).

18 *Ibid* ss 22(5), 46(4).

19 Guardians and administrators must act in the ‘best interests’ of the represented person: *ibid* ss 28(1), 49(1). Similarly, in determining whether to consent to medical or dental treatment, the ‘person responsible’ must act in the ‘best interests’ of the patient: at s 42H(2). See also: at s 38(1).

20 *Guardianship and Administration Act 1986* (Vic) s 28(2).

21 *Ibid* s 49(2).

22 *Ibid* s 38(1).

23 *Ibid* s 42U(1). The person responsible for medical research decisions must ensure that the medical research procedure ‘would not be contrary to the best interests of the patient’: at s 42S(3).

24 *Guardianship and Administration Act 1986* (Vic) ss 22(3), 46(3).

25 *Ibid* ss 23(1)(a), 47(1)(c)(i).

26 *Ibid* s 4(2)(c).

27 *Ibid* ss 28(2)(e), 49(2)(b).

- 6.21 For medical decisions and medical research decisions, ‘the wishes of the patient, so far as they can be ascertained’ must be considered in determining their best interests.²⁸ When deciding whether there is a need for a guardian or administrator, and who the guardian or administrator should be, VCAT must consider, among other things, the wishes of the person ‘so far as they can be ascertained’.²⁹

OTHER JURISDICTIONS

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

- 6.22 Perhaps the most significant international development in the rights of people with impaired capacity has been the United Nations *Convention on the Rights of Persons with Disabilities* (the Convention), which was ratified by Australia on 17 July 2008. The Convention provides an important framework for building new guardianship laws.
- 6.23 The Convention’s overriding stated purpose is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.³⁰
- 6.24 The Convention also outlines its general principles, which include:
- respect for a person’s inherent dignity, individual autonomy including the freedom to make their own choices, and independence
 - non-discrimination
 - full and effective participation and inclusion in society
 - respect for difference and acceptance of people with disabilities as part of human diversity and humanity
 - equality of opportunity
 - accessibility
 - equality between men and women
 - respect for the evolving capacities of children with disabilities and respect for the right of children to preserve their identities.³¹
- 6.25 The Convention strongly emphasises the inherent dignity of people with disabilities, and their right to participate in society on an equal basis with others.³²
- 6.26 Article 12 of the Convention has direct relevance to guardianship laws. It recognises the right of people with disabilities to be recognised as people before the law, their right to enjoy legal capacity on an equal basis with others, and their right to the support and assistance necessary for them to exercise their legal capacity.³³ Importantly, the Convention requires that this support:
- respects the rights, will and preferences of the person
 - is free of conflict of interest and undue influence

28 Ibid ss 38(1)(a), 42U(1)(a).

29 Ibid ss 22(2)(ab), 46(2)(b). The relevance of the wishes of the represented person to the criteria of whether there is a ‘need’ for a guardian or administrator was considered in *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [34]. In this case Cavanough J found that the general ‘object’ of giving effect to the wishes of the person wherever possible was relevant to a consideration of the ‘need’ for an order. In 2006, the G&A Act was amended to explicitly require VCAT to consider the ‘wishes of the person . . . so far as they can be ascertained’ in assessing the need for orders and who should be appointed: see *Guardianship and Administration (Further Amendment) Act 2006* (Vic) ss 15(a), 17(1). Determining the ‘need’ for a guardian or administrator therefore requires VCAT to consider both the wishes of the person so far as they can be ascertained, and the broader requirement that VCAT give effect to those wishes wherever possible: see *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [79] (Deputy President Billings).

30 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1 (‘*Convention on the Rights of Persons with Disabilities*’).

31 Ibid art 3.

32 See, eg, ibid arts 1, 3, 9, 12, 19.

33 *Convention on the Rights of Persons with Disabilities* arts 12(1)–(3).



- is proportional and tailored to the person's circumstances
- applies for the shortest time possible
- is subject to regular review by a competent, independent and impartial authority.³⁴

- 6.27 Article 12 marks a change in approach towards people with decision-making disabilities by placing an obligation on states to provide appropriate decision-making support.
- 6.28 The concept of 'participation', which is a practical way of fulfilling the overarching goals of dignity and equality, is emphasised throughout the Convention.³⁵ The Convention recognises that 'persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world' and obliges states parties to take action to ensure the 'full and effective participation' of people with disabilities in society.³⁶
- 6.29 Throughout the Commission's guardianship review, the goals and values of the Convention have been widely supported by stakeholders in submissions and consultations. The importance of the Convention was also endorsed by the Victorian Parliament Law Reform Committee's recent inquiry into powers of attorney,³⁷ and recent reviews of guardianship laws in New South Wales³⁸ and Queensland.³⁹

OTHER AUSTRALIAN JURISDICTIONS

- 6.30 Victoria's G&A Act was one of the earliest modern guardianship laws. Every Australian state and territory now has guardianship laws that are broadly similar to the Victorian G&A Act. These Acts have been introduced over the past quarter century, with the Queensland *Guardianship and Administration Act 2000* (Qld) the most recent.
- 6.31 The three core principles of the G&A Act—'best interests', 'least restrictive' and 'wishes'—are included as overarching principles in most other Australia guardianship laws. The 'best interests' principle, however, is not a central principle of guardianship laws in South Australia and Queensland, which instead emphasise the use of substituted judgment.⁴⁰ This approach requires decision makers to try to determine the decision they believe the person would make themselves in the circumstances.

Queensland

- 6.32 Of all the Australian jurisdictions, Queensland has the most comprehensive set of rights and principles in its guardianship laws. Queensland's laws include principles and human rights statements that are not found in other guardianship laws.
- 6.33 The principles that guide the implementation of Queensland's guardianship laws are largely found in schedule 1 of the Act, but are also expressed through the stated purpose and acknowledgements of the Act.
- 6.34 Some of the key principles currently expressed in Queensland guardianship laws include:

34 Ibid art 12(4).

35 Ibid arts 1, 3(c), 5(3), 9(1), 12(3), 29, 30.

36 Ibid preamble (k), arts 3(c), 4.

37 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 42 ('*Inquiry into Powers of Attorney*').

38 Standing Committee on Social Issues, NSW Legislative Council, *Substitute Decision-making for People Lacking Capacity* (2010) 61–2.

39 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, 33–149 ('*A Review of Queensland's Guardianship Laws*').

40 The term 'best interests' does not appear as a core principle in South Australian and Queensland guardianship laws, other than in the context of medical decision making. However, these laws do require decisions and actions to be consistent with the 'proper care and protection of the person': see *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(5); *Guardianship and Administration Act 1993* (SA) s 5(d). The ACT refers to the 'interests' of the person, which are defined in s 5A of the *Guardianship and Management of Property Act 1991* (ACT).

- a presumption of capacity⁴¹
- the right of all adults to equality of human rights⁴²
- recognition of the dignity and individual value of adults⁴³
- the right of an adult to be valued as a member of society, encouraging the adult to perform valued social roles, and encouraging the adult to participate in community life⁴⁴
- encouragement of self-reliance⁴⁵
- maintaining existing supportive relationships⁴⁶
- maintaining cultural environments and values⁴⁷
- the importance of acting in a way that is appropriate to the adult's characteristics and needs⁴⁸
- a right to confidentiality.⁴⁹

6.35 Queensland also emphasises the importance of the following matters in relation to decision making:

- an adult's right to participate in decisions that affect the adult's life⁵⁰
- preserving the adult's right to make decisions to the greatest possible extent, including providing them with any necessary support and access to information to enable them to participate in decisions affecting their' life⁵¹
- the use of substituted judgment where appropriate⁵²
- acting consistently with the proper care and protection of the adult.⁵³

Queensland Law Reform Commission

6.36 In 2010, the Queensland Law Reform Commission released an extensive final report of its review of Queensland's guardianship laws.⁵⁴ This report recommended amendments to the principles of Queensland's guardianship laws to bring them in line with the Convention, and to make them more logical and easier to apply.⁵⁵

6.37 These recommendations included:

- providing additional guidance about the content of the human rights and fundamental freedoms of adults—in line with the Convention's general principles⁵⁶
- the creation of a new principle of 'maximising an adult's participation in decision making'⁵⁷

41 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1.

42 *Ibid* sch 1 pt 1 cl 2.

43 *Ibid* sch 1 pt 1 cl 3.

44 *Ibid* sch 1 pt 1 cls 4, 5.

45 *Ibid* sch 1 pt 1 cl 6.

46 *Ibid* sch 1 pt 1 cl 8.

47 *Ibid* sch 1 pt 1 cl 9.

48 *Ibid* sch 1 pt 1 cl 10.

49 *Ibid* pt 1 cl 11.

50 *Ibid* sch 1 pt 1 cl 7(1).

51 *Ibid* sch 1 pt 1 cls 2, 3(a).

52 *Ibid* sch 1 pt 1 cl 7(4).

53 *Ibid* sch 1 pt 1 cl 7(5).

54 *A Review of Queensland's Guardianship Laws*, above n 39, vol 1.

55 *Ibid* vol 1, 62.

56 *Ibid* vol 1, 70–74.

57 *Ibid* vol 1, 105–6.



- removing the 'appropriate to circumstances' principle on the basis that it does not add significantly to the other principles.⁵⁸
- 6.38 The Queensland Government supported most of the Commission's recommendations.⁵⁹
- 6.39 One of the most significant recommendations was to amend the guidance for decision making under the Act.⁶⁰ The Queensland Law Reform Commission provided a majority and minority view about how the law should change, and the Queensland Government has indicated support for the minority view. This view emphasises the recognition of an adult's right to make their own decisions if they are able to do so or can be supported to do so, and the use of the principle of 'substituted judgment' as the basis for decision making where this is not possible.⁶¹ We discuss the Queensland Law Reform Commission's proposal in more detail in Chapter 17, where we consider the principles that should guide substitute decision makers.
- 6.40 The Commission believes that both the current general principles of Queensland's guardianship legislation and the recent recommendations of the Queensland Law Reform Commission represent important developments in the evolution of modern guardianship laws. The Commission has drawn significantly upon these developments in the creation of its own set of recommendations for guardianship principles.

OTHER VICTORIAN LAWS

Charter of Human Rights and Responsibilities

- 6.41 Victoria is one of two Australian jurisdictions with a charter of rights.⁶² The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) came into full operation on 1 January 2008.⁶³ The Charter gives statutory recognition to 20 civil and political rights and freedoms primarily derived from the *International Covenant on Civil and Political Rights*.⁶⁴ The purpose of the Charter, discussed in detail in Chapter 4, is to protect and promote the human rights of all people in Victoria.⁶⁵ The Charter provides that legislation is to be developed and interpreted compatibly with human rights.⁶⁶

Disability Act

- 6.42 The *Disability Act 2006* (Vic) provides a comprehensive set of principles that apply to the provision of services to people with disabilities in Victoria, other than disabilities related solely to mental illness or ageing. In Chapter 4, we discuss the development of the Disability Act in Victoria in more detail.
- 6.43 The core principles in the Disability Act emphasise that people with disabilities have the same rights and responsibilities as other members of the community to:
- (a) respect for their human worth and dignity as individuals
 - (b) live free from abuse, neglect or exploitation

58 Ibid vol1, 118–122.

59 Queensland Department of Justice and Attorney General, *Queensland Government Initial Response to the Queensland Law Reform Commission's Report: A Review of Queensland's Guardianship Laws* (2011) 7–15 ('*Queensland Government Initial Response to the Queensland Law Reform Commission's Report*').

60 *A Review of Queensland's Guardianship Laws*, above n 39, vol1, 74–106. This recommendation contained a majority and minority view of the Commissioners.

61 *A Review of Queensland's Guardianship Laws*, above n 39, 74–106; *Queensland Government Initial Response to the Queensland Law Reform Commission's Report*, above n 59, 12–14.

62 The other is the Australian Capital Territory: see *Human Rights Act 2004* (ACT).

63 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2.

64 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 1.

65 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1. 'Person' is defined in s 3(1) to mean a human being, and 'child' means a person under the age of 18 years.

66 *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 3.

- (c) realise their individual capacity for physical, social, emotional and intellectual development
- (d) exercise control over their own lives
- (e) participate actively in the decisions that affect their lives, and have information and support where necessary, to enable this to occur
- (f) access information and communicate in a manner appropriate to their communication and cultural needs
- (g) access services that support their quality of life.⁶⁷

6.44 The Disability Act also includes important principles about developing service plans for people with disabilities.⁶⁸ These principles complement the principles in guardianship laws.⁶⁹

Victorian Parliament Law Reform Committee *Inquiry into Powers of Attorney*

6.45 The Victorian Parliament Law Reform Committee's review of enduring powers of attorney (financial) and enduring powers of guardianship considered the 'founding principles' that should govern all aspects of a new 'Powers of Attorney Act', as well as more specific principles in relation to capacity and decision making. This report was the result of extensive stakeholder consultation, and the Commission seeks to build upon the Law Reform Committee's ideas in the context of guardianship laws.

6.46 The Committee argued that the Convention should be central to new powers of attorney legislation. It recommended two foundational principles. These are that people must exercise their powers and functions in relation to a person with impaired capacity:

- in a way that is as least restrictive of the person's freedom of decision and action as is possible in the circumstances
- so that the person is provided with appropriate support to allow them to exercise their legal capacity to the maximum extent possible.⁷⁰

6.47 The Committee recommended a legislative presumption of capacity, as well as the inclusion of definitions of capacity and incapacity.⁷¹

6.48 In relation to decision making by people appointed under powers of attorney, the Committee recommended that:

- The starting point for any decision making should be the person's stated wishes.
- People should be encouraged to participate in decision making, even when they have impaired decision-making capacity.
- Representatives must act in a way that promotes the personal and social wellbeing of the person.⁷²

6.49 Guidance around the 'personal and social wellbeing of the person' should include matters such as:

- recognising the person's role as a valued member of society

⁶⁷ *Disability Act 2006* (Vic) s 5.

⁶⁸ *Ibid* s 52(2).

⁶⁹ Robin Creyke, *Who Can Decide? Legal Decision-making for Others* (Department of Human Services and Health, Aged and Community Care Division (Commonwealth), 1995) 44–5.

⁷⁰ *Inquiry into Powers of Attorney*, above n 37, 41–2.

⁷¹ *Ibid* 109–113.

⁷² *Ibid* 172–4.

- taking into account the person's existing supportive relationships, values and cultural and linguistic environment
- recognising the person's right to confidentiality of information.⁷³

COMMUNITY RESPONSES

- 6.50 While the core principles of the G&A Act have served Victoria well over the past 26 years, the Commission believes that they should be modernised. In the consultation paper, the Commission proposed a new draft statement of purpose and new draft principles.
- 6.51 Those proposals were drawn from developments in Australia, in other comparable jurisdictions, and in international human rights, together with proposals and responses from the community.

DRAFT PURPOSE

- 6.52 The Commission proposed the following purpose for new guardianship laws:
- The purpose of this Act is to protect and promote the dignity and human rights of people with impaired decision-making capacity. To this end, the Act establishes mechanisms to support and assist people to participate in decisions that affect their lives, realise their rights and protect their inherent dignity.
- 6.53 Many organisations supported the draft purpose.⁷⁴ There were also some suggestions about how it could be improved.
- 6.54 Some responses suggested that the proposed purpose does not make it sufficiently clear that guardianship laws authorise substitute decision making.⁷⁵

DRAFT PRINCIPLES

- 6.55 Many people and organisations responded to the Commission's new draft principles which were:

All adults have an inherent human dignity which must at all times be respected and upheld.

All adults are entitled to the same basic human rights, and should be empowered to exercise those rights wherever possible.

All adults are presumed to have the ability to make decisions that affect their lives unless this is shown not to be the case.

The assessment of an adult's decision-making capacity must take into account the following:

- Capacity is specific to each decision to be made.
- Impaired decision-making capacity may be temporary or permanent and can fluctuate over time.

Where a person is found to be unable to make a decision, any decision made on their behalf should, as far as possible, be the decision that the decision maker believes the person would have made if they were able to.

All adults, regardless of their ability to make decisions, have wishes and preferences that can and should inform decisions made in their lives.

⁷³ Ibid 174.

⁷⁴ Submissions CP 24 (Autism Victoria), CP 29 (STAR Victoria), CP 46 (Victorian Coalition of ABI Service Providers), CP 59 (Carers Victoria), CP 65 (Council on the Ageing Victoria), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

⁷⁵ Consultation with Julian Gardner (29 March 2011); Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 67 (Trustee Corporations Association of Australia).

All adults are entitled to the support necessary for them to make or participate in decisions affecting their lives.

All adults are entitled to take reasonable risks and make choices that other people might disagree with.

All adults have the right to communicate in any way that allows them to understand and be understood.

All adults are entitled to live in safety and security and to be protected from abuse, neglect and exploitation.

Any limitations on the ability of adults to make decisions that affect their lives must be justified, reasonable and proportionate.

- 6.56 A majority of submissions supported the proposed principles fully⁷⁶ or in part.⁷⁷ There were also many suggestions about how these principles could be improved.
- 6.57 The Public Advocate suggested that the general principles should describe the central purposes of guardianship laws more broadly, and that some of the proposed decision-making principles could be dealt with separately.⁷⁸
- 6.58 Scope and the Centre for the Advancement of Law and Mental Health argued that the principles should give more prominence to the principle of supported decision making.⁷⁹
- 6.59 The Victorian Equal Opportunity and Human Rights Commission suggested that the principles for guardianship laws should be more closely aligned with the Convention and the Charter, and cited the Queensland Law Reform Commission's proposals—which attempt to incorporate some of the language and principles of the Convention—as a useful model for Victoria.⁸⁰
- 6.60 Disability Discrimination Legal Service and the Federation of Community Legal Centres proposed that the principles specifically refer to the rights contained in the Convention.⁸¹
- 6.61 Action for More Independence & Dignity in Accommodation was particularly concerned that principles of guardianship laws recognise a role for advocacy, independent of the role of substitute decision makers.⁸²
- 6.62 Anita Smith, President of the Tasmanian Guardianship and Administration Board and Chair of the Australian Guardianship and Administration Council, felt that the existing principles of guardianship laws struck an effective balance, and warned that adding too many principles could undermine their effectiveness.⁸³
- 6.63 The Catholic Archdiocese of Melbourne and the Australian Christian Lobby argued that the Commission's proposed principles reflected strongly individualistic values, rather than a more community-based understanding of disability, which they favoured.⁸⁴

76 Submissions CP 22 (Alzheimer's Australia Vic), CP 29 (STAR Victoria), CP 57 (Aged Care Assessment Service in Victoria), CP 61 (Disability Services Commissioner), CP 71 (Seniors Rights Victoria), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

77 Submissions CP 45 (Scope Vic), CP 46 (Victorian Coalition of ABI Service Providers), CP 67 (Trustee Corporations Association of Australia), CP 70 (State Trustees Limited), CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria).

78 Submission CP 19 (Office of the Public Advocate).

79 Submissions CP 45 (Scope Vic) and CP 48 (Centre for the Advancement of Law and Mental Health—Monash University).

80 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

81 Submissions CP 56 (Disability Discrimination Legal Service), CP 75 (Federation of Community Legal Centres (Victoria)).

82 Submission CP 21 (Action for More Independence & Dignity in Accommodation).

83 Consultation with Anita Smith (21 February 2011).

84 Submission CP 27 (Catholic Archdiocese of Melbourne) and CP 31 (Australian Christian Lobby).

Inclusion of additional principles

- 6.64 In the consultation paper, the Commission asked if two further principles should be included in legislation:
- Recognition of culture and religion.
 - Recognition of the role of families, friends and caring relationships.
- 6.65 The inclusion of both these principles was generally supported in consultations and submissions.⁸⁵
- 6.66 The Mental Health Legal Centre argued against specific reference to families, carers or supportive relationships, out of concern that this may ascribe rights to these people beyond the person's wishes.⁸⁶

THE COMMISSION'S VIEWS AND CONCLUSIONS

- 6.67 The Commission believes that the principles underpinning guardianship laws need to be modernised. They should be a blend of existing principles that remain relevant and new principles—perhaps most clearly articulated in the Convention—that reflect contemporary values concerning people with impaired decision-making ability. There are four parts to the Commission's recommended new legislative principles:
- a statement of purpose
 - general principles that include a presumption of capacity
 - capacity assessment principles (discussed in Chapter 7)
 - decision-making principles for substitute decision makers (discussed in Chapter 17).
- 6.68 The Commission has made several changes to the principles it proposed in the consultation paper in light of community responses.

PURPOSE OF LAWS

- 6.69 The Commission believes that a new statement of purpose should describe the goals of the legislation. While the values of the draft purpose outlined in the consultation paper were largely supported in submissions, the Commission accepts the observation that the proposed purpose should refer to the ongoing use of substitute decision making, as well promoting the use of supported decision making where possible.
- 6.70 Consistent with similar purpose provisions in other Victorian legislation, the Commission believes the proposed purpose could more fully outline the key goals of guardianship laws, namely:
- supporting and assisting people to make their own decisions where possible
 - appointing substitute decision makers for people who are unable to make their own decisions with support, and guiding those substitute decision makers in exercising their powers
 - ensuring that support and substitute decision-making arrangements established under guardianship laws are appropriate to the specific circumstances of the person, and remain appropriate over time
 - safeguarding against the abuse, neglect and exploitation of people with impaired decision-making ability.

⁸⁵ For eg, Submissions CP 24 (Autism Victoria), CP 32 (Ethnic Communities' Council of Victoria), CP 59 (Carers Victoria) and CP 73 (Victoria Legal Aid).

⁸⁶ Submission CP 78 (Mental Health Legal Centre).

6.71 While the drafting of the purpose of new laws will ultimately be a matter for the Office of Chief Parliamentary Counsel and the Victorian Parliament, the Commission has proposed an amended purpose for new guardianship laws.

RECOMMENDATION

A new purpose

20. The purpose of this Act is to protect and promote the dignity and human rights of people with impaired decision-making ability. To this end, the Act establishes mechanisms to:
- (a) support and assist people to make, participate in, or implement decisions that affect their lives
 - (b) appoint and guide substitute decision makers
 - (c) ensure the ongoing appropriateness of support and substitute decision-making arrangements
 - (d) safeguard against the abuse, neglect and exploitation of people with impaired decision-making ability.

New general principles

6.72 The Commission believes that new principles should clearly explain the values upon which the law is based and guide the interpretation of guardianship laws. These include principles that are at the core of the Convention, such as:

- Respect for the dignity of all people.⁸⁷
- Recognition that people with impaired capacity have the same rights and freedoms as other members of the community.⁸⁸
- Support for the principle of supported decision making.⁸⁹

6.73 In the consultation paper the Commission proposed a number of general principles to guide new guardianship laws. They included:

- A clear restatement of the right of all people to a presumption of capacity.
- A recognition of the importance of the right of people with impaired decision-making ability to take reasonable risks.
- An acknowledgement of the importance of people being able to participate in the life of the community on an equal basis.
- A right for people to communicate in a way they can understand, and which allows them to be understood by others.
- A right for people to live in safety and security, and to be protected from abuse, neglect and exploitation.
- A guiding principle that any limitations placed on a person's ability to make their own decisions should be reasonable, justified and proportionate.

⁸⁷ *Convention on the Rights of Persons with Disabilities* art 3.

⁸⁸ *Ibid* arts 3, 5.

⁸⁹ *Ibid* art 12.

- 6.74 As several submissions pointed out, there may be conflict between some of these principles at times. For example, what some people might perceive as a 'reasonable risk' for a person with impaired decision-making ability, others might see as abusive or neglectful behaviour.
- 6.75 While principles alone cannot easily resolve all difficult decisions that need to be made under guardianship laws, they do provide an accessible set of values to guide those decisions.
- 6.76 The Commission has refined the draft principles in the consultation paper. In line with community responses, the Commission recommends three important changes:
- The principles should explicitly acknowledge the rights outlined in the Charter of Human Rights and Responsibilities and the *Convention on the Rights of Persons with Disabilities*.
 - The principles should acknowledge the importance of respect for a person's cultural and linguistic circumstances, and their values and beliefs.
 - The principles should acknowledge the importance of supportive relationships in the life of the person.
- 6.77 Further, the Commission believes that rather than being cast as applying to 'all adults', the application of the principles should be more specifically targeted to people with 'impaired decision-making ability', as these are the people whose rights and interests are directly affected by guardianship laws.
- 6.78 The Commission believes that for ease of use, principles concerning the assessment of capacity and the process of substitute decision making should be dealt with separately in new guardianship laws.

Recognition of the Charter and the Convention

- 6.79 The human rights protections in the Convention and the Charter are of particular importance to people with impaired decision-making ability because of their emphasis upon equality and participation.
- 6.80 The Charter, which has been in operation since 2008, has been utilised to protect the rights of people with impaired capacity in a number of cases.⁹⁰
- 6.81 The Convention was ratified by Australia on 17 July 2008 and on 21 August 2009 Australia ratified the Optional Protocol, which allows individual citizens to make a complaint about violations of the Convention.
- 6.82 While both the Convention and the Charter already form part of the framework of human rights protections in Victoria, the Commission believes there is significant value in recognising these instruments as legitimate sources of interpretation of Victorian guardianship laws.

Respect for cultural and linguistic circumstances, and values and beliefs

- 6.83 This principle, which is explicitly recognised in guardianship laws in New South Wales, Western Australia, and Queensland,⁹¹ was strongly supported in the Commission's consultations. A consistent theme that emerged was the need for laws to be sufficiently flexible to preserve and uphold the diverse cultural values and practices of people with impaired decision-making ability.⁹²

⁹⁰ See, eg, *Kracke v Mental Health Review Board* [2009] VCAT 646; *PJB v Melbourne Health* [2011] VSC 327.

⁹¹ *Guardianship Act 1987* (NSW) s 4(e); *Guardianship and Administration Act 1990* (WA) ss 51(2)(h), 70(2)(h); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9.

⁹² For eg, roundtables with members of Migrant communities (in partnership with Spectrum Migrant Resource Centre) (19 May 2011) and Turkish and Vietnamese groups (in partnership with Advocacy Disability Ethnicity Community) (10 May 2011); Submission CP 32 (Ethnic Communities' Council of Victoria).

6.84 Respect for cultural and linguistic identity and values forms an important protection in the Charter⁹³ and the Convention.⁹⁴ For these reasons, the Commission believes there is value in principles of guardianship laws specifically recognising the cultural and linguistic circumstances and values of people with impaired decision-making ability.

Recognition of supportive relationships

6.85 The role of supportive relationships in the lives of people with impaired capacity—including family, friends, advocates, and other relationships of importance to the person—was consistently emphasised in consultations and submissions. A number of groups argued that the proposed general principles did not adequately address the role of caring families in the lives of people with impaired decision-making ability.⁹⁵ Action for More Independence & Dignity in Accommodation argued that the role of advocates was not given adequate recognition.⁹⁶

6.86 Supportive relationships—and, in particular, supportive family relationships—are a crucial part of the lives of most people with impaired decision-making ability. As the use of guardianship laws often affects these relationships, it is appropriate that people exercising power under guardianship laws consider the impact of their decisions upon them.

6.87 The G&A Act already explicitly acknowledges supportive relationships. For example, VCAT is required to consider ‘the desirability of preserving existing family relationships’ in relation to appointments of guardians.⁹⁷ The Commission’s recommendation seeks to ensure a greater emphasis is placed on supportive relationships when making all decisions under the Act.

6.88 The Commission has chosen the broad term ‘supportive relationships’, rather than referring to ‘family’ or ‘carers’. This is not intended to exclude family or carers, but recognises that some people may have important non-family relationships that should be considered and recognised. The use of the term ‘supportive’ seeks to exclude a requirement to recognise relationships that have broken down and are damaging the person.

Application of principles—‘people with impaired decision-making ability’

6.89 The Commission’s draft general principles were expressed to apply to ‘all adults’. The Commission now believes that it is simpler and more effective to apply the principles to ‘people with impaired decision-making ability’.

6.90 One reason for the change in emphasis is that the principles may no longer apply only to people over the age of 18, as the Commission is recommending in Chapter 22 that guardians and administrators should be able to be appointed for people aged 16 years or older.

6.91 The Commission also believes that the focus of the principles should be on the group of people the Act seeks to assist: people with impaired decision-making ability. Describing the people actually affected by the principles is more logical, and provides context for the particular values the law seeks to protect.⁹⁸

93 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19.

94 *Convention on the Rights of Persons with Disabilities* art 30.

95 Roundtables with metropolitan carers (in partnership with Carers Victoria) (24 March 2011), carers in Hastings (in partnership with Carers Victoria) (29 March 2011), carers, advocates and service providers in Bendigo (in partnership with Regional Information & Advocacy Council) (30 March 2011); Submissions CP 29 (STAR Victoria) and CP 59 (Carers Victoria).

96 Submission CP 21 (Action for More Independence & Dignity in Accommodation).

97 *Guardianship and Administration Act 1986* (Vic) ss 22(2)(c), 23(2)(b).

98 Though the Act is primarily concerned with people with impaired decision-making ability, it also establishes the Public Advocate whose role in protecting and promoting the rights of people with a disability is not limited solely to people whose decision-making ability is impaired. The proposed principles of new guardianship laws are not intended to limit the Public Advocate’s role.



6.92 This narrowing of the scope of the application of principles also requires that the presumption of capacity precede the other principles. While the Commission does not intend the presumption of capacity to apply to all children, it may have application for young people under the age of 18 who are able to satisfy the *Gillick* 'mature minor' test endorsed by the High Court in *Marion's case*.⁹⁹

'Best interests' should no longer be part of the general principles

6.93 As foreshadowed in the consultation paper, the Commission does not believe that 'best interests' should continue to be a general principle governing the application of all aspects of guardianship laws.

6.94 In Chapter 17, the Commission recommends that the phrase 'best interests of the person' should be replaced with the 'promotion of the personal and social wellbeing of the person' as a guiding principle for substitute decision making. The Public Advocate, among others, proposed this change. While the 'best interests' principle in modern guardianship laws encompasses a consideration of the person's wishes,¹⁰⁰ the Public Advocate has argued:

In common usage, 'best interests' has come to be associated negatively with paternalism which itself is perceived negatively as being antithetical to individual rights. Whilst this may be a misinterpretation of the Act, it creates a problem in community understanding and acceptance of the legislation.¹⁰¹

6.95 The concept of 'best interests' has been judicially criticised for being unclear and reliant upon an outcome based on the values of the person applying the test.¹⁰² It has also been criticised on the basis that it has paternalistic connotations because it is a test applied when making decisions for children.¹⁰³

6.96 While the promotion of the 'personal and social wellbeing' of a person remains an important principle for the exercise of various functions and powers under guardianship laws, the Commission believes that this principle also does not sit comfortably within a statement of general principles. This is because it is a principle that has primary application in relation to substitute decision making.

Limitations should be justified, reasonable and proportionate

6.97 The 'least restrictive' principle has been an important feature of guardianship laws, both in Australia and overseas.¹⁰⁴ In practice, this principle has the effect that:

- substitute decision making is considered a last resort, and informal arrangements are preferred¹⁰⁵
- substitute decision-making orders should be limited to the areas where decisions are actually needed.¹⁰⁶

99 See *Gillick v West Norfolk AHA* [1986] AC 112; *Department of Health and Community Services (NT) v JWB (Marion's case)* (1992) 175 CLR 218.

100 *Guardianship and Administration Act 1986* (Vic) ss 28(2)(e), 49(2)(b).

101 Barbara Carter, *Principles and Values in Victorian Guardianship Legislation* (Office of the Public Advocate (Victoria), 2009) 14.

102 *Department of Health and Community Services (NT) v JWB (Marion's case)* (1992) 175 CLR 218, 270–1 (Brennan J).

103 Eilionoir Flynn, 'A Socio-Legal Analysis of Advocacy for People with Disabilities - Competing Concepts of 'Best Interests' and Empowerment in Legislation and Policy on Statutory Advocacy Services' (2010) 32(1) *Journal of Social Welfare & Family Law* 23, 33.

104 See, eg, *Guardianship Act 1987* (NSW) s 4(b); *Guardianship and Administration Act 2000* (Qld) sch 1, cl 7(3)(c); *Guardianship and Administration Act 1993* (SA) s 5(d); *Mental Capacity Act 2005* (UK) s 1(6); *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, s 2(c).

105 *Report of the Minister's Committee*, above n 15, 75.

106 For example, in Victoria the appointment of a limited, rather than plenary guardian is the norm.

- 6.98 In some places, the ‘least restrictive’ principle also requires that formal appointments, short of full substitute decision-making appointments, should be made.¹⁰⁷ We discuss these appointments more in Chapters 8 and 9, which deal with supported and co-decision making.
- 6.99 The Commission believes that the principle of preserving and promoting a person’s freedom of decision and action is a crucial one. However, the Commission considers that the current formulation of this principle tends to reinforce the notion that substitute decision making is always a ‘restrictive’ measure. While the appointment of a substitute decision maker can restrict a person’s autonomy, it may also allow the person to achieve things that would otherwise not have been possible without someone with capacity making decisions or giving authorisations on their behalf.
- 6.100 The Commission believes that a more modern and balanced formulation of this principle is that restrictions on an individual’s ability to make decisions should be ‘justified, reasonable and proportionate’.
- 6.101 The Commission acknowledges that the proposed principles would significantly increase the number of interpretative principles governing guardianship laws when compared to the current three core principles in the G&A Act. Although there are clear benefits in listing a broad array of important considerations, an overly long list of considerations can become too onerous for users of the law.

¹⁰⁷ Section 2(c) of the *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2 in Alberta for example, requires that ‘where an adult requires assistance to make a decision or does not have the capacity to make a decision, the adult’s autonomy must be preserved by ensuring that the least restrictive and least intrusive form of assisted or substitute decision-making that is likely to be effective is provided.’

**RECOMMENDATION****New general principles**

21. New guardianship legislation should contain general principles. Those principles should include words to the following effect:

It is the intention of Parliament that the following general principles should guide interpretation of the Act and should be considered by any person or body when making any decision or taking any action under the Act:

All people are presumed to have capacity to make decisions that affect their lives unless this is shown not to be the case.

People with impaired decision-making ability:

- (a) have human dignity which must at all times be respected and upheld
- (b) have the same human rights and fundamental freedoms as other members of the community, including those set out in the *Convention on the Rights of Persons with Disabilities* and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- (c) should be provided with the support necessary for them to make, participate in and implement decisions that affect their lives
- (d) have wishes and preferences that should inform decisions made in their lives
- (e) are entitled to take reasonable risks and make choices that other people might disagree with
- (f) should be able to participate in the life of the community on an equal basis with others
- (g) should be able to communicate in any way that allows them to understand and be understood
- (h) have the right to live in safety and security and to be protected from abuse, neglect and exploitation
- (i) should have supportive relationships in their life recognised and respected by others
- (j) should have their cultural and linguistic circumstances recognised and respected by others.

Any limitations on the rights and freedoms of a person with impaired decision-making ability to make their own decisions must be justified, reasonable and proportionate.



Chapter 7

Capacity and incapacity

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INTRODUCTION

- 7.1 The concept of capacity is used throughout the law as a shorthand term to refer to a level of cognitive ability that is required before a person can lawfully do various things. Because lack of capacity can prevent people from participating in many of the activities that form part of daily life, alternative decision-making arrangements are necessary.
- 7.2 Guardianship laws are used when a person who lacks capacity needs the assistance of another person to make legally binding decisions on their behalf in order to engage in activities that require individual authorisation. For legal purposes, the decision of the substitute decision maker becomes the decision of the represented person.¹
- 7.3 Current Victorian guardianship law draws a sharp distinction between those people who have capacity and those who do not. It does not cater for different levels of cognitive functioning. At present, guardianship law has only one response to the needs of people with impaired decision-making ability: the appointment of a substitute decision maker to make decisions on that person's behalf.²
- 7.4 The Commission believes that new guardianship laws must be sufficiently flexible to accommodate different levels of cognitive ability and decision-making needs. We discuss the Commission's recommendations for a broader range of decision-making arrangements in Chapters 8 and 9. Those recommendations aim to respond to 'capacity disqualifications' by allowing people to participate to the greatest extent possible in decisions that affect them.
- 7.5 The Commission also believes that we should reform the way guardianship law describes and assesses capacity. This is necessary to:
- better reflect the reality of the way impaired decision-making ability is experienced by different people
 - provide users of the system (people with disabilities, their supporters, carers and professionals) with greater clarity about indicators of incapacity and more guidance concerning when appointments under guardianship law might be appropriate
 - safeguard the rights of people who might be experiencing impaired decision-making ability.
- 7.6 While the Commission believes that the way in which guardianship law describes and assesses incapacity should be clarified, it also believes that there must be an individualised approach to assessment. The law must be flexible enough to respond to individual circumstances and experiences of impaired decision-making ability.
- 7.7 Throughout this report we use the term 'capacity' to refer to 'legal capacity'—the standard which allows a person to engage in legal relationships. When referring to someone's cognitive ability to make decisions, we generally use the term decision-making 'ability'.

BACKGROUND

- 7.8 Three issues associated with capacity are among the most complex and challenging aspects of guardianship law. They are:
- the meaning of capacity

¹ *Guardianship and Administration Act 1986* (Vic) ss 24(4), 25(3), 40, 48(3).

² Other substitute decision-making regimes, such as those found in the *Disability Act 2006* (Vic) and the *Mental Health Act 1986* (Vic), are discussed in Chapters 23 and 24.

- the relevant capacity standard in particular circumstances—the level of cognitive functioning that a person must have before they can be said to have capacity to participate in an activity
- the means of testing or assessing whether a person meets the required capacity standard.

7.9 The term ‘competence’ is sometimes used instead of capacity, especially in North America, to describe this fundamental concept. Although some people suggest that competence is a legal concept and capacity a medical one,³ we prefer the view that the terms have the same meaning and can be used interchangeably.⁴ It appears that the terms are usually treated as synonyms in Australian law, with capacity being the more common expression.

7.10 As Canadian expert Robert Gordon has observed:

[O]f all the issues and problems in the field of adult guardianship law the meaning of ‘incompetency’ and ‘competency’ and determining the difference between them attracts the greatest level of concern and dialogue.⁵

THE MEANING AND SIGNIFICANCE OF CAPACITY

7.11 Capacity is a legal concept that describes the level of intellectual functioning a person requires to make and accept responsibility for important decisions that often have legal consequences. Capacity is linked to the significant value of respect for autonomy, which is ‘the authority to make decisions of practical importance to one’s life, for one’s own reasons, whatever those reasons might be’.⁶

7.12 Autonomous people are presumed to have the necessary level of intellectual functioning, as well as the right, to make their own decisions. Medical ethicists Tom Beauchamp and James Childress suggest that while:

autonomy and *competence* differ in meaning (*autonomy* meaning self governance; *competence* meaning the ability to perform a task or range of tasks) the criteria of the autonomous person and of the competent person are strikingly similar.⁷

7.13 Peteris Darzins and his fellow authors suggest that:

Capacity ... is a useful social construct, which underpins people’s rights to make autonomous decisions about their own affairs, while establishing a mechanism through which the need for substitute decision making processes could be determined in the case of decision making capacity having been lost.⁸

7.14 The New South Wales Government’s *Capacity Toolkit* also emphasised the connection between capacity and autonomy:

People who have capacity are able to live their lives independently. They can decide what is best for themselves and can either take or leave the advice of others.⁹

7.15 Terry Carney suggests that the meaning of the term often depends upon the professional context in which it is used. The medical perspective is concerned with ‘cognitive ability to comprehend, remember and reason rationally’; the legal

3 See the discussion in Ben White, Lindy Willmott and Shih-Ning Then, ‘Adults Who Lack Capacity: Substitute Decision Making’ in Ben White, Fiona McDonald and Lindy Willmott, *Health Law in Australia* (2010) 151.

4 Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (Oxford University Press, 6th ed, 2009) 111.

5 Robert M Gordon and Simon N Verdun-Jones, *Adult Guardianship Law in Canada* (Carswell, 1992) 6–34. See also Jonathan Herring, ‘Entering the Fog: On the Borderlines of Mental Capacity’ (2008) 83 *Indiana Law Journal* 1619, 1624 where Herring states, ‘The search for a single test for legal competency has been said to be like the search for the Holy Grail’.

6 Catriona Mackenzie, ‘Relational Autonomy, Normative Authority and Perfectionism’ (2008) 39(4) *Journal of Social Philosophy* 512, 512.

7 Beauchamp and Childress, above n 4, 113.

8 Peteris Darzins, D William Molloy and David Strang, *Who Can Decide? The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 1.

9 New South Wales Government, Attorney General’s Department, *Capacity Toolkit* (2008), 18 <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySvcres.nsf/wwFiles/CAPACITY_TOOLKIT0609.pdf/\\$file/CAPACITY_TOOLKIT0609.pdf](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySvcres.nsf/wwFiles/CAPACITY_TOOLKIT0609.pdf/$file/CAPACITY_TOOLKIT0609.pdf)>.



perspective involves the ability 'to understand information and appreciate the issues and consequences entailed in particular decisions'; and the social perspective concerns the more general issue of maintaining 'adequate levels of social functioning'.¹⁰

- 7.16 Capacity is an extremely important attribute. Its absence disqualifies a person from being able to:
- enter into a binding contract¹¹
 - dispose of property by will or by gift¹²
 - vote¹³
 - become a member of parliament¹⁴
 - hold various public offices¹⁵
 - have sexual relations with another person¹⁶
 - marry¹⁷
 - authorise many forms of medical treatment¹⁸
 - engage in various occupations¹⁹
 - undertake numerous other activities that are regulated by law.
- 7.17 Legal policy concerning people who lack capacity also serves to strengthen a central notion of our law that we should ordinarily respect the autonomy of people to make their own decisions, regardless of the quality of those decisions. As a community we qualify this principle, however, by distinguishing some people with impaired decision-making ability from those who are free to exercise autonomy, because we consider it is necessary to protect vulnerable people from those who might seek to exploit them, or from themselves.
- 7.18 The common law has long supported the autonomy principle by developing rules presuming that all adults have capacity and placing the burden of disproving capacity upon any person who seeks to challenge that presumption.²⁰ In some jurisdictions, such as Queensland,²¹ Western Australia²² and England and Wales,²³ modern guardianship legislation reinforces the common law rules by declaring that all adults are presumed to have capacity and by placing an evidentiary burden upon any person who asserts otherwise.

THE STANDARD FOR LEGAL CAPACITY

- 7.19 The law has not devised a uniform standard for the level of cognitive ability a person requires in order to have capacity to legally participate in many of the activities of

10 Terry Carney, 'Guardianship, Citizenship, & Theorizing Substitute Decisionmaking Law' in I Doron and A Soden, *Beyond Elder Law: New Directions in Law and Ageing* (Springer, forthcoming 2012).

11 *Blomley v Ryan* (1954) 99 CLR 362.

12 *Banks v Goodfellow* (1870) LR 5 QB 549.

13 *Commonwealth Electoral Act 1918* (Cth) s 93(8); *Constitution Act 1975* (Vic) s 48(2)(d).

14 A requirement to become a member of Parliament in Victoria is that the person is enrolled to vote, and a person who lacks capacity is not entitled to be enrolled: see *Constitution Act 1975* (Vic) ss 44(1), 48(2)(d).

15 For example, the Australian Constitution and the Victorian Constitution allow for the removal of judges on the grounds of incapacity: see *Australian Constitution* s 72(ii); *Constitution Act 1975* (Vic) s 87AAB(1).

16 *Crimes Act 1958* (Vic) s 36(e).

17 *Marriage Act 1961* (Cth) s 23B(1)(d).

18 If a doctor provides medical treatment to a patient who is unable to consent without the consent of someone authorised to provide consent or other lawful justification, that doctor may be found guilty of trespass or false imprisonment.

19 For example, a lack of capacity would lead to a finding that the person was not a 'fit and proper person' to practise law. See *Legal Profession Act 2004* (Vic) ss 1.2.6(1)(m), 2.3.3, 2.4.7.

20 *Re T (An adult: Consent to Medical Treatment)* [1992] 4 All ER 649.

21 *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1.

22 *Guardianship and Administration Act 1990* (WA) s 4(3).

23 *Mental Capacity Act 2005* (UK) s 1(2).

everyday life. Some years ago, leading United States' commentators described the search for a uniform standard of competency (or capacity) as 'the search for a holy grail'.²⁴ That observation is still relevant in Australia today.

- 7.20 Many different statutory and common law standards are used when disqualifying a person from participating in particular activities because of incapacity. Some of these standards are discussed below.
- 7.21 A major difference between these various branches of the law of general application and guardianship law is the perspective from which a person's capacity is viewed. The various branches of the general law, such as the law of contract, are interested in whether a person has the capacity to be regarded as an autonomous person who is bound by their own decisions. In contrast, when a tribunal determines whether someone requires the assistance of a guardian or an administrator, the central issue is the person's incapacity to make particular decisions.

ASSESSING CAPACITY

- 7.22 There are no definitive, scientific tests for use when assessing whether a person meets a particular capacity standard. Capacity has been described as an 'artificial construct' with 'no incontrovertible proof of its existence'.²⁵ Although clinicians can and do employ various assessment tools when testing for capacity, 'because normative judgments underlie each test ... the assessment of decisional competence remains heavily a matter of clinical judgment'.²⁶
- 7.23 Courts have often emphasised that capacity assessments are ultimately questions of fact for judicial officers and tribunal members when the issue of a person's capacity arises in the course of legal proceedings. For example, when VCAT is dealing with a guardianship or administration application, it cannot delegate the task of assessing capacity to a health professional by relying upon that person's opinion alone.²⁷

CURRENT LAW

- 7.24 In this part, we consider the numerous legal rules about capacity that exist in the general law and examine the various capacity standards that are used in different contexts in Victoria's guardianship laws.

THE GENERAL LAW

- 7.25 The numerous legal rules concerning capacity have developed over time and without coordination. While there is no uniform test for legal capacity, the level of cognitive ability required to satisfy a court that a person has capacity is generally quite low. Each area of law has developed its own standard for deciding whether a person is unable to participate in an activity on the same terms as other people because they lack capacity. In most instances, capacity standards exist to protect vulnerable people and ensure fair transactions.
- 7.26 Understanding of capacity appears to have evolved over time, from being seen as something that either exists or is absent, to a more recent acceptance that capacity is a state that can vary from one time and from one decision to another. Understood in this way, modern capacity standards generally focus on the particular decisions a person is asked to make.²⁸

24 Loren H Roth, 'Tests of Competency to Consent to Treatment (1977) 134 *American Journal of Psychiatry* 279, 283 referred to in Michael Perlin, Pamela Champine, Henry Dlugacz and Mary Connell, *Competence in the Law: From Legal Theory to Clinical Application* (John Wiley & Sons, 2008) 1.

25 Darzins, Molloy and Strang, above n 8, 111.

26 Beauchamp and Childress, above n 4, 115.

27 *XYZ v State Trustees Ltd* [2006] VSC 444.

28 See Peteris Darzins, D William Molloy and David Strang, 'What is Capacity?' in Darzins, Molloy and Strang, above n 8, 4-5.



7.27 Different capacity standards apply in relation to the following activities:

- entering into a valid contract
- making a will
- voting in elections
- consenting to sexual relations
- getting married
- responsibility for criminal conduct.

7.28 In some areas of law it has been implicitly accepted that people have varying levels of capacity that require different responses depending on the degree of incapacity experienced by a person in particular circumstances. These developments are most evident in contract law and criminal law.

Contracts

7.29 Capacity of the parties is an essential requirement of a valid contract. The common law of contracts has effectively recognised two capacity standards, described below.

Non est factum

7.30 When dealing with written contracts, the common law distinguishes between a person unable to understand the general nature or purport of a document due to mental incapacity and a person whose mind has no concept at all of the deed apparently executed.²⁹

7.31 In the latter case, when a person's degree of incapacity is profound, the contract is void and held to never have existed at law because of the underlying policy that a person should not be held to a bargain when they have no idea of the document they signed.³⁰ This defence is called *non est factum*, or literally, 'it is not his deed'.

7.32 The relevant capacity standard was recently described by the New South Wales Court of Appeal:

The principle is that the signer must know what he or she is signing. The cases reveal ... the difficulty of expression in identifying the line marking the boundary of *non est factum*. It is sufficient to state for present purposes that a signer who has no understanding at all about what he or she is signing, because of incapacity, does not know what he or she is signing such that the mind does not go with the pen.³¹

Soundness of mind

7.33 The second capacity standard is relevant when dealing either with contracts that are not written or, if the contract is written, when the defence of *non est factum* is not available. In these circumstances, there is no fixed standard because the requisite level of capacity must be determined according to the particular transaction. The common law rule is that 'each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation'.³²

7.34 Failure to achieve the second capacity standard means that a contract is voidable—it can be set aside if the party who seeks to avoid contractual obligations is able to prove the incapacity of any party.³³

29 Elsie Bant, 'Incapacity, Non Est Factum and Unjust Enrichment' (2009) 33 Melbourne University Law Review 368, 371. See also *Gibbons v Wright* (1954) 91 CLR 423.

30 So that when total incapacity is proved, there is no contract on which to proceed: see *Drew v Nunn* (1879) 4 QBD 661,669 where Lord Bramwell states: 'If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting.'

31 *Ford v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42 at 62.

32 *Gibbons v Wright* (1954) 91 CLR 423 at 437.

33 *Gibbons v Wright* (1954) 91 CLR 423.

Making a will

- 7.35 A will is valid if at the time of execution the testator (person who made the will) possessed the requisite capacity and intention, and if the will meets certain formal requirements.³⁴
- 7.36 A person with ‘testamentary capacity’ is commonly described as being of ‘sound mind, memory and understanding’.³⁵ They must be able to understand the nature and effect of what they are doing in executing the will, and realise the extent and character of the property they are dealing with.³⁶ A testator must also be able to recognise the nature of the moral claims on their estate to which they ought to give effect.³⁷
- 7.37 The lawyer assisting a client to make or change a will should assess their client’s capacity. This involves assessing whether the will is the product of a free and capable testator³⁸ and was made with their knowledge and approval.³⁹ A medical opinion is not always conclusive.⁴⁰
- 7.38 Whether a person had sufficient capacity to make a will is a question of fact; the doubt must be such that the court considers it sufficient to prevent a finding of testamentary capacity.
- 7.39 The legal test for testamentary capacity is not the same as for the appointment of an administrator under the *Guardianship and Administration Act 1986* (Vic) (G&A Act), and it is possible for a represented person with an administrator to be capable of making a will.⁴¹
- 7.40 In 2009 in *Nicholson v Knaggs*, Justice Vickery said that the United Nations’ *Convention on the Rights of Persons with Disabilities*—and its emphasis on equal enjoyment of legal capacity—will have a role in the development of the law of testamentary capacity in Victoria.⁴²

Voting in elections

- 7.41 The Commonwealth and each of the state jurisdictions have compulsory voting for all people over the age of 18. Each jurisdiction also provides that some people are disqualified from voting, including disqualification relating broadly to unsoundness of mind or mental illness.
- 7.42 The *Commonwealth Electoral Act 1918* (Cth) provides that once it is proved that a person ‘by reason of being of unsound mind is incapable of understanding the nature and significance of enrolment and voting’,⁴³ they are no longer ‘entitled to have [their] name placed or retained on any Roll or to vote at any Senate election or House of Representatives election’.⁴⁴
- 7.43 The equivalent provision in Victoria is found in the *Constitution Act 1975* (Vic):

34 I J Hardingham et al, *Wills and Intestacy in Australia and New Zealand* (Law Book Company Limited, 2nd ed, 1989) 50. See also *Wills Act 1997* (Vic) s 7.

35 *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

36 *In Will of Wilson* (1897) 23 VLR 197, 199 (Hood J). See also *Timbury v Coffee* (1941) 66 CLR 277.

37 *Banks v Goodfellow* (1870) 5 QB 549; *Timbury v Coffee* (1941) 66 CLR 277.

38 *Bagot’s Executor & Trustee Co Ltd v Bathern* (1982) 62 FLR 177; *Le Cras v Perpetual Trustee Co Ltd* [1967] 2 NSW 706.

39 *Timbury v Coffee* (1941) 66 CLR 277.

40 Danuta Mendelson ‘Assessment of Competency: a Primer’ (2006) 14(2) *Journal of Law and Medicine* 156, 157.

41 *Edwards v Edwards* [2009] VSC 190, [55]–[58].

42 *Nicholson v Knaggs* [2009] VSC 64, [58]–[75].

43 *Commonwealth Electoral Act 1918* (Cth) s 93(8)(a).

44 *Ibid* s 93(8).

A person who, by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting is not entitled to be enrolled as an elector for the Council or Assembly.⁴⁵

- 7.44 In order to remove an elector from the rolls due to incapacity, the Australian Electoral Commission and Victorian Electoral Commission both require a registered medical practitioner to 'certify in writing that the person is incapable of understanding the nature and significance of enrolment and voting'.⁴⁶

Consenting to sexual relations

- 7.45 The law generally assumes that people over the age of consent⁴⁷ have the capacity to consent to sexual acts. However, a person may be found to lack the capacity to consent to these acts. A person who engages in sexual acts with a person who lacks capacity to consent to such acts may be guilty of a criminal offence.⁴⁸
- 7.46 Consent is defined in the *Crimes Act 1958* (Vic) as 'free agreement'.⁴⁹ The Act contains a non-exhaustive list of circumstances in which a person cannot freely agree to an act. One of them is when the person is incapable of understanding the sexual nature of the act.⁵⁰
- 7.47 Determining consent in cases of rape against people with a cognitive impairment has been described as 'problematic'.⁵¹ Proof of cognitive impairment is not enough to establish that a person does not have the capacity to consent to sexual acts,⁵² as most people with a cognitive impairment are capable of both understanding the nature of sexual acts and consenting to sexual activity.⁵³
- 7.48 The Victorian Full Court decision *R v Morgan*⁵⁴ (Morgan) is the leading authority in relation to the capacity to understand or comprehend sexual acts. The case sets out a two-staged approach to establishing a complainant's understanding of sexual acts:
- that what is proposed to be done is a physical fact of penetration of the body by the male organ
- or, if that is not proved,
- that the act of penetration proposed is one of sexual connexion as distinct from an act of a totally different character.⁵⁵
- 7.49 The second limb of the Morgan test is a broad approach, requiring only general understanding of the nature and significance of sexual intercourse.

45 *Constitution Act 1975* (Vic) s 48(2)(d).

46 See Victorian Electoral Commission, *Removal of Elector's Name Form* <<http://www.vec.vic.gov.au/files/NoLongerCapable.pdf>>; Australian Electoral Commission, *Claim that an elector should not be on the electoral role*, available from Australian Electoral Commission upon request. See <<http://www.aec.gov.au/>>.

47 The age of consent in Victoria is 16. However, it is an offence for a person to take part in an act of sexual penetration with a 16 or 17 year old child to whom he or she is not married and who is under his or her care, supervision or authority: see *Crimes Act 1958* (Vic) s 48(1).

48 *Crimes Act 1958* (Vic) s 36(d),(e), pt 1 div 8A, 8E.

49 A definition of 'consent' was inserted to the *Crimes Act 1958* (Vic) following recommendations by the former Law Reform Commission of Victoria in 1991: see Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, Report No 43 (1991).

50 *Crimes Act 1958* (Vic) s 36(e).

51 Bernadette McSherry, 'Sexual Assault Against Individuals with Mental Impairment: Are Criminal Laws Adequate?' (1998) 5(1) *Psychiatry, Psychology and Law* 107, 112.

52 *R v Lynch* (1930) 30 SR (NSW) 420, 421 (Ferguson J). See also *The Queen v Beattie* (1981) 26 SASR 481.

53 Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) 365.

54 *R v Morgan* [1970] VR 337.

55 *Ibid* 341.

7.50 The law does not indicate how this understanding should be assessed. In presenting evidence of a complainant's capacity to comprehend the sexual nature of such acts, 'it is highly likely that expert evidence from psychiatrists and psychologists will be led to aid the jury' in the assessment of the state of the complainant's knowledge or understanding of the act at the material time.⁵⁶

Getting married

7.51 The law provides that marriage may be entered into by two adults—a man and a woman—who have given their individual consent to the marriage.⁵⁷

7.52 Section 23B of the *Marriage Act 1961* (Cth) provides that a marriage is void⁵⁸ when a person's consent was 'not a real consent'. One of those circumstances is when a party 'was mentally incapable of understanding the nature and effect of the marriage ceremony'.⁵⁹ Courts have generally been reluctant to find that a marriage is void for this reason.⁶⁰

Responsibility for criminal conduct

7.53 Where a person has engaged in conduct that might constitute a criminal offence, a defence of not guilty by reason of mental impairment may be available to them.

7.54 A person must be found not guilty because of mental impairment if, at the time they engaged in the conduct constituting the offence, the person had a mental impairment that had the effect that:

- (a) he or she did not know the nature and quality of the conduct; or
- (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).⁶¹

7.55 A finding of not guilty because of mental impairment does not necessarily mean the person will be released into the community as they may be placed under a supervision order.⁶² We discuss supervision orders in more detail in Chapter 25 where we consider the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

7.56 In some jurisdictions, but not Victoria, there is a partial defence of 'diminished responsibility' for homicide.⁶³ This defence deals with circumstances where a person experiences an 'abnormality of mind' at the time an offence is committed that substantially impairs their mental responsibility for the killing. It is a lesser standard than a finding that a person is not guilty because of mental impairment.

CAPACITY STANDARDS IN VICTORIAN GUARDIANSHIP LAWS

7.57 As discussed earlier, guardianship laws permit the appointment of a substitute decision maker to make decisions for a person who is legally unable to make their own decisions.

⁵⁶ McSherry, above n 51, 109.

⁵⁷ *Marriage Act 1961* (Cth) ss 5, 23B.

⁵⁸ If a marriage is held to be void, a decree of nullity may be granted: *Family Law Act 1975* (Cth) s 51.

⁵⁹ *Marriage Act 1961* (Cth) s 23B(1)(d).

⁶⁰ John Blackwood, 'Sexuality and the Disabled: Legal Issues' (1992) 11 *University of Tasmania Law Review* 182, 183.

⁶¹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20.

⁶² *Ibid* s 23.

⁶³ *Homicide Act 1957*, 5 & 6 Eliz 2, c 2 (UK) s 2; *Crimes Act 1900* (ACT) s 14; *Criminal Code Act 1899* (Qld) s 304A. In New South Wales it is known as 'substantial impairment by abnormality of mind': *Crimes Act 1900* (NSW) s 23A.

7.58 The need for a capacity standard arises in four main contexts under current guardianship laws. Different language—and perhaps a different standard—is used in each instance. The table below outlines the four contexts in which capacity standards arise and what standards are applied in each context.

Context	Capacity standard
VCAT is asked to appoint a guardian or an administrator.	The person 'is unable ... to make reasonable judgments' about matters relating to their person or their estate ⁶⁴
A person responsible is asked to consent to medical or dental treatment or to authorise participation in medical research for another person who is incapable of giving consent.	The person is incapable of understanding 'the general nature and effect' or is incapable of 'indicating whether or not they consent or do not consent' to the proposed procedure or treatment. ⁶⁵
A person seeks to appoint an enduring guardian, an attorney with enduring powers, or a medical agent, and the witnesses to the appointment are required to record their opinion about that person's capacity.	The standard for each of the appointments is different. For the appointment of an attorney, the standard is that the person appeared to have the capacity necessary to make the appointment, which is defined as 'the ability to understand the nature and effect' of the document. ⁶⁶ Similarly, for an enduring guardian, a witness must certify that the person appeared to understand the nature and effect of the document. ⁶⁷ For an agent it is a belief that the person is of sound mind and understands the importance of the document. ⁶⁸
A person who holds an appointment as an enduring guardian, enduring attorney or medical agent seeks to activate the appointment because the principal is no longer able to make decisions.	For the activation of an enduring power of attorney (medical) the standard is that the person is 'incompetent'. ⁶⁹ For the activation of an enduring power of guardianship, the standard is the person is unable to make reasonable judgments in respect of the relevant matter. ⁷⁰ There is no set legislative standard for activation of an enduring power of attorney (financial), as the donor can elect when or in what circumstance the power comes into effect. ⁷¹

7.59 The legislative history of these various statutory provisions does not indicate whether the drafters of the legislation sought to create different capacity standards or whether they chose different language to describe the same, or a similar, standard. There is little case law to provide guidance about whether different standards should be applied in the various circumstances set out in the above table.

64 *Guardianship and Administration Act 1986* (Vic) ss 22(1)(b), 46(1)(a)(ii).

65 *Ibid* s 36(2).

66 *Instruments Act 1958* (Vic) ss 118, 125A(1)(b).

67 *Guardianship and Administration Act 1986* (Vic) s 35A(2), sch 4, Form 1

68 *Medical Treatment Act 1988* (Vic) s 5A(2), sch 2.

69 *Ibid* s 5A(2)(b).

70 *Guardianship and Administration Act 1986* (Vic) s 35B(1).

71 The donor of an enduring power of attorney (financial) may specify a time, circumstance, or occasion upon which the attorney may exercise their powers. A donor might decide to specify that the power becomes exercisable when they have lost the capacity to make the decision themselves. If the donor does not specify a particular time, circumstance or occasion the default position is that the attorney may exercise their powers immediately: see *Instruments Act 1958* (Vic) s 117.

VCAT appointments—unable to make reasonable judgments

- 7.60 Before appointing a guardian or an administrator, VCAT must be satisfied that a person has a disability—defined as ‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’—and that by reason of that disability the person is ‘unable to make reasonable judgments’ in respect of their person or their estate.⁷²
- 7.61 The determination of whether a person is ‘unable to make reasonable judgments’ is a question of fact which requires VCAT to consider all the relevant lay and expert evidence.⁷³
- 7.62 In Victoria, the test is subjective in the sense that VCAT must measure the person’s capacity in relation to their actual property and affairs, rather than against the objective standard used elsewhere, such as ‘the ordinary routine affairs of man’.⁷⁴
- 7.63 The G&A Act does not define ‘reasonable judgments’. This term could be interpreted as inviting VCAT to evaluate the worth or quality of the decisions a person makes. In practice, the term seems to have been given the same meaning as ‘capacity’ or ‘competence’.⁷⁵ However, it has also been suggested that the standard of ‘unable to make reasonable judgments’ is potentially a different standard than that of legal incompetence,⁷⁶ and may allow for the appointment of a guardian or administrator in circumstances where capacity is not lacking or severely impaired.⁷⁷
- 7.64 The Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee) report, which recommended that the term ‘reasonable judgments’ be used in legislation as a standard for capacity, explained their approach in the following terms:

In order to determine whether a particular individual falls within the category of persons incapable of making reasonable judgments for themselves, one would be required to make a factual judgment. In the context of surgical intervention and ability of a patient to consent to it, one would observe the patient’s response to and comprehension of facts, including likely risks and possible benefits, when explained to him by his medical adviser. A determination that a person is incapable of managing his financial affairs would be influenced by observation of his financial dealings over, say, the previous 12 months. This does not mean, of course, that the bad investor or unsuccessful entrepreneur should lose control of his estate, nor should the person who simply lacks an interest in money matters be the subject of an estate administration order. It is the person whose capacity is lacking or is severely impaired who may be in need of this type of protection.⁷⁸

Personal appointments—able to understand the nature and effect of the document

- 7.65 The common law test for legal capacity to execute a document or enter a transaction depends upon the particular transaction. The person must have ‘the capacity to understand the nature of the transaction when it is explained’.⁷⁹
- 7.66 The statutes that permit one person to appoint another to make decisions for them when they are unable to do so require the person to demonstrate capacity at the time

⁷² *Guardianship and Administration Act 1986* (Vic) ss 22(1)(a)–(b), 46(1)(a)(i)–(ii).

⁷³ *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [55]–[58].

⁷⁴ *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [53]–[55]; *Guardianship and Administration Act 1986* (Vic) s 46(1)(a)(ii).

⁷⁵ See John Chesterman, ‘Capacity in Victorian Guardianship Law: Options for Reform’, *Monash University Law Review* (forthcoming).

⁷⁶ *A v Guardianship and Management of Property Tribunal* [1999] ACTSC 77 (16 July 1999) [49]–[61]; *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [35]–[36], [71]–[73].

⁷⁷ *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [64].

⁷⁸ Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 95.

⁷⁹ *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ).

of making the appointment. While the wording of the capacity standards differ, they appear to have been designed to replicate the common law standard.

- 7.67 As described in the table above, legislation requires that a person must understand the nature and effect of an enduring power of attorney when making an appointment.
- 7.68 The *Instruments Act 1958* (Vic) describes what it means to ‘understand the nature and effect’ of an enduring power of attorney:
- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters—
 - (a) that the donor may, in the power of attorney, specify conditions or limitations on, or instructions about, the exercise of the power to be given to the attorney;
 - (b) when the power is exercisable;
 - (c) that once the power is exercisable, the attorney has the same powers as the donor had (when not under a legal incapacity) to do anything for which the power is given subject to any limitations or restrictions on exercising the power included in the enduring power of attorney;
 - (d) that the donor may revoke the enduring power of attorney at any time the donor is capable of making an enduring power of attorney;
 - (e) that the power the attorney is given continues even if the donor subsequently ceases to have legal capacity;
 - (f) that at any time that the donor is not capable of revoking the enduring power of attorney, the donor is unable to effectively oversee the use of the power.⁸⁰
- 7.69 The G&A Act and the *Medical Treatment Act 1988* (Vic) do not provide equivalent descriptions of the matters a person must understand when making an enduring power of guardianship and an enduring power of attorney (medical).

Automatic appointments for medical treatment

- 7.70 The *Guardianship and Administration Act 1986* (Vic) provides that a person is incapable of giving consent to medical and dental treatment, medical research or a special procedure if they are:
- incapable of understanding the general nature and effect of the proposed procedure or treatment, or
 - incapable of indicating whether or not they consent to the proposed procedure or treatment.⁸¹
- 7.71 While this appears to be a different standard to that of ‘unable to make reasonable judgments’ which applies when VCAT is appointing guardians and administrators,⁸² there are no reported cases in which the two standards have been compared.

APPROACHES TO ASSESSING CAPACITY

VCAT

- 7.72 Whether a person is unable to make reasonable judgments about a matter is a question of fact,⁸³ which VCAT must determine on the balance of probabilities when deciding whether to appoint a guardian or an administrator.

⁸⁰ *Instruments Act 1958* (Vic) s 118.

⁸¹ *Guardianship and Administration Act 1986* (Vic) s 36(2).

⁸² *Ibid* ss 22(1)(b), 46(1)(a)(ii).

⁸³ *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006).

- 7.73 VCAT usually requires some medical evidence of a person's cognitive functioning. In many cases, this will involve a standard 'Medical Practitioner's Opinion', which can be completed by either a general practitioner or specialist.⁸⁴ In more complex cases additional material such as a report from a neuropsychologist may be provided.
- 7.74 VCAT must make its own finding of fact in relation to capacity, and cannot simply defer to medical opinion.⁸⁵ In addition to medical opinion, VCAT considers relevant lay evidence, such as evidence as to how the person is actually managing their affairs.

Creation and activation of enduring powers

- 7.75 While witnesses to enduring powers are required to indicate their belief that the person has the capacity to make the appointment, there is no formal process to assess the person's capacity at this time.⁸⁶ Similarly, there is no formal capacity assessment process for use when an enduring power is activated. Where there is doubt about the person's capacity, the representative may seek medical opinion or advice from VCAT.

OTHER JURISDICTIONS

UNITED NATIONS' CONVENTION

- 7.76 The *Convention on the Rights of Persons with Disabilities* does not contain a capacity standard. It requires signatories to ensure that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.⁸⁷
- 7.77 The meaning of this requirement has been a source of significant debate.⁸⁸ Australia and other nations have stated that this requirement does not prohibit the use of substitute decision making.⁸⁹ At a minimum, however, the Convention is viewed as marking a paradigm shift towards promoting greater autonomy for people with disabilities in decisions that affect their lives, and in obliging states to provide decision-making support that is proportionate and tailored to their individual circumstances.⁹⁰
- 7.78 We consider new options for supporting people in the exercise of legal capacity in Chapters 8 and 9.

OTHER AUSTRALIAN JURISDICTIONS

- 7.79 The approach in other Australian jurisdictions to describing a capacity standard in guardianship laws and assessing whether a person meets that standard appears to be similar to the position in Victoria. In Queensland, however, it is unnecessary for the purposes of both making a tribunal appointment and activating a personal appointment to establish any causal link between a person's lack of capacity and any disability.⁹¹

84 The form has been recently updated and is available at: <[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/\\$file/medical_report_guardianship_list.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/$file/medical_report_guardianship_list.pdf)>.

85 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [54]–[59].

86 However s 118 of the *Instruments Act 1958* (Vic) does note that it is advisable for a witness to record the basis upon which they determined that the person understood the nature and effect of the enduring power of attorney.

87 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(2) ('*Convention on the Rights of Persons with Disabilities*').

88 See, eg, Tina Minkowitz, 'Abolishing Mental Health Laws to Comply with CRPD' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing, 2010) 151, 156–9.

89 See United Nations Treaty Collection, *Chapter IV: Human Rights, 15*; *Convention on the Rights of Persons with Disabilities* (6 December 2010), 2 <<http://treaties.un.org/doc/Publication/MTDSG/Volume%20IV/Chapter%20IV/IV-15.en.pdf>>.

90 United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) 89–91.

91 *Guardianship and Administration Act 2000* (Qld) sch 4 (Dictionary): definition of 'capacity', *Powers of Attorney Act 1998* (Qld) sch 3 (Dictionary): definition of 'capacity'.

Statutory capacity standards

- 7.80 Like Victoria, guardianship laws in Tasmania, Western Australia and the Northern Territory may be invoked when a person is 'unable to make reasonable judgments' about their affairs because of a disability.⁹²
- 7.81 In New South Wales, guardianship orders may apply where a person is 'totally or partially incapable of managing his or her person',⁹³ while a financial management order may be made where the person is 'not capable' of managing their affairs.⁹⁴
- 7.82 In the Australian Capital Territory, guardianship laws are applicable where a person 'has impaired decision making ability' in relation to the matter.⁹⁵
- 7.83 In South Australia, 'mental incapacity' is defined as the 'inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs'.⁹⁶
- 7.84 Queensland guardianship laws contain a more detailed 'capacity' standard:
capacity, for a person for a matter, means the person is capable of—
 (a) understanding the nature and effect of decisions about the matter; and
 (b) freely and voluntarily making decisions about the matter; and
 (c) communicating the decisions in some way.⁹⁷

Requirement of 'disability' or other diagnosis

- 7.85 Guardianship laws in all Australian states and territories except Queensland stipulate that a person's lack of capacity must be due to a disability.⁹⁸

Inability to communicate a decision

- 7.86 In Victoria, the inability to communicate a decision is only specifically referred to as indicating incapacity in relation to medical and other treatment decisions.⁹⁹
- 7.87 Queensland and the Australian Capital Territory are the only two Australian jurisdictions to specify that an inability to communicate a decision is part of the test for capacity more generally.¹⁰⁰

Presumption of capacity

- 7.88 Although the common law presumes that adults have the capacity to make decisions that affect their own lives unless there is evidence to the contrary,¹⁰¹ this presumption has not been given statutory force in the G&A Act.
- 7.89 Queensland and Western Australian guardianship laws have explicitly included a presumption of capacity in their guardianship laws.¹⁰²

92 *Guardianship and Administration Act 1995* (Tas) ss 20 (1)(b), 51(1)(b); *Guardianship and Administration Act 1990* (WA) ss 43(1)(b)(ii), 64(1)(a); *Adult Guardianship Act* (NT) s 3(1) (as part of the definition of 'intellectual disability' for the purposes of this Act).

93 *Guardianship Act 1987* (NSW) ss 3, 14(1).

94 *Ibid* s 25G(a).

95 *Guardianship and Management of Property Act 1991* (ACT) ss 5, 7(1)(a), 8(1)(a).

96 *Guardianship and Administration Act 1993* (SA) s 3 (definition of mental incapacity).

97 *Guardianship and Administration Act 2000* (Qld) sch 4 (Dictionary), *Powers of Attorney Act 1998* (Qld) sch 3 (Dictionary).

98 *Guardianship and Administration Act 1986* (Vic) ss 3 (definition of 'disability'), 22(1)(a)–(b), 46(1)(a)(i)–(ii); *Guardianship and Management of Property Act 1991* (ACT) s 5; *Guardianship Act 1987* (NSW) s 3 (definition of 'person in need of a guardian'. However a diagnostic test is not specifically required in relation to the appointment of a financial manager: at s 25G; *Guardianship and Administration Act 1993* (SA) s 3 (definition of 'mental incapacity'); *Guardianship and Administration Act 1990* (WA) ss 3 (definition of 'mental disability'), 64(1)(a); *Guardianship and Administration Act 1995* (Tas) ss 3 (definition of 'disability'), 20(1)(b), 51(1)(b); *Adult Guardianship Act* (NT) s 3(1) (definition of 'intellectual disability' for the purposes of this Act).

99 *Guardianship and Administration Act 1986* (Vic) s 36(2).

100 *Guardianship and Administration Act 2000* (Qld) sch 4 (Dictionary): definition of 'capacity'; *Powers of Attorney Act 1998* (Qld) sch 3 (Dictionary): definition of 'capacity'; *Guardianship and Administration Act 1993* (SA) s 3 (definition of mental incapacity).

101 See *Borthwick v Caruthers* (1787) 99 ER 1300 and *Re Cumming* (1852) 42 ER 660 at 668.

102 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1; *Guardianship and Administration Act 1990* (WA) s 4(3). The presumption of capacity in Queensland was considered in the Queensland Supreme Court case of *Bucknall v Guardianship and Administration Tribunal* (No 1) [2009] 2 Qd R 402. In this case it was found that the Queensland Guardianship Tribunal was obliged to start from the presumption of capacity in determining an initial application for guardianship and in reviewing a guardianship order, but that an administrator was entitled to rely on the Tribunal's finding of incapacity in exercising its powers: at [21–6], [43].

Other additions to capacity standards

7.90 Queensland guardianship laws contain an additional provision which amplifies the capacity standard in the Act and which should be considered whenever anyone is making a capacity assessment:

the capacity of an adult with impaired capacity to make decisions may differ according to—

- (i) the nature and extent of the impairment; and
- (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
- (iii) the support available from members of the adult's existing support network.¹⁰³

7.91 Guardianship laws in the Australian Capital Territory specify that a person cannot be found to have impaired decision-making capacity only because the person:

- (a) is eccentric; or
- (b) does or does not express a particular political or religious opinion; or
- (c) is of a particular sexual orientation or expresses a particular sexual preference; or
- (d) engages or has engaged in illegal or immoral conduct; or
- (e) takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account).¹⁰⁴

ENGLAND AND WALES

7.92 The *Mental Capacity Act 2005* (UK), which operates in England and Wales, includes a detailed incapacity standard as well as principles for use when assessing whether a person meets that standard. A person must be assumed to have capacity unless it is shown that they lack capacity.¹⁰⁵

7.93 As with Victorian guardianship laws, the Mental Capacity Act requires a causal link between a finding of incapacity and a disability or impairment:

a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.¹⁰⁶

7.94 The Mental Capacity Act describes what it means for a person to be unable to make a decision:

- (1) ... a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

¹⁰³ *Guardianship and Administration Act 2000* (Qld) s 5(c).

¹⁰⁴ *Guardianship and Management of Property Act 1991* (ACT) s 6A.

¹⁰⁵ *Mental Capacity Act 2005* (UK) s 1(2).

¹⁰⁶ *Ibid* s 2(1). The Act also specifies that it does not matter whether the impairment or disturbance is permanent or temporary: at s 2(2).



- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
 - (a) deciding one way or another, or
 - (b) failing to make the decision.

7.95 The principles for use when assessing incapacity are that:

- A person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success.¹⁰⁷
- A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision.¹⁰⁸
- A lack of capacity cannot be established merely by reference to—
 - (a) a person's age or appearance, or
 - (b) a condition or an aspect of his or her behaviour which might lead others to make unjustified assumptions about his capacity.¹⁰⁹

CANADA

Alberta and Ontario

7.96 The Canadian provinces of Alberta and Ontario provide for the use of capacity assessors, who may come from medical and non-medical backgrounds.

Capacity assessment in Alberta

- 7.97 In Alberta, the court must be satisfied that a person 'does not have the capacity to make decisions' about the relevant matters before a guardian or trustee can be appointed.¹¹⁰ Capacity is defined as the ability to understand the information relevant to the decision, and to appreciate the reasonably foreseeable consequences of a decision or failure to make a decision.¹¹¹
- 7.98 Guardianship, trusteeship and co-decision-making applications ordinarily require a 'capacity assessment report'.¹¹² The process for capacity assessment is set out in detail in regulations.¹¹³ Capacity assessments are conducted by 'designated capacity assessors'. Medical practitioners and psychologists are automatically designated capacity assessors, but social workers, registered nurses, psychiatric nurses and occupational therapists may also become designated capacity assessors provided that they undergo specific capacity assessment training.¹¹⁴
- 7.99 The Public Guardian of Alberta described Alberta's system of designated capacity assessors as a 'fabulous success', arguing that it provides a more thorough and inclusive process. The use of social workers, nurses and occupation therapists allows capacity assessments to occur more often in environments such as the person's home, which allow the person to perform at their best. The process of capacity assessment

¹⁰⁷ *Mental Capacity Act 2005* (UK) s 1(3).

¹⁰⁸ *Ibid* s 1(4).

¹⁰⁹ *Ibid* s 2(3).

¹¹⁰ *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, ss 26(6)(a), 46(5)(a).

¹¹¹ *Ibid* s 1(d).

¹¹² *Ibid* ss 13(2)(a), 26(3)(a), 46(2)(a). If the person refuses or is unable to participate in this process the Court may consider other evidence: at s 105.

¹¹³ *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, regs 3–10.

¹¹⁴ *Ibid* reg 7.

takes up to two hours, and the findings of assessments are generally accepted by courts in Alberta.¹¹⁵

- 7.100 This system is quite costly. An assessor may charge up to CAD \$500 for a capacity report in relation to personal or financial matters, and CAD \$700 for both.¹¹⁶

Capacity Assessment in Ontario

- 7.101 Similar to Alberta, Ontario has a system of prescribed capacity ‘assessors’.
- 7.102 The capacity standard in Ontario is that a person is incapable of managing their property or personal care if the person is not able to understand information that is relevant to making a decision, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.¹¹⁷
- 7.103 Capacity assessors in Ontario are trained and supported by the ‘Capacity Assessment Office’, which also produces guidelines for capacity assessment.¹¹⁸ As with Alberta, the professionals eligible to become capacity assessors are doctors, psychologists, nurses, social workers and occupational therapists.¹¹⁹ To be an assessor, all of these professional groups are required to complete a course, participate in continuing education, and conduct at least five assessments every two years.¹²⁰

SIX-STEP CAPACITY ASSESSMENT PROCESS

- 7.104 One approach to capacity assessment that received significant support in consultations and submissions was the six-step capacity assessment process, devised by Professor Peteris Darzins and colleagues.¹²¹
- 7.105 The process is as follows:
- Step 1: Ensure there is a valid trigger present to justify a capacity assessment, such as a person demonstrating behaviour that puts themselves or others at risk, or making choices that seem inconsistent with their previously held values.
 - Step 2: Engage the person in the assessment process by seeking agreement and informing the person about the process as far as possible.
 - Step 3: Gather information about the triggers for the assessment, and information about the person that can help inform an assessment of their decision making.
 - Step 4: Educate the person about the relevant decisions to the extent necessary to ensure that ‘ignorance’ is not mistaken for ‘incapacity’.
 - Step 5: Assess the person’s capacity by diligently and thoroughly determining whether a person understands and appreciates the decisions they face.
 - Step 6: Take appropriate action based on the person’s capacity results, including arranging for a substitute decision maker if necessary.¹²²
- 7.106 The six-step capacity assessment process strongly emphasises the need to work from a presumption of capacity. The process of capacity assessment should primarily seek evidence of incapacity, and if this evidence cannot be found, the presumption of capacity should prevail.¹²³

115 Teleconference with Brenda Lee Doyle—Provincial Director, Office of the Public Guardian, Alberta Canada (19 May 2011).

116 *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, regs 9–10.

117 *Substitute Decisions Act*, 1992 SO 1992, c 30, ss 6, 45.

118 Capacity Assessment Office, Ontario Ministry for the Attorney General, *Guidelines for the Assessment of Capacity* (May 2005) <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf>>.

119 *Substitute Decisions Act*, 1992, O Reg 460/05 reg 2(2).

120 *Substitute Decisions Act*, 1992, O Reg 460/05 reg 2(1), 4–6.

121 Darzins, Molloy and Strang, above n 8, 1.

122 *Ibid* 12–18.

123 *Ibid* 3.



COMMUNITY RESPONSES

- 7.107 In the consultation paper, we asked for views about what criteria should guide the appointment of substitute decision makers, how to improve understanding of the concept of capacity, and how the law could better reflect people's different experiences of impaired decision-making ability. The Commission proposed a range of possible reform options for community comment.
- 7.108 A majority of submissions favoured retaining the presence of 'disability' as part of the capacity standard used by VCAT when deciding whether to appoint a guardian or administrator. There was general support for providing a clearer definition of capacity in guardianship laws, but some disagreement about what that definition should be. There was strong support for a statutory presumption of capacity and legislative capacity assessment principles.

THE CAPACITY STANDARD

- 7.109 The Commission posed two questions in the consultation paper:
- Should 'disability' continue to be relevant to the assessment of capacity and the criteria for appointment?
 - What should be the legislative standard for capacity under new guardianship laws?¹²⁴

Disability as a precondition to lacking capacity

- 7.110 The issue of whether 'disability' is an appropriate concept for continued use in guardianship law formed part of our terms of reference. In response to our information paper, a number of groups expressed concern that focusing on people with a 'disability' was discriminatory and suggested that the real issue was 'incapacity'.¹²⁵
- 7.111 It was widely accepted that the presence of disability alone does not justify the appointment of a guardian or administrator.¹²⁶
- 7.112 However, there was also general support for the Commission's proposal that the presence of a disability should remain part of the test for finding that a person lacks capacity.¹²⁷ A smaller number of submissions argued that the presence of a disability should not be a precondition to a finding that a person lacks capacity—primarily on the basis that the requirement is discriminatory.¹²⁸ The Victorian Equal Opportunity and Human Rights Commission, for example, argued that the requirement of a diagnosis of disability is a 'discriminatory step' and that concerns about widening the category of people to whom an order could apply had been overstated.¹²⁹

124 Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 199–200.

125 For eg, Submissions IP 5 (Southwest Advocacy Association), IP 9 (Royal District Nursing Service), IP 11 (Tony and Heather Tregale), IP 19 (Scope Vic), IP 20 (Dying with Dignity Victoria), IP 22 (Epworth Foundation), IP 29 (Australian Association of Social Workers), IP 37 (Victorian Equal Opportunity and Human Rights Commission), IP 42 (Health Services Commissioner), IP 46 (Troy Huggins), IP 47 (Law Institute of Victoria), IP 50 (Action for Community Living) and IP 52 (Spectrum Migrant Resource Centre).

126 Consultation with College of Clinical Neuropsychologists (23 March 2011); Submissions CP 14 (BENETAS), CP 17 (Inclusion Melbourne), CP 45 (Scope Vic), CP 54 (JacksonRyan Partners), CP 57 (Aged Care Assessment Service in Victoria), CP 58 (The Australian Psychological Society), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 74 (PILCH Homeless Persons' Legal Clinic) and CP 75 (Federation of Community Legal Centres (Victoria)). However, the Catholic Archdiocese of Melbourne argued that 'disability' alone could be sufficient justification if there is a need for representation: Submission CP 27 (Catholic Archdiocese of Melbourne).

127 Consultation with College of Clinical Neuropsychologists (23 March 2011); Submissions CP 14 (BENETAS), CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 23 (Dr Kristen Pearson), CP 29 (STAR Victoria), CP 33 (Eastern Health), CP 47 (Dr Michael Murray), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 54 (JacksonRyan Partners), CP 56 (Disability Discrimination Legal Service), CP 57 (Aged Care Assessment Service in Victoria), CP 58 (The Australian Psychological Society), CP 59 (Carers Victoria), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 74 (PILCH Homeless Persons' Legal Clinic) and CP 75 (Federation of Community Legal Centres (Victoria)).

128 Submission CP 37 (Mildura Base Hospital), CP 45 (Scope Vic), CP 63 (Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

129 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

Describing the capacity standard

- 7.113 The Commission asked whether new legislation should define ‘capacity’. The Commission suggested that the definition in the United Kingdom’s Mental Capacity Act could be adopted in Victoria because it is the product of detailed consideration of this issue in a similar jurisdiction.¹³⁰
- 7.114 The inclusion of a clearer legislative definition of capacity or incapacity was supported in submissions,¹³¹ but there was concern among some groups that a definition could prove overly prescriptive.¹³²
- 7.115 The Public Advocate, State Trustees, the Law Institute of Victoria and several other groups supported the Mental Capacity Act approach,¹³³ while others had concerns with particular aspects of the definition.
- 7.116 The Mental Capacity Act definition is that a person lacks the ability to make a decision if they are unable to:
- understand the information relevant to the decision, or
 - retain that information, or
 - use or weigh that information as part of the process of making the decision, or
 - communicate their decision in some way.¹³⁴
- 7.117 The Act provides further guidance about what this means,¹³⁵ and a Code of Practice provides additional assistance.¹³⁶
- 7.118 The requirement to be able to communicate decisions was seen by a number of groups as having the potential to lead to inappropriate incapacity findings for people with significant communication impairments.¹³⁷ It was argued that the law should explicitly require the provision of appropriate assistance in communication.¹³⁸ Communication Rights Australia was particularly concerned, arguing that ‘without full support it is inevitable that an unacceptable number of people will have their autonomy eroded on the basis of inaccurate assessments of their capacity’.¹³⁹
- 7.119 The requirement to ‘retain’ information was also criticised as potentially including people who have memory difficulties, but are nonetheless able to make decisions about their own affairs.¹⁴⁰ Seniors Rights Victoria argued that the law should only require the ability to retain information for as long as is necessary to make the decision.¹⁴¹
- 7.120 The Australian Psychological Society (APA) supported a statutory framework for the assessment of capacity, but suggested modifications to the Mental Capacity Act approach. The APA argued that retention of information is needed for both the decision and its implementation, and that the framework should identify people who

130 The *Mental Capacity Act 2005* (UK) was the result of an extensive review process conducted by the Law Commission of England and Wales. The Commission’s report considered the capacity standard which should be used, which was ultimately adopted in England and Wales. See Law Commission (United Kingdom), *Mental Incapacity*, Report No 231 (1995) 32–41.

131 Submissions CP 19 (Office of the Public Advocate), CP 57 (Aged Care Assessment Service in Victoria), CP 58 (The Australian Psychological Society), CP 59 (Carers Victoria), CP 74 (PILCH Homeless Persons’ Legal Clinic) and CP 77 (Law Institute of Victoria).

132 Submissions CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 67 (Trustee Corporations Association of Australia).

133 Submissions CP 19 (Office of the Public Advocate), CP 57 (Aged Care Assessment Service in Victoria), CP 59 (Carers Victoria), CP 70 (State Trustees Limited), CP 74 (PILCH Homeless Persons’ Legal Clinic), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

134 *Mental Capacity Act 2005* (UK) s 3(1).

135 *Ibid* s 3(2)–(4).

136 Department for Constitutional Affairs (United Kingdom), *Mental Capacity Act 2005 Code of Practice* (The Stationery Office, 2007) 40–62.

137 Consultation with carers, service providers and advocates in Bendigo (30 March 2011); Submission CP 75 (Federation of Community Legal Centres (Victoria)).

138 Submissions CP 29 (STAR Victoria), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 82 (Communication Rights Australia).

139 Submission CP 82 (Communication Rights Australia).

140 Submissions CP 22 (Alzheimer’s Australia Vic), CP 71 (Seniors Rights Victoria) and CP 73 (Victoria Legal Aid).

141 Submission CP 71 (Seniors Rights Victoria).

lack insight into the potential consequences of the decisions—in particular people with damage to the frontal regions of the brain. The APA proposed the following amended definition:

A person is unable to make a decision for himself if he is unable—

- (a) to understand the information relevant to the decision
- (b) to retain that information for as long as is relevant to the decision and its implementation
- (c) to appreciate the potential consequences of the decision on themselves and their situation
- (d) to weigh the risks and benefits of the options as part of making the decision
- (e) to communicate the decision in some way (whether by talking, using sign language or any other means).¹⁴²

CAPACITY ASSESSMENT

7.121 In the consultation paper the Commission proposed:

- introducing legislative principles to guide the assessment of capacity
- including a presumption of capacity in new legislation
- recognising that capacity is decision and time specific; should not be assumed based on appearance; should not be based solely on evidence of ‘unwise’ decision making; and that incapacity should not be found if it is possible to support the person to make the decision.¹⁴³

7.122 These proposals were based on concerns expressed to the Commission about the cursory manner in which capacity assessments are sometimes conducted,¹⁴⁴ and important developments in other jurisdictions.¹⁴⁵

7.123 The proposals for a legislative presumption of capacity and the inclusion of statutory principles guiding capacity assessments were strongly supported in consultations and submissions.¹⁴⁶

7.124 While generally supportive of the proposed principles, Scope argued that the principles should further emphasise the provision of support in decision-making and supported decision-making principles.¹⁴⁷

7.125 The Victorian Equal Opportunity and Human Rights Commission noted the value in a consistent approach to capacity between guardianship and mental health laws, and a move away from an ‘all or nothing’ approach to assessing capacity.¹⁴⁸

THE COMMISSION’S VIEWS AND CONCLUSIONS

RETAINING THE CONNECTION BETWEEN ‘DISABILITY’ AND ‘INCAPACITY’

7.126 The Commission believes that new guardianship laws should require proof of a causal connection between a person’s lack of capacity and a disability. We discuss this issue again in Chapter 12 where we look at the criteria for VCAT to apply before it appoints a substitute decision maker.

¹⁴² Submission CP 58 (The Australian Psychological Society).

¹⁴³ Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 201.

¹⁴⁴ *Ibid* 189–190.

¹⁴⁵ Primarily the *Mental Capacity Act 2005* (UK) ss 1–3.

¹⁴⁶ Roundtables with people with acquired brain injuries (16 March 2011) and Disability Advocacy Resource Unit (13 April 2011); Submissions CP 58 (The Australian Psychological Society), CP 69 (Australian Medical Association (Victoria)), CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

¹⁴⁷ Submission CP 45 (Scope Vic).

¹⁴⁸ Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

- 7.127 As noted earlier, capacity is a legal construct ultimately determined by professional judgment rather than by objective testing. In order to ensure that findings of incapacity are not made because of subjective views about the quality of particular decisions, it is important that part of the assessment process rely upon objective, verifiable grounds. This would occur if a link between ‘disability’ and ‘incapacity’ is retained.
- 7.128 Retaining this link should also ensure that guardianship law does not become a means of controlling people with behavioural problems. Guardianship should continue to be seen as a mechanism for assisting people who have impaired decision-making ability because of disability to retain their individual status and participate in the life of the community to the fullest extent possible. Numerous other legal mechanisms can be invoked to assist people with behavioural problems and to protect the community from people who pose an unacceptable risk of harm.¹⁴⁹

RECOMMENDATION

Retaining the connection between disability and incapacity

22. The law should state that a person lacks capacity in relation to a matter if at the relevant time they are unable to make a decision in relation to the matter because of a disability.

Definition of disability

- 7.129 The current definition of ‘disability’ in the G&A Act—‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’¹⁵⁰—remains appropriate for new guardianship laws. Some concern was expressed about the continued inclusion of ‘physical disability’, given that the presence of a physical disability is a separate issue from a person’s cognitive ability to make a decision. However, because a physical disability can bear upon a person’s capacity to execute a decision by impairing their ability to communicate their wishes, the Commission believes its continued inclusion in the definition of ‘disability’ is appropriate.
- 7.130 The Commission accepts Autism Victoria’s submission that ‘autism spectrum disorder’ should be included in the definition of ‘disability’ for the purposes of the Act. This will clearly indicate that autism spectrum disorder is a condition that can impair a person’s decision-making ability.
- 7.131 While it is arguable that autism spectrum disorder is already included in the definition of ‘disability’ because it falls within the concept of ‘mental disorder’, the Commission believes that it is helpful to put this matter beyond doubt by specifically including autism spectrum disorder. While having an autism spectrum disorder does not necessarily mean that a person’s decision-making ability is impaired, guardianship legislation should be available to a person with autism spectrum disorder who satisfies all of the criteria for the appointment of a substitute decision maker.

RECOMMENDATION

The definition of disability

23. The definition of ‘disability’ should include intellectual impairment, autism spectrum disorder, mental disorder, brain injury, physical disability or dementia.

¹⁴⁹ See eg, *Severe Substances Dependence Treatment Act 2010* (Vic); *Disability Act 2006* (Vic) pt 8; *Mental Health Act 1986* (Vic) pt 3; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Sex Offenders Registration Act 2004* (Vic); *Sentencing Act 1991* (Vic) pt 2A, s 18B.

¹⁵⁰ *Guardianship and Administration Act 1986* (Vic) s 3(1).

Disability should not be a separate criterion

- 7.132 As foreshadowed in the consultation paper, the Commission believes that ‘disability’ should not be a separate and distinct element of the statutory grounds for appointing a substitute decision maker. This recommendation represents an important change to the current law. Retaining ‘disability’ as a separate element would be out of step with a capacity-based approach to guardianship laws. The Commission considers that a person’s disability should be relevant only to the extent that it bears upon their ability to make or implement decisions.
- 7.133 Although this reform is unlikely to bring about any change in practice, it is symbolically important because it reinforces the notion that incapacity rather than disability justifies the appointment of a substitute decision maker.
- 7.134 This approach was largely supported in submissions,¹⁵¹ although some submissions argued that the Commission should go further and recommend removal of all reference to disability as a precondition for a finding of incapacity.¹⁵² Victoria Legal Aid expressed concerns, shared by the Commission, about removing reference to disability altogether:

The alternative proposal of removing the criterion of ‘disability’ altogether is problematic. It would mean that, regardless of the cause of a person’s inability to make reasonable judgments, if they lacked capacity an administrator or guardian could be appointed. The issue of how this capacity could be tested and objectively assessed would need to be determined. There is also the risk that removing this criterion would allow the law to be used to make orders in a far more liberal way than Parliament intended. If this approach were to be adopted then people with substance dependencies could easily be caught within the Act. The Act should not be used as a form of social control or to protect people who are vulnerable, even if they are making objectively bad decisions, where there is no issue of incapacity.¹⁵³

- 7.135 The Commission acknowledges the concerns by some groups that continued reference to ‘disability’ could be seen as discriminatory. However, on balance, these concerns are outweighed by the need to ensure that there is some objective basis upon which to make a finding of incapacity.¹⁵⁴ In Chapter 12 the Commission makes a specific recommendation excluding the consideration of disability as a separate criteria for a VCAT appointment of a substitute decision maker.

DEFINING INCAPACITY AND CAPACITY

- 7.136 The Commission believes that new guardianship laws should define both capacity and incapacity. A capacity standard would be used when determining whether a person has the cognitive ability to appoint an enduring personal guardian or financial administrator. An incapacity standard would be used when determining whether a person is unable to make decisions for themselves and a personal appointment becomes operative, a tribunal appointment might by necessary, or a health decision maker assumes responsibility for making medical treatment decisions.
- 7.137 The Commission believes that the incapacity standard and the incapacity assessment framework in the United Kingdom’s Mental Capacity Act are useful precedents that

151 For eg, Submissions CP 19 (Office of the Public Advocate), CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria). However, the Catholic Archdiocese argued against this approach, arguing that a disability should be enough to justify an application for guardianship if there is a need for representation and there should be no tests for incapacity: Submission CP 27 (Catholic Archdiocese of Melbourne).

152 For eg, Submissions CP 45 (Scope Vic), CP 63 (Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

153 Submission CP 73 (Victoria Legal Aid).

154 The Commission notes that this approach differs from that of the Queensland Law Reform Commission, which recently recommended retaining Queensland’s current approach of not requiring a finding of a disability as part of the test for incapacity. The Queensland Law Reform Commission argued that to do so would be discriminatory: Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010) vol 1, 270.

can be adapted for use in Victoria. The Commission recommends a few changes of detail, based largely upon aspects of the Queensland legislation. The approach in the United Kingdom Act was mostly supported in submissions, and was endorsed in the Victorian Parliament Law Reform Committee's *Inquiry Into Powers of Attorney*.¹⁵⁵

The ability to retain information

- 7.138 The United Kingdom Act's stipulation that an inability to retain information is one of four indicators of incapacity was of particular concern to groups associated with age-related disabilities. The Mental Capacity Act also makes it clear that it is sufficient that a person may only be able to retain information for a short period.¹⁵⁶
- 7.139 The Commission believes that it is preferable to deal with the issue of retention of information by saying that a person requires the ability to retain information only to the extent that is necessary to make the decision. This approach acknowledges that some decisions—such as those involving complex financial transactions—might require an ability to retain information on an ongoing basis, whereas other routine decisions might require a very limited ability to retain information.

Effect of the decision

- 7.140 Another criticism of the Mental Capacity Act test—primarily from the Australian Psychological Association—is that it does not adequately recognise the importance of the ability to understand the possible consequences of the decision.¹⁵⁷ However, the Mental Capacity Act deals with this matter in the following way:
- The information relevant to a decision includes information about the reasonably foreseeable consequences of—
- (a) deciding one way or another, or
 - (b) failing to make the decision.¹⁵⁸
- 7.141 The Commission prefers the simpler test used in many branches of the common law that a person 'understand the nature and effect' of a decision.¹⁵⁹ The Commission has incorporated the 'effect' limb of this test in its recommendation that the person must be capable of understanding 'the information relevant to a decision *and the effect of the decision*'.
- 7.142 This amendment to the Mental Capacity Act standard makes the ability to understand the likely consequences of a decision a clearer component of the test. This is important because an understanding of the effect of a decision is an essential component of being legally responsible for that decision.

Ability to communicate the decision

- 7.143 Concerns about the requirement of being able to communicate a decision fell into two categories:
- Concern that people will be inappropriately found to lack capacity when they really lack assistance in communication.
 - A broader concern that an inability to communicate a decision does not mean a person lacks the cognitive ability to make a decision.

¹⁵⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 110–113 ('*Inquiry into Powers of Attorney*').

¹⁵⁶ *Mental Capacity Act 2005* (UK) s 3(3).

¹⁵⁷ Submission CP 58 (The Australian Psychological Society).

¹⁵⁸ *Mental Capacity Act 2005* (UK) s 3(4).

¹⁵⁹ The leading case on capacity to enter into a contract in Australia—*Gibbons v Wright* (1954) 91 CLR 423—held that a person must have 'such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation': at 437 (Dixon CJ, Kitto and Taylor JJ). In addition to forming the standard for capacity for entry into enduring powers of attorney in Victoria, the test of 'nature and effect' forms part of the standard for guardianship laws in Queensland: see *Guardianship and Administration Act 2000* (Qld) sch 4.



- 7.144 A physiological inability to communicate a decision does not mean a person lacks the cognitive ability to make that decision. All reasonable efforts should be made to assist people in these circumstances to communicate their decisions to others. However, where all efforts to assist a person to communicate have been tried without success, it should be possible to find that a person lacks legal capacity, and therefore allow for the possibility of appointing a substitute decision maker. The appointment of a substitute decision maker may be justified in these circumstances on the basis that there is no other way to ensure the person's rights and interests are protected so that they can participate in the many activities where capacity is essential.
- 7.145 The Commission suggests that the law should include a very broad definition of what it means to be able to communicate a decision, and further principles to guide the process of capacity assessment.

RECOMMENDATIONS

Defining incapacity

24. A person is unable to make a decision if they are unable to:
- understand the information relevant to the decision and the effect of the decision
 - retain that information to the extent necessary to make the decision
 - use or weigh that information as part of the process of making the decision, or
 - communicate the decision in some way.

Defining capacity

25. A person has the capacity to make a decision if they are able to:
- understand the information relevant to the decision and the effect of the decision
 - retain that information to the extent necessary to make the decision
 - use or weigh that information as part of the process of making the decision, and
 - communicate the decision in some way.

ASSESSING CAPACITY

- 7.146 Assessing capacity is a very complex undertaking. There are no definitive, objective tests and relatively few professionals are specially trained to conduct capacity assessments. Professionals with decades of experience have suggested to the Commission that capacity assessment actually gets harder over time, as practitioners become more aware of the complex and individualised nature of cognitive ability and inability.¹⁶⁰
- 7.147 The Commission believes that clear principles should inform the process of capacity assessment under guardianship laws. These principles should provide guidance when anyone—including clinicians, tribunal members, or persons appointed under enduring powers—is required to determine whether another person has capacity to engage in a particular activity.

¹⁶⁰ Consultation with Australian & New Zealand Society for Geriatric Medicine (7 April 2011).

7.148 The principles proposed by the Commission in the consultation paper were strongly supported in consultations and submissions and, with some additions, have formed the basis of the Commission’s recommendations. The Victorian Parliament Law Reform Committee’s *Inquiry into Powers of Attorney* also recommended similar principles.¹⁶¹

Presumption of capacity

7.149 While it would effectively be a restatement of the common law, a statutory recognition of a presumption of capacity is symbolically significant.

7.150 The legal presumption of capacity is a particularly important starting point for VCAT when determining whether a substitute decision maker should be appointed. The presumption is also important when an assessment is made about whether a personal appointment should be activated due to loss of capacity.

RECOMMENDATION

Presumption of capacity

26. A person must be presumed to have capacity unless it is established that the person lacks capacity.

Capacity is decision-specific and time-specific

7.151 It is unhelpful to view capacity as an attribute that a person either has or does not have. Impaired decision-making capacity may be temporary or permanent and can fluctuate over time or according to the decision to be made.

7.152 While some people may lose some or most capacity permanently—for example, a person in the late stages of dementia—others may only temporarily lose capacity.

7.153 Similarly, an inability to make decisions in one area—such as the management of money—does not necessarily mean that a person is unable to make other decisions about other aspects of their personal circumstances, such as decisions around health care or accommodation.

7.154 While these principles already appear to inform approaches to capacity assessment, the Commission believes there is benefit in including them in new guardianship laws.

Capacity is support-dependant

7.155 This principle, drawn from the United Kingdom’s Mental Capacity Act, recognises that a person’s capacity to make a decision can be affected by the support available to them. Some people who struggle to make a decision alone might be capable of making their own decision with the support of a trusted person.

7.156 This principle would also oblige VCAT to consider options that are less restrictive of a person’s autonomy when deciding to appoint a substitute decision maker. This principle is consistent with Australia’s obligations under the Convention.¹⁶²

Capacity should be properly assessed, and should not be based on assumptions

7.157 These proposals, also drawn from the Mental Capacity Act, are consistent with a modern, functional approach to capacity assessment.

¹⁶¹ *Inquiry into Powers of Attorney*, above n 155, 113–120.

¹⁶² *Convention on the Rights of Persons with Disabilities* arts 12(3), (4).



- 7.158 An adult's lack of capacity to make a decision should not be assumed because of their age, appearance, condition, or an aspect of their behaviour. Additionally, a person should not be considered to lack the capacity to make a decision merely because they make a decision that others consider unwise.
- 7.159 While a person's condition or repeatedly poor decisions might give rise to concerns about their capacity, these matters should not be accepted as proof alone that a person lacks capacity.

Capacity should be assessed in an appropriate environment

- 7.160 A person's capacity to make a decision may vary according to the circumstances in which an assessment occurs. When assessing a person's capacity, every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed. For example, a person may demonstrate greater decision-making ability when assessed in their home environment rather than in an unfamiliar setting such as a hospital or a tribunal hearing room. They may also perform better at certain times of the day than at others.

RECOMMENDATIONS

Capacity assessment principles

27. New guardianship legislation should contain the following capacity assessment principles:
- (a) A person's capacity is specific to the decision to be made.
 - (b) Impaired decision-making capacity may be temporary or permanent and can fluctuate over time.
 - (c) An adult's incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour.
 - (d) A person should not be considered to lack the capacity to make a decision merely because they make a decision that others consider to be unwise.
 - (e) A person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support.
 - (f) When assessing a person's capacity, every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.

MEANS OF ASSESSING CAPACITY

Victoria capacity assessment toolkit

- 7.161 Consistent with the recommendation of the Victorian Parliament Law Reform Committee,¹⁶³ the Commission believes that the development of a capacity assessment toolkit in Victoria would be beneficial, and contribute to capacity assessment standards.
- 7.162 The New South Wales capacity toolkit¹⁶⁴—which has received broad support—should be adapted to the Victorian context, and in particular to reforms of Victorian guardianship laws.

¹⁶³ *Inquiry into Powers of Attorney*, above n 155, 113–130.

¹⁶⁴ NSW Government *Capacity Toolkit* (15 February 2001) Lawlink: Attorney General and Justice <http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_capacity_toolkit>.

RECOMMENDATION

Means of assessing capacity

28. The Victorian Government should develop a comprehensive resource about capacity and capacity assessment based on the New South Wales capacity toolkit.

Qualified capacity assessors

- 7.163 The Commission believes the Victorian Government should consider introducing a training and certification system for capacity assessment based on the designated capacity assessor systems developed in Ontario and Alberta. This consideration should involve key organisations with an interest in guardianship laws, such as the Public Advocate, State Trustees and other professional administrators, and VCAT.
- 7.164 The quality of capacity assessments would clearly be improved by relying on trained and certified capacity assessors. As there is considerable cost associated with such a scheme, the Commission recommends that the Victorian Government further evaluate this proposal.

RECOMMENDATION

Qualified capacity assessors

29. The Victorian Government should consider the development of a system of designated capacity assessors, based on the Alberta model of designated capacity assessors.

Chapter 8

Supporters

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INTRODUCTION

- 8.1 Supported decision-making is an emerging concept that has been given considerable impetus by the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention).
- 8.2 Some of the things people mean when they talk about decision-making support include:
- providing and explaining information to someone in a way they can understand
 - spending time with a person to help them consider the options available to them, and the consequences of these options
 - providing advice about which options the person might choose
 - spending time with the person to ascertain their wishes, preferences and choices
 - helping the person to communicate their decisions to others
 - taking action to ensure the person's decisions are respected and implemented.
- 8.3 As discussed in Chapter 7, the law has traditionally viewed decision-making 'capacity' as an absolute concept—a person has decision-making capacity or they lack it. A finding of incapacity has significant consequences because it causes a person to be effectively disqualified from participating in a broad range of activities. Because the law has not openly acknowledged that a person can experience partial or fluctuating capacity, it has provided only one mechanism—substitute decision making—to assist people with impaired decision-making ability.
- 8.4 Although this approach is understandable because of the value the law has historically placed on certainty and finality in various transactions, it does not reflect the reality of everyday life. Many people have a level of decision-making ability that fluctuates significantly over time and depends on the nature of particular decisions and the context in which they are made.
- 8.5 Supported decision making recognises the interdependent nature of most people's lives. Most people make important decisions with personal support (such as advice from family, friends or mentors), or sometimes with professional support (for example, doctors or accountants). Some people with disabilities sometimes need additional support to make important decisions.
- 8.6 Supported decision making differs from substitute decision making in two main ways:
- A substituted decision is made on behalf of a person with impaired decision-making ability, whereas a supported decision means that someone has been helped to make it themselves.
 - A substitute decision maker is authorised to make a decision for the represented person, which is deemed the decision of the represented person.¹ By contrast, in supported decision-making arrangements, the assisted person continues to be the person authorised to make decisions, either alone (but with support) or together with a co-decision maker.
- 8.7 In this chapter, we consider how a new legal mechanism—a 'supporter'—could assist some people with impaired decision-making ability to continue to exercise legal capacity. Unlike substitute decision makers, supporters would not have the power to make decisions on behalf of a person, but they would be authorised to do certain things to assist the person to make their own decisions.

¹ See, eg, *Guardianship and Administration Act 1986* (Vic) ss 24(4), 25(3), 48(3).

8.8 In the next chapter we consider another new mechanism to assist people in decision making: the appointment of a co-decision maker.

CURRENT LAW

CURRENT LAW IN VICTORIA

8.9 Victoria's guardianship laws do not contain any supported decision-making mechanisms. Substitute decision makers in the form of guardians, administrators, the 'person responsible', attorneys, agents and enduring guardians are the only formal decision-making appointments available. In practice, relationships of support currently operate informally.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

8.10 The Convention is one of the most significant developments in the shift in focus towards supported decision making. At its core, the Convention promotes the dignity and equality of people with disabilities and their participation in society on an equal basis with others.² The Convention fundamentally repositions understanding of people with disabilities—moving away from viewing people with disabilities as objects of care and protection towards the view that people with disabilities are equal members of society, with the same human rights as any other person.³

8.11 Article 12 of the Convention is particularly relevant to the emergence of supported decision making. It requires parties to the Convention to recognise that people with disabilities have a right to equal recognition before the law, and a right to enjoy legal capacity on an equal basis with other members of society.⁴ It also requires parties to take appropriate measures to provide people with disabilities with access to the support they may require in exercising their legal capacity.⁵ This support must:

- respect the rights, will and preferences of the person
- be free of conflict of interest and undue influence
- be proportional and tailored to the person's circumstances
- apply for the shortest time possible
- be subject to regular review by a competent, independent and impartial authority.⁶

8.12 Article 12 promotes greater autonomy for people with disabilities in decisions that affect their lives and imposes an obligation on states to provide decision-making support that is proportionate and tailored to their individual circumstances. The United Nations acknowledges that providing appropriate decision-making support in accordance with the Convention will require effort and financial investment, and suggests this might involve a redistribution of some of the existing resources currently used for substitute decision making.⁷

2 See *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1 ('*Convention on the Rights of Persons with Disabilities*').

3 Volker Lipp, 'Autonomy and Guardianship—Foes or Friends?' (paper presented at World Congress on Adult Guardianship, Yokohama, 2 October 2010).

4 *Convention on the Rights of Persons with Disabilities* arts 12(1)–(2).

5 *Ibid* art 12(3).

6 *Ibid* art 12(4).

7 United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007), 91 <<http://www.un.org/disabilities/default.asp?id=212>> ('*Handbook for Parliamentarians*').



OTHER JURISDICTIONS

CANADA

- 8.13 The Canadian provinces have adult guardianship laws that are broadly similar to those in Australia. However, in recent years several Canadian provinces have introduced mechanisms intended to facilitate and encourage supported decision-making arrangements, and provide alternatives to guardianship and administration.⁸
- 8.14 Reforms in Alberta in particular have formed the basis of the Commission's recommendations in both this chapter and Chapter 9, which discusses co-decision-making arrangements.

Alberta—supported decision-making authorisations

- 8.15 'Supported decision-making authorisations' have been available in Alberta since 2009.⁹ They allow a person with capacity to appoint one or more people, known as 'supporters', to assist them when making personal (but not financial) decisions. The person must understand the nature and effect of the appointment in order for it to be valid.¹⁰
- 8.16 A supported decision-making authorisation may permit the supporter:
- (a) to access, collect or obtain or assist the adult in accessing, collecting or obtaining from any person any information that is relevant to the decision and to assist the adult in understanding the information;
 - (b) to assist the adult in making the decision;
 - (c) to communicate or assist the adult in communicating the decision to other persons.¹¹
- 8.17 The supporter does not have the power to make legally enforceable decisions on behalf of the person, but a decision made or communicated with the assistance of a supporter is considered a decision of the person.¹² A third party may refuse to recognise a decision communicated by the supporter if they reasonably believe there has been undue influence, fraud or misrepresentation.¹³
- 8.18 The Alberta Office of the Public Guardian has stated that while supported decision-making agreements have been very popular, the number of supported decision-making appointments is currently unknown as they are not registered.¹⁴

Yukon—supported decision-making agreements

- 8.19 'Supported decision-making agreements' have been available in Yukon since 2005.¹⁵ As in Alberta, the person making the appointment must be able to understand the nature and effect of the agreement.¹⁶ However, unlike in Alberta, agreements in Yukon are not limited to personal decisions. The types of decisions the person seeks assistance with are set out in the agreement and may include financial matters.¹⁷

8 These provinces include the Yukon (*Decision Making, Support and Protection to Adults Act* SY 2003, c 21), Saskatchewan (*The Adult Guardianship and Co-decision-making Act* SS 2000 c A-5.3), Alberta (*Adult Guardianship and Trusteeship Act* SA 2008 c A-4.2) and British Columbia (*Representation Agreement Act* RSBC 1996, c 405). Manitoba has also included explicit recognition of supported decision making in the *Vulnerable Persons Living with a Mental Disability Act* SM 1993, c V90, s 6.

9 *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2, div 1.

10 *Ibid* s 4(1).

11 *Ibid* s 4(2).

12 *Ibid* s 6(1).

13 *Ibid* s 6(2).

14 Teleconference with Brenda Lee-Doyle, Office of the Public Guardian, Alberta, Canada (19 May 2011).

15 *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21.

16 *Ibid* s 6.

17 *Ibid* 9(c)–(d).

- 8.20 The stated purpose of supported decision-making agreements is:
- (a) to enable trusted friends and relatives to help adults who do not need guardianship and are substantially able to manage their affairs, but whose ability to make or communicate decisions with respect to some or all of those affairs is impaired; and
 - (b) to give persons providing support to adults under paragraph (a) legal status to be with the adult and participate in discussions with others when the adult is making decisions or attempting to obtain information.¹⁸
- 8.21 The responsibilities of the appointed person—known as an ‘associate’—may include:
- (a) to assist the adult to make and express a decision;
 - (b) to assist the adult to obtain relevant information;
 - (c) to advise the adult by explaining relevant information and considerations;
 - (d) to ascertain the wishes and decisions of the adult and assist the adult to communicate them; and
 - (e) to endeavour to ensure that the adult’s decision is implemented.¹⁹
- 8.22 Associates may not ‘exert undue influence upon, nor make decisions on behalf of, the adult’.²⁰
- 8.23 As in Alberta, decisions made or communicated with the assistance of an ‘associate’ are recognised in Yukon as the decision of the adult unless there has been fraud, misrepresentation, or undue influence.²¹
- 8.24 As Yukon has a small population of less than 35,000 people and these arrangements have been available for only a few years, their success is difficult to determine. The actual number of supported decision-making agreements in Yukon is unknown as they are not registered, but it appears that their use has been quite limited.²²

British Columbia—representation agreements

- 8.25 Since 2000, British Columbia has allowed a person to enter into a ‘representation agreement’, appointing one or more ‘representatives’ to make decisions on their behalf.²³ The decisions the representative may assist the person with may be personal, medical, or day-to-day financial decisions.
- 8.26 These agreements are a significant shift in the law because a person can make a representation agreement even when they may not satisfy a common law test of capacity to make a power of attorney, or to make the types of decisions the agreement covers, such as consent to medical treatment or enter into a contract for goods and services.²⁴
- 8.27 The *Representation Agreement Act* RSBC 1996 presumes that everyone is able to make a representation agreement,²⁵ and provides the following examples of ‘relevant factors’ in determining whether a person can make or vary a representation agreement:
- whether the adult communicates a desire to have a representative make, help make, or stop making decisions

18 Ibid s 4.

19 Ibid s 5(1).

20 Ibid s 5(2).

21 Ibid s 11.

22 Michelle Browning, *Report to Investigate New Models of Guardianship and the Emerging Practice of Supported Decision Making* (Winston Churchill Memorial Trust of Australia, 2010) 29.

23 *Representation Agreement Act* RSBC 1996, c 405.

24 Ibid s 8(1).

25 Ibid s 3(1).



- whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others
 - whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult
 - whether the adult has a relationship with the representative that is characterised by trust.²⁶
- 8.28 The Commission understands that the focus of these laws is not to test whether someone 'has capacity', but to enable support to be provided where it is needed.²⁷ To safeguard against financial abuse of vulnerable people, the Representation Agreement Act requires that where financial powers are provided under the agreement, a monitor must be appointed to oversee the conduct of the representative unless:
- the representative is the adult's spouse, the Public Guardian and Trustee, a trust company, or a credit union
 - two or more representatives have been appointed and are required to act unanimously
 - the agreement has been made in the presence of a lawyer.²⁸
- 8.29 The Representation Agreement Act requires representatives to consult the person and follow the person's wishes if it is reasonable to do so. The Act requires that when making decisions, representatives must comply with:
- the person's current wishes unless it is unreasonable to do so
 - if current wishes are unreasonable or cannot be obtained, any written instructions prepared by the person
 - if there are no written instructions, then the person's known beliefs and values
 - if the person's beliefs and values are unknown, then the person's best interests.²⁹
- 8.30 Because registration of representation agreements is possible but optional in British Columbia,³⁰ the number of agreements made is unknown. It is estimated that several thousand representation agreements have been made.³¹
- 8.31 Representation agreements are often discussed as mechanisms that facilitate supported decision making and, as a result, the United Nations has praised British Columbia as 'one of the leading jurisdictions in incorporating supported decision making into law, policy and practice'.³² However, while representation agreements place a significant emphasis on the wishes, beliefs and values of the person, and provide alternatives to guardianship and administration, they continue to confer decision-making power upon a substitute. By contrast, 'supported decision-making agreements' in Alberta and supported decision-making authorisations in Yukon do not confer substitute decision-making power, and are solely instruments of support.

26 Ibid s 8(2).

27 Consultation with NIDUS Personal Planning Resource Centre and Registry (31 March 2010).

28 *Representation Agreement Act* RSBC1996, c 405, ss 12(1)–(2).

29 Ibid s 16.

30 This may be done through NIDUS Personal Planning Resource Centre and Registry. Further details are available at <<http://www.rarc.ca/>>.

31 Consultation with NIDUS Personal Planning Resource Centre and Registry (31 March 2010). For further statistical information around the use of representation agreements in British Columbia, see NIDUS Personal Planning Resource Centre, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (2010) <http://www.nidus.ca/PDFs/Nidus_Research_RA7_InAction.pdf>.

32 *Handbook for Parliamentarians*, above n 7, 90–1.

QUEENSLAND

- 8.32 In 1996 the Queensland Law Reform Commission recommended the introduction of a tribunal-appointed assistant decision maker in relation to personal or financial decisions to 'assist a person with decision-making disability to make the person's own decision'.³³
- 8.33 The Commission argued that this approach was consistent with the least restrictive approach, and provided an important option for people with a decision-making disability who are in need of decision-making support.³⁴ This recommendation formed part of the draft guardianship legislation prepared by the Queensland Law Reform Commission.³⁵
- 8.34 Although much of the Queensland Law Reform Commission's 1996 report was adopted in the *Guardianship and Administration Act 2000* (Qld), the proposal for an assistant decision maker was not included. The Queensland Law Reform Commission did not revive this recommendation in its more recent review of Queensland's guardianship laws.³⁶

SOUTH AUSTRALIA

- 8.35 Although no Australian jurisdiction has reformed its guardianship laws to introduce supported decision-making mechanisms, the South Australian Public Advocate, together with the Julia Farr MS McLeod Benevolent Fund, has developed a Supported Decision Making Project that seeks to encourage and trial supported decision making in South Australia.³⁷
- 8.36 The project involves a person with a decision-making impairment appointing one or more 'supporters' to assist them to make decisions through a written 'supported decision-making agreement'. These agreements do not confer any substitute decision-making power and are not specifically provided for under South Australian law.³⁸ Under the program, supporters are drawn from the person's existing support network of informal supports, or a 'community agency willing to develop these networks and trusting relationships where they are lacking'.³⁹
- 8.37 To enter into an agreement, the supported person needs to be able to:
- express a wish to receive support
 - form a trusting relationship with another person
 - indicate what decisions they may need support for
 - indicate who they wish to receive support from for which decisions
 - express a wish to end support if that time comes
 - be aware that they are making the final decision, not their supporter.⁴⁰
- 8.38 In addition to the appointment of one or more supporters, the agreements provide for a monitor to oversee the appointment and take action if the agreement has broken down.⁴¹

33 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for People with a Decision-making Disability*, Report No 49 (1996) vol 1, 201–4 ('*Assisted Substituted Decisions*').

34 *Ibid* 204.

35 *Ibid* 72–4.

36 See Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).

37 South Australian Supported Decision Making Project, *Report of Preliminary "Phase I"* (2011) ('*Report of Preliminary "Phase I"*').

38 *Ibid* 7.

39 *Ibid* 10.

40 *Ibid* 9.

41 *Ibid* 10.



- 8.39 A preliminary trial involving eight participants is currently underway, with a larger trial involving up to 40 participants planned.⁴² A preliminary in-house evaluation has been conducted, with initial observations that participants expressed greater feelings of power and control in their lives.⁴³
- 8.40 The areas of decision making covered by the agreement are included in the supported decision-making document. Decisions that require Guardianship Board approval, such as selling property and sterilisation procedures, are not covered and the agreements are not intended to provide an alternative to financial administration.⁴⁴ The agreements have been used to provide support in relation to decisions such as consent to surgery, health care, relationships, living arrangements, and decisions to quit smoking and limit alcohol exposure.⁴⁵

COMMUNITY RESPONSES

- 8.41 In the consultation paper, the Commission proposed that people with impaired decision-making ability should be able to appoint a ‘supporter’ to assist with decision making. The supporter would not be empowered to make decisions on behalf of the person, but could be empowered to:
- gather relevant information on behalf of the person, including personal information that might otherwise be protected by privacy laws
 - assist the person to make the decision
 - communicate the person’s decision to others.
- 8.42 The authority given to a supporter could be tailored to suit the needs of a particular person. If, for example, a person needed assistance only in communicating a decision, the supporter’s powers could be limited to this role.
- 8.43 Formalised support arrangements could also provide greater certainty for third parties about the nature and extent of the support arrangement, allowing them to deal with supporters more confidently than if the relationship were purely informal.
- 8.44 The Commission proposed that supporters could be appointed in relation to both personal and financial decisions, but acknowledged the concerns of some financial institutions about a new formal decision-making mechanism.
- 8.45 While supporters should be appointed by the person themselves through written appointment whenever possible, the Commission suggested that there might be circumstances where a person would benefit from the appointment of a supporter, but there might be doubts about the person’s capacity to make the appointment themselves. In these circumstances, the Commission proposed that the Victorian Civil and Administrative Tribunal (VCAT) should be able to make an appointment with the consent of the person in order to overcome any doubts about the validity of the appointment.
- 8.46 The Commission also suggested that a network of volunteer supporters could be established and coordinated by the Public Advocate to provide assistance for people who do not have any appropriate person to support them in this way.

42 Ibid 9, 15.

43 Ibid 18.

44 Ibid 11.

45 Ibid 18.

- 8.47 Many people and organisations supported the Commission’s proposal for new supported decision-making appointments.⁴⁶ Victoria Legal Aid argued that ‘such an approach promotes autonomy and dignity’.⁴⁷ The Disability Services Commissioner suggested supported decision-making arrangements ‘will offer greater clarity and certainty for informal arrangements, along with less restrictive options for people who may otherwise find themselves being subject to a guardianship application’.⁴⁸
- 8.48 Many people who responded to the Commission’s online forum also supported the principle of supported decision making, and suggested that supported decision-making appointments might provide a good alternative to administration.⁴⁹
- 8.49 Some other people and organisations expressed concerns about the proposal. Both the Law Institute of Victoria and the Australian Medical Association suggested that the Commission’s proposal for supporters was not the right approach, although they were in favour of supported decision making.⁵⁰ The Law Institute’s concerns centred on the added complexity of introducing new legal arrangements, the risk of abuse and exploitation, and the lack of options available to people who do not have a support network already.⁵¹ The Australian Medical Association queried the value of formalising a relationship that is one of trust and support.⁵²

SUPPORTERS AND FINANCIAL DECISIONS

- 8.50 Both State Trustees and the Trustee Corporations Association expressed concern about using supported decision-making arrangements for financial decisions.⁵³ Their concerns focused on the potential for these arrangements to undermine the speed and certainty of financial transactions, and the potential for confusion that the introduction of new legal arrangements could create.⁵⁴
- 8.51 State Trustees argued that supported decision making can be facilitated by the creation of limited general or enduring powers of attorney.⁵⁵
- 8.52 Other submissions and consultations were generally in favour of the use of supporters in relation to financial decisions. While not expressing a conclusive view either way, the Public Advocate noted that the risk of financial abuse was a prime concern with this proposal.⁵⁶

VCAT-APPOINTED SUPPORTERS

- 8.53 The Mental Health Legal Centre expressed significant reservations about the proposal for VCAT-appointed supporters, but it was in favour of allowing personally appointed supporters. The Centre was concerned that people may be pressured or unduly influenced to consent to a VCAT order.⁵⁷ The Law Institute of Victoria queried how a person could consent to a supported decision-making order, but at the same time not have the capacity to make a supported decision-making appointment themselves.⁵⁸

46 Submissions CP 19 (Office of the Public Advocate), CP 29 (STAR Victoria), CP 59 (Carers Victoria), CP 61 (Disability Services Commissioner), CP 62 (St Kilda Legal Service), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 73 (Victoria Legal Aid), CP 78 (Mental Health Legal Centre) and CP 75 (Federation of Community Legal Centres (Victoria)).

47 Submission CP 73 (Victoria Legal Aid).

48 Submission CP 61 (Disability Services Commissioner).

49 See generally ‘Would an arrangement like supported decision making be helpful?’ on Victorian Law Reform Commission, *Guardianship Review Forum* (17 May 2011) <<http://consultations.lawreform.vic.gov.au/topic/would-an-arrangement-like-supported-decision-making-be-helpful>>.

50 Submissions CP 69 (Australian Medical Association (Victoria)) and CP 77 (Law Institute of Victoria).

51 Submission CP 77 (Law Institute of Victoria).

52 Submission CP 69 (Australian Medical Association (Victoria)).

53 Submissions CP 67 (Trustee Corporations Association of Australia) and CP 70 (State Trustees Limited).

54 Ibid.

55 Submission CP 70 (State Trustees Limited).

56 Submission CP 19 (Office of the Public Advocate).

57 Submission CP 78 (Mental Health Legal Centre).

58 Submission CP 77 (Law Institute of Victoria).



ROLE OF THE PUBLIC ADVOCATE IN SUPPORT ARRANGEMENTS

- 8.54 A majority of submissions agreed with the suggestion that the Public Advocate should not be eligible for appointment as a supporter.⁵⁹ The Public Advocate acknowledged that her office was not well suited to perform this role given its other roles as advocate or guardian.⁶⁰
- 8.55 There was some support for the Public Advocate having a role in educating and training supporters,⁶¹ but also an acknowledgement that other groups might be well suited to these roles.⁶² There was also concern about the Public Advocate monitoring support arrangements, which it was argued did not sit well with its primary function of providing advocacy and support for people with disabilities.⁶³

VOLUNTEER SUPPORTERS

- 8.56 The Commission's proposal for a network of volunteer supporters, coordinated by the Public Advocate, to assist people without a potential supporter received mixed responses. The Public Advocate favoured this approach as a last resort, noting its experience with other volunteer programs.⁶⁴ Other groups suggested that volunteer supporters might assist people who lack access to appropriate support from family or friends.⁶⁵ However, the Federation of Community Legal Centres felt that volunteers could be a 'second best' option and expressed concerns about the quality of support that would be provided.⁶⁶

SAFEGUARDS

- 8.57 Suggestions to safeguard against the misuse or abuse of supported decision-making arrangements included:
- registration of arrangements⁶⁷
 - police checks on appointments⁶⁸
 - appointment of more than one supporter⁶⁹
 - appointment of monitors⁷⁰
 - community education and training for appointments.⁷¹
- 8.58 The Council on the Ageing acknowledged, however, that people cannot be fully protected against all forms of abuse.⁷²

59 Submissions CP 19 (Office of the Public Advocate), CP 21 (Action for More Independence & Dignity in Accommodation), CP 45 (Scope Vic), CP 59 (Carers Victoria), CP 68 (Australian Nursing Federation) and CP 73 (Victoria Legal Aid).

60 Submission CP 19 (Office of the Public Advocate).

61 Submissions CP 45 (Scope Vic), CP 57 (Aged Care Assessment Service in Victoria) and CP 76 (Federation of Community Legal Centres (Victoria)).

62 Submissions CP 24 (Autism Victoria), CP 59 (Carers Victoria) and CP 78 (Mental Health Legal Centre).

63 Submission CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

64 Submission CP 19 (Office of the Public Advocate).

65 Submissions CP 22 (Alzheimer's Australia Vic), CP 45 (Scope Vic), CP 59 (Carers Victoria) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

66 Submission CP 75 (Federation of Community Legal Centres (Victoria)).

67 Submissions CP 19 (Office of the Public Advocate), CP 21 (Action for More Independence & Dignity in Accommodation), CP 22 (Alzheimer's Australia Vic) and CP 65 (Council on the Ageing Victoria).

68 Submission CP 19 (Office of the Public Advocate).

69 Submission CP 45 (Scope Vic).

70 Submission CP 21 (Action for More Independence & Dignity in Accommodation).

71 Submission CP 22 (Alzheimer's Australia Vic).

72 Submission CP 65 (Council on the Ageing Victoria).

THE COMMISSION'S VIEWS AND CONCLUSIONS

INTRODUCTION OF SUPPORTERS INTO VICTORIAN GUARDIANSHIP LAWS

8.59 The Commission believes that new guardianship laws should enable the appointment of one or more 'supporters' to assist some people with the process of gathering information, making important decisions about their lives and implementing those decisions.

Reflects reality of decision-making impairment

8.60 At present, the law draws a sharp distinction between people who have capacity to make a decision and people who lack capacity to do so. This bright line does not reflect the reality of many people with impaired decision-making ability. There are many people in our community who do not clearly lack capacity, but who would benefit from support when making some important decisions. As Heather Wilkinson notes, in the context of older people:

In practice ... a substantial body of empirical evidence indicates that older mentally capable adults do not behave as isolated agents but rely heavily on family members ... for assistance in decision-making ... There is also evidence that legal, financial, health care and welfare decision-making is inevitably a family shared process.⁷³

8.61 There are some people who may have questionable capacity to make certain decisions without support, but who would clearly be able to do so with the support of a trusted family member or friend.

8.62 Formalising support relationships would provide important legal acknowledgment of the fact that mechanisms other than substitute decision making can be used to help people engage in activities requiring legal capacity.

Reflects current practice in the community

8.63 Many people receive informal support when making important decisions. Formalising 'support arrangements' is a practical way to achieve a middle ground between autonomous decision making and substitute decision making. As Robert Gordon has noted, supported decision making 'simply recognizes the way in which most adults function in their everyday lives'.⁷⁴

Provides status and guidance to relationships of support

8.64 Formalising a support relationship is an effective way of recognising the value of that relationship. It may also assist other important people in the person's life to understand and recognise the significance of the support relationship, especially at a time when fewer people are prepared to rely upon informal decision making assistance.

8.65 For the supporter, the authority to access information and to support the person when making and communicating decisions provides important powers without which their ability to assist the person could be quite limited. For example, an appointment could allow supporters to access confidential health information the person could not access themselves and to which access would otherwise be denied.

8.66 Formalising the relationship would also clarify the supporter's role to third parties who interact with the person and their supporter. This step should allow doctors, service providers, banks and others to deal with the person and their supporters with greater confidence.

73 Heather Wilkinson, 'Empowerment and Decision-making for People with Dementia: The Use of Legal Interventions in Scotland' (2001) 5(4) *Aging & Mental Health* 322, 324.

74 Robert M Gordon, 'The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making' (2000) 23(1) *International Journal of Law and Psychiatry* 61, 65.

- 8.67 Formalising support relationships also affords an opportunity to provide additional guidance to people who undertake these roles. Supporters could be provided with information at the time of appointment, and ongoing advice could be provided by community organisations and the Public Advocate.

Alternative to substitute decision making

- 8.68 The availability of formal support mechanisms may provide an alternative to a substitute decision-making appointment in many cases.
- 8.69 For VCAT, the ability to appoint a supporter will provide a clear, 'less restrictive' alternative to appointing a substitute decision maker. Where VCAT is satisfied that the support arrangement is sufficient to ensure a supporter can meet the person's needs, an appointment of this nature would preserve the autonomy and dignity of the person by retaining their decision-making authority.
- 8.70 The ability to appoint a supporter allows a person to plan and put supports in place to assist them with current or future decision-making needs. This step could also reduce the likelihood of a substitute decision maker being appointed at a time of crisis.

Some challenges of supported decision making

- 8.71 There are arguments against introducing a supported decision-making mechanism. Major concerns expressed to the Commission were:
- the added complexity of introducing new legal arrangements into law
 - the fact that there is limited experience of these arrangements in other parts of the world
 - the availability of a formal support relationships might promote their use at the expense of informal arrangements that are operating effectively
 - the potential for abuse and exploitation by use of these arrangements.
- 8.72 The concerns about added complexity are important because of the general lack of awareness of guardianship laws. The Commission believes, however, that these concerns can be alleviated by effective community education.
- 8.73 The Commission does not believe that formalising some support relationships will necessarily undermine those informal relationships that are working well. It is self-evident that the community has become more risk averse and less inclined to rely upon informal arrangements than it was when the Cocks Committee reported 30 years ago.⁷⁵ However, effective informal support arrangements should remain a major source of decision-making support for people with impaired decision-making ability. These arrangements should be encouraged whenever they are operating effectively and fairly.
- 8.74 The potential for support arrangements to facilitate abuse is a matter of concern. Later in the chapter, the Commission recommends a number of safeguards to minimise the risk of abuse.

RECOMMENDATIONS

Introduction of supporters into Victorian guardianship laws

30. A new appointment, known as a 'supporter', should be introduced into new guardianship laws.
31. The person supported under the arrangement should be known as the 'supported person'.

⁷⁵ See Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 19.

HOW SHOULD SUPPORTERS BE APPOINTED?

- 8.75 The Commission believes that it should be possible for a person to appoint their own supporter and for VCAT to have the power to make these appointments.

Personal appointment of supporters

- 8.76 A person should be able to appoint a supporter in writing. As some people who wish to make these appointments are likely to have some kind of decision-making impairment, the forms should be as accessible as possible. However, as with other personal appointments, a person should only be able to appoint a supporter in writing if they have the capacity to do so.
- 8.77 In Chapter 10, the Commission has recommended standardising the formal requirements for personal appointments of substitute decision makers and the Commission believes these requirements should also apply to supported decision-making appointments.

RECOMMENDATIONS

Personal appointments of supporters

32. A person should be able to appoint a personal supporter or financial supporter through a written 'supported decision-making appointment' if they have the capacity to do so.
33. The appointment should be in a prescribed form, written in plain English and available in an easy English format. Translated plain language and 'easy' versions of the form should also be available in community languages.
34. The formal requirements for the creation of a supported decision-making appointment should be the same as for other personal appointments.

VCAT appointment of supporters

- 8.78 There will be circumstances where a person may benefit from the appointment of a supporter to assist them with some decisions, but doubts are expressed about the person's capacity to make the appointment.
- 8.79 One option would be to permit a person who lacks capacity, but who can indicate a preference for assistance from a particular person, to appoint that person to assist them with decisions. This approach has been taken in relation to representation agreements in British Columbia.
- 8.80 While the aims of this mechanism are laudable, it does not adequately safeguard the interests of the person with impaired capacity and undermines the longstanding legal principle that people must have a minimum level of capacity before they can authorise other people to act on their behalf.
- 8.81 The Commission believes a more prudent approach in these situations would be to allow VCAT to make 'supported decision-making orders'. The external oversight provided by VCAT would help to ensure that the arrangement was appropriate and reflected the person's wishes. A VCAT appointment should also alleviate the concerns of third parties who might doubt a person's capacity to make a personal appointment of a supporter.
- 8.82 The consent of the person concerned and the proposed supporter should be clearly given before a VCAT appointment can be made.

- 8.83 The Commission believes that legislative criteria should guide VCAT when making appointments of supporters. While these appointments should not be made where it is clear that the person has the capacity to make the appointment themselves, they should be available for use in cases of doubt.
- 8.84 VCAT should be satisfied that the person's decision-making ability is impaired in some way, and that the person would be assisted to make decisions by the appointment of a supporter. Further, and consistent with other VCAT appointments, VCAT should be satisfied that there is a need for the appointment before making it.
- 8.85 The availability of one or more appropriate supporters will also be crucial to a decision to appoint a supporter as, unlike the appointment of a personal guardian or financial administrator, there is no default option of appointing the Public Advocate or a professional administrator.
- 8.86 The Commission believes that before making an appointment, VCAT should be satisfied that the appointment would promote the personal and social wellbeing of the person. We discussed this principle briefly in Chapter 6. This approach emphasises the centrality of the person and the outcomes sought for them. This is consistent with the approach proposed by the Commission in relation to all other criteria for VCAT appointments.
- 8.87 The 'personal and social well-being' principle is also discussed in Chapter 17 in relation to principles that should guide substitute decision makers when they make decisions pursuant to their appointments. The change from 'best interests' to the more 'modern' terminology of personal and social wellbeing was endorsed by the Victorian Parliament Law Reform Committee's 2010 *Inquiry into Powers of Attorney*.⁷⁶

RECOMMENDATION

VCAT appointed supporters—criteria for appointment

35. VCAT should be able to appoint a personal or financial supporter to assist a person if:
- (a) the person's ability to make or implement decisions about the matters referred to in the order is impaired in some way
 - (b) the person would be assisted to make decisions about the matters referred to in the order if provided with appropriate guidance and support from one or more supporters
 - (c) the person is unable to make the appointment themselves
 - (d) there is a need for an appointment to be made
 - (e) the proposed supporter/s is suitable to act in the role and consents to the appointment
 - (f) the person freely and voluntarily consents to:
 - (i) the appointment of the individual/s who are proposed to be appointed as a supporter
 - (ii) all other aspects of the order
 - (g) the appointment of the supporter/s will promote the personal and social wellbeing of the person.

⁷⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 173–4.

How should VCAT decide who to appoint as a supporter?

- 8.88 The Commission believes that VCAT should be guided by clear criteria when determining whether a person is a suitable supporter. These criteria should focus on the proposed supported person's wishes, the nature of the relationship between that person and the proposed supporter, the ability of the proposed supporter to assist the person to make decisions, and the likelihood that the supporter will advance the person's interests.

RECOMMENDATION

The identity of a supporter

36. In determining whether a person is suitable to act in the role of supporter, VCAT must take into account:
- (a) the wishes of the person
 - (b) the desirability of preserving existing family relationships, and other relationships of importance to the person
 - (c) the nature of the relationship between the person and the proposed supporter, and in particular whether the relationship is characterised by trust
 - (d) the ability and availability of the proposed supporter to assist the person to make the decisions about the matters to be referred to in the order
 - (e) whether the proposed supporter will act honestly, diligently and in good faith in the performance of their role
 - (f) whether the proposed supporter has a potential conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any potential conflicts.

Professional supporters should not be appointed

- 8.89 The Commission does not believe that the Public Advocate should be eligible for appointment as a supporter, or that payment should be available to a professional financial supporter such as State Trustees. Supporter arrangements are designed for close, personal relationships, which cannot be replicated by professional appointments.
- 8.90 However, the Commission does not wish to preclude the possibility that an employee of an organisation such as an advocacy group may be appointed as a supporter in some cases, and therefore be indirectly remunerated for this service.

RECOMMENDATIONS

Professional supporters should not be appointed

37. The Public Advocate should not be able to be appointed as a 'supporter'.
38. Supporters should not receive any direct financial remuneration for the performance of their role.

TYPES OF DECISIONS COVERED BY SUPPORT ARRANGEMENTS

- 8.91 As with other VCAT and personal appointments, the Commission believes that the types of decisions the person is being supported to make should be clearly specified in the VCAT order or the document in which the personal appointment is made.



RECOMMENDATIONS

Types of decisions covered by support arrangements

39. The supported decision-making appointment or order should specify the areas of decision making in which the supporter is authorised to act.
40. The appointment or order should also specify any conditions or limitations upon the appointment.

Financial decisions should be included

- 8.92 The Commission is aware of the concerns held by some people and organisations about the confusion and uncertainty that could arise if support arrangements were available to assist people when making financial decisions.
- 8.93 On the other hand, the Commission has heard throughout the review that financial decisions often have a very significant impact on a person's wellbeing and that some people experience loss of control over these decisions as a deep infringement upon their autonomy and dignity.
- 8.94 Current guardianship law provides only two mechanisms to assist people with the process of financial decision making: administration orders and enduring powers of attorney (financial). Both are substitute decision-making mechanisms, even though enduring powers of attorney (financial) may be able to be used as instruments of support. The Commission believes that in keeping with the spirit of the Convention, Victorian law should provide additional options to assist people to exercise the capacity that is necessary for financial decision making.
- 8.95 While the concerns about confusion and uncertainty are important, there is evidence that other financial support mechanisms appear to operate effectively. For example, Centrelink has a number of arrangements available to assist people to manage their social security payments. 'Correspondence nominees' and 'payment nominees' may be appointed to assist people with communications with Centrelink and with the management of their money.⁷⁷
- 8.96 The Commission's proposal for financial supporters provides an instrument designed to assist people with financial matters without conferring substitute decision-making power upon another person. Appointments of this nature should permit some people who are currently under administration orders, but who have some ability to manage their finances, to participate more in the decisions that affect them. This mechanism should also assist people who are currently relying upon informal supports that are proving difficult because of the risk management concerns of third parties.

RECOMMENDATIONS

Personal and financial decisions

41. Supported decision-making appointments and orders should be available for both personal and financial decisions.
42. Separate orders or appointments should exist in relation to the appointment of 'personal supporters' and 'financial supporters'.

⁷⁷ See *Social Security (Administration) Act 1999* (Cth) pt 3A.

POWERS OF SUPPORTERS

- 8.97 It is often possible to support a person in decision making without any legal authority. In practice, the quality of the support a person receives to make important decisions will often depend just as much on the nature of the relationship between the person and their supporter, and the supporter's skills and abilities, as it does on the terms of the supporter's legal authority to act.
- 8.98 However, one of the key benefits the Commission sees in the formalisation of a support arrangement is the ability to give supporters powers they may not otherwise have which would allow them to assist the supported person in ways that might previously have been impossible. These powers should give the supporter authority to:
- collect information on behalf of the person
 - discuss the information with the person and assist them in decision making
 - communicate decisions on behalf of the person.
- 8.99 These authorities are the same as those available to supporters in Alberta, Canada.⁷⁸
- 8.100 Where the supporter is a close family member, such as a parent or partner, these support roles might already be recognised, either informally or through the operation of other laws.⁷⁹ However, the Commission believes it is important to clarify the authority supporters have when assisting another person.

Authority to access information

- 8.101 In some instances, a person without clear legal authority to act may have trouble accessing relevant information when making an important decision. Examples include medical reports, financial statements, and other personal information held by government departments. The Commission has heard that many people experience significant frustrations when trying to access this information on behalf of family members and close friends whose impaired ability means they cannot collect the information themselves. A supporter with clear powers to access this information should be able to avoid these frustrations.
- 8.102 The support appointment or order should not permit the supporter to access information that the person themselves could not have obtained had they had the ability to do so.

Authority to assist person in decision making

- 8.103 This authority recognises the central role of the supporter in providing decision-making assistance. The actual tasks might include:
- explaining the relevant information to the person in a way they can understand
 - spending time with the person to help them consider the options available to them, and the consequences of these options
 - providing advice about which options the person might choose
 - helping the person identify wishes and preferences.
- 8.104 These roles reflect the reality that most people, and particularly people with impaired decision-making ability, make important decisions with the support of those closest to them.

⁷⁸ See *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, s 4(2).

⁷⁹ For example, section 85 of the *Health Records Act 2001 (Vic)* allows an individual to authorise another person in writing to access health information on their behalf. A person who lacks capacity to consent to or request access to health information may have such information accessed by an 'authorised representative': at s 85.

Authority to communicate decisions and advocate where necessary

- 8.105 This authority recognises that a person may have difficulty communicating decisions and would be assisted by authorising another person to communicate on their behalf. For many people, this could be the most significant authority available under the appointment because it would give them support when implementing their decisions but would not deprive them of the power to make those decisions.
- 8.106 However, the Commission recognises that this power is open to misuse because a supporter could use it as a form of proxy decision making. For this reason, the Commission recommends later in this chapter that it should be possible to apply to VCAT to review supported decision-making appointments if it is suspected that the supporter is communicating their own decisions rather than those of the supported person.

No authority to make substitute decisions

- 8.107 The Commission believes that to avoid doubt, the law should state that supporters are unable to exercise any kind of substitute decision-making authority on behalf of the person, or use their powers without the knowledge and consent of the supported person. To attempt to do so would defeat the purpose of the arrangement.

Prohibition on communicating decisions about significant financial transactions

- 8.108 The Commission recognises that, as with all relationships of trust and confidence, there is the potential for misuse of the supporter's powers, especially in relation to the power to communicate a financial decision on behalf of the supported person.
- 8.109 The power to communicate decisions seeks to assist people in their dealings with organisations such as banks, utility and other service providers, and government agencies. While the supporter may assist the person when making decisions, they have no authority to make decisions for the person they are assisting. As an added safeguard, the law should explicitly prohibit the use of the communication power in relation to significant financial transactions. These decisions will need to be communicated by the person themselves or other arrangements will need to be considered to assist them if this is not possible, such as, for example, substitute decision making.

RECOMMENDATIONS**Powers of supporters**

43. A supported decision-making appointment or order should authorise a supporter to exercise some or all of the following powers in relation to a decision:
- (a) the power to access, collect or obtain or assist the supported person in accessing, collecting or obtaining from any person any relevant information to assist the supported person to understand the information
 - (b) the power to discuss the relevant information with the supported person in a way the person can understand and that will assist the person in making the decision
 - (c) the power to communicate or assist the supported person in communicating the decisions to other people, and advocate for the implementation of the person's decision where necessary.

44. The appointment or order should specify which of these powers the supporter is authorised to exercise.
45. To avoid doubt, the law should specify that:
- (a) A supporter is not authorised to make decisions on behalf of the supported person, and may not exercise their authority without the knowledge and consent of the person.
 - (b) A supporter may not use their authority to access, collect or obtain information that the supported person themselves could not legally have accessed, collected or obtained if able to do so.
 - (c) The power to communicate decisions under a support agreement should not authorise the supporter to enter into significant financial transactions, including:
 - (i) investing for the supported person
 - (ii) continuing the investments of the supported person, including taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by their existing shareholding
 - (iii) signing any documents that have legal effect.

RECOGNITION OF DECISIONS MADE UNDER SUPPORT APPOINTMENTS

- 8.110 An important element of the effectiveness of support arrangements will be the recognition of these arrangements by others. This will be particularly important where the supporter seeks to use their power to gather information, or to assist the person to communicate a decision.
- 8.111 To ensure the relationship is effective, the law should stipulate that decisions made or communicated with the assistance of a supporter should be recognised as the decision of the supported person whenever it is appropriate to do so. This recognition should not affect the need for relevant documents to be signed by the supported person whenever this is required by law or by the practices of a party with whom they are transacting.

RECOMMENDATION

Recognition of decisions made under support appointments

46. Any decision made with the assistance of a supporter or communicated by or with the assistance of a supporter within the authority of the appointment or order should be recognised as the decision of the supported person for all purposes.

RESPONSIBILITIES OF SUPPORTERS

- 8.112 The Commission believes that supporters should have similar responsibilities to those of a substitute decision maker when performing their supporting role. These responsibilities should be set out in new guardianship legislation and in documents given to supporters at the time of their appointment.
- 8.113 The fiduciary obligations to act honestly, diligently and in good faith and to avoid conflicts of interest should be clearly articulated. The law should also specify that the supporter should respect the privacy and confidentiality of the person.

- 8.114 To avoid doubt, guardianship legislation should make it clear that supporters cannot use their authority to assist the person to conduct an illegal act.
- 8.115 Consistent with the nature of the support relationship, supporters should be obliged not to pressure a supported person to reach a particular decision.

RECOMMENDATIONS

Responsibilities of supporters

47. The law should specify that in performing their role, supporters should:
- (a) assist the supported person to make the decisions specified in the appointment or order
 - (b) act honestly, diligently and in good faith
 - (c) act within the limits of the appointment, and comply with any conditions, limitations or requirements set out in the appointment or order
 - (d) identify and respond to situations where the supporter's interests conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, and seek external advice where necessary
 - (e) respect the privacy and confidentiality of the supported person by:
 - (i) only collecting personal information about the supported person in their capacity as supporter to the extent that is relevant to and necessary for carrying out the supporter's role, and
 - (ii) only disclosing such information:
 - with the supported person's consent, and
 - for a purpose that is relevant to and necessary for carrying out the supporter's role, or
 - for the purposes of any legal proceedings arising out of the Act or of any report of any such proceedings, or
 - with any other lawful excuse.
48. The law should also require that supporters:
- (a) not use their authority to assist the supported person to conduct an illegal activity
 - (b) not coerce, intimidate or in any way unduly influence the supported person into a particular course of action.

REVIEW OF SUPPORTED DECISION-MAKING ARRANGEMENTS BY VCAT

- 8.116 The Commission believes that VCAT should be required to review its supported decision-making orders and should also have jurisdiction to review personal appointments of supporters when there are grounds for believing that the arrangement is not operating satisfactorily.

Regular reviews of supported decision-making orders by VCAT

- 8.117 VCAT should review supported decision-making orders at regular intervals. The current usual standard for other orders under guardianship legislation—an initial review within 12 months and thereafter three-yearly reviews—seems appropriate.

RECOMMENDATION

Regular reviews of supported decision making-orders by VCAT

49. Supported decision-making orders made by VCAT must be reviewed by VCAT at least once within the first 12 months of making the order and subsequently at least once every three years.

Applications for review at VCAT

- 8.118 It should be possible for any person with an interest in the affairs of the supported person to apply to VCAT for review of a personal supported decision-making appointment, or a VCAT order, when there are grounds for believing that the appointment or order should no longer operate.

RECOMMENDATIONS

Applications for review at VCAT

50. Any person with an interest in the affairs of the supported person should be able to apply for review of a supported decision-making arrangement made either by VCAT order or by personal appointment.
51. Applications to VCAT should be possible in respect of supported decision-making appointments or orders on the basis that:
 - (a) the supported person lacked the capacity to make the personal appointment
 - (b) the appointment was not validly made
 - (c) the supported person no longer has the capacity to participate in a supported decision-making arrangement
 - (d) the supported person no longer consents to the appointment or order
 - (e) the supporter is acting in breach of their responsibilities
 - (f) the order is no longer appropriate to the needs of the supported person
 - (g) the supporter is exercising undue influence over the supported person.

Powers of VCAT upon review

- 8.119 The Commission believes that when conducting reviews of this nature, VCAT should have similar powers to those it has when reviewing substitute decision-making arrangements. These include the power to revoke, vary, continue or amend the appointment or order.

RECOMMENDATION**Powers of VCAT upon review**

52. Upon hearing an application for review, VCAT should have the power to:
- (a) revoke the appointment
 - (b) vary the appointment with the consent of the supported person
 - (c) continue the order for a specified period with the consent of the supported person
 - (d) amend the appointment with the consent of the supported person
 - (e) revoke the order, and where appropriate, replace it with a different order.

SAFEGUARDS TO PROTECT SUPPORTED PERSONS

- 8.120 While some people and organisations expressed concern about the risk of abuse of supported decision-making arrangements,⁸⁰ the need to strike a balance between adequate safeguards and excessive regulation was widely accepted.⁸¹ To do otherwise might discourage honest people from accepting an appointment as a supporter. Too much regulation would also have a tendency to undermine the important relationship of trust between a supporter and a supported person.
- 8.121 Regular review of VCAT orders, coupled with the ability of any interested party to apply for review of the operation of a supported decision-making arrangement, should provide sufficient safeguards against abuse of these arrangements.

Appointment of monitors under supported decision-making agreements

- 8.122 As with other personal appointments, the supported person should be able to appoint a 'monitor' to oversee the arrangement. This is consistent with the recommendations of the Victorian Parliament Law Reform Committee's *Inquiry into Powers of Attorney* in relation to powers of attorney,⁸² and the approach of the South Australian supported decision-making trial.⁸³

REGISTRATION OF SUPPORTED DECISION-MAKING APPOINTMENTS

- 8.123 In Chapter 16, the Commission proposes the introduction of an online register of personal appointments and VCAT orders. The Commission believes that a register will provide greater certainty for third parties about the validity of decision-making arrangements, assist in the implementation of decisions made under these arrangements, and add to the protection against abuse for the represented or supported person.
- 8.124 The Commission believes that all supported decision-making appointments and orders should be included on the register, and should not come into force until they are registered. This will be particularly important where a supporter seeks to obtain confidential information on behalf of the person, or communicate the person's decision, and the third party is seeking evidence about the nature of the relationship between the supporter and supported person.

80 For eg, Submission CP 77 (Law Institute of Victoria).

81 Roundtable with seniors groups (Aged and Community Care Victoria; Council on the Ageing Victoria; Seniors Information Victoria; Elder Rights Advocacy; National Seniors (Victoria)) (8 April 2011); Submission CP 71 (Seniors Rights Victoria).

82 *Inquiry into Powers of Attorney*, above n 76, 197–200.

83 *Report of Preliminary "Phase I"*, above n 37, 10.

RECOMMENDATION

Registration of supported decision-making appointments

53. A supported decision-making appointment should not become a valid instrument until it is registered.

REVOCATION OF PERSONAL APPOINTMENTS AND ORDERS

- 8.125 The ongoing consent of the supported person is an essential part of these arrangements. The Commission believes that if a person no longer wishes to be supported, they should be able to revoke an appointment they have made themselves if they have the capacity to do so.
- 8.126 It will be necessary for the supported person to apply to VCAT for a VCAT supported decision-making order to be revoked. VCAT will then be able to consider whether it is necessary to make some other arrangement to ensure that the person's decision-making needs are met.
- 8.127 New guardianship legislation should also require supporters to apply to VCAT for review if they believe the supported person no longer consents to the arrangement or no longer has the capacity to make decisions with support.

RECOMMENDATIONS

Revocation of personal appointments and orders

54. A person supported under a supported decision-making appointment should be free to revoke the appointment at any time if they have the capacity to do so.
55. A person supported under a supported decision-making order should be able to apply to VCAT for revocation of a supported decision-making order at any time.
56. A supporter should be required to notify VCAT if they believe the supported person no longer consents to the arrangement, or no longer has the capacity to make their own decisions with support.
57. The registry should immediately be notified upon revocation or variation of a supported decision-making appointment or order.
58. Revocation should take effect once the revocation is registered.

FIDUCIARY DUTIES OF SUPPORTERS AND LIABILITY

- 8.128 The extent to which supporters should be personally liable for decisions made under a support appointment is challenging. It may be argued that the supported person should be responsible for the consequences of any decisions made within a supported arrangement because they retain decision-making autonomy.
- 8.129 While the supporter may be in a position to advise and influence the person in decision making, they are unable to control the outcome of the decision. It would therefore be unfair, as a matter of principle, to hold the supporter responsible for the consequences of any decisions made within a supported arrangement. Investment decisions are good examples of this issue.



- 8.130 However, the law should also recognise that the support relationship is one of special trust and confidence, and the supported person is likely to be in a position of vulnerability relative to their supporter. Therefore, to avoid doubt, the law should designate the relationship between a supporter and the supported person as fiduciary. Supporters who fail to comply with their fiduciary obligations will leave themselves open to the full range of equitable remedies that are available in these circumstances. Supporters should also be liable to the same civil and criminal penalties as substitute decision makers who abuse their powers.
- 8.131 We discuss penalties and financial redress in more detail in Chapter 18.

RECOMMENDATIONS

Fiduciary duties of supporters and liability

59. To avoid doubt, the relationship between the supporter and the supported person should be designated by law as one that imposes fiduciary obligations upon the supporter.
60. The law should specify that supporters are not personally liable for anything done or not done in good faith while exercising their authority or carrying out their duties and responsibilities.
61. Supporters should be liable for the same penalties as substitute decision makers for misuse and abuse of their powers, in addition to any other criminal penalties or civil remedies that may apply.

VOLUNTEER SUPPORTERS

- 8.132 In our consultation paper, the Commission recognised there could be circumstances where a person needs support in decision making, but does not have a family member or friend to take on this role.
- 8.133 The Commission proposed that volunteers might be able to fill this gap and suggested the Public Advocate might be able to coordinate a volunteer program, drawing on its experience with community guardians.
- 8.134 There was some support for this proposal, including from the Public Advocate. The Commission believes the proposal has merit because it could help to ensure that isolated Victorians with some impaired decision-making ability have access to an appropriate supporter.
- 8.135 A pilot program may be the most efficient and effective way of gauging whether there is a demand for volunteer supporters and a reasonable supply of appropriate people to undertake this important role.

RECOMMENDATIONS

Volunteer supporters

62. The Public Advocate should establish a pilot program, modelled broadly on the community guardianship program, to match people in need of decision-making support with appropriate individuals to become supporters in relation to personal decisions.
63. Appointments under this program could be made by personal appointment where possible, or by VCAT appointment with the consent of the supported person.

Chapter 9

Co-decision making

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Co-decision making

INTRODUCTION

- 9.1 In the previous chapter, the Commission recommended the introduction of a new legal arrangement—the appointment of a supporter—to provide more options to people who need decision-making assistance.
- 9.2 In this chapter, we consider another alternative to substitute decision making: the appointment of a ‘co-decision maker’. This reform involves the appointment of someone to make decisions jointly with a person with impaired decision-making ability. This differs from the appointment of a guardian or an administrator who makes decisions on behalf of the represented person, rather than with them jointly.
- 9.3 Like the appointment of a ‘supporter’, the appointment of a co-decision maker recognises that while a person may struggle to make decisions alone, they may be able to make decisions with assistance from a trusted family member or friend. However, the appointment of a co-decision maker is more restrictive than the appointment of a supporter. Under a co-decision-making arrangement, the person loses some autonomy because they must make decisions about particular matters jointly with a co-decision maker. Under this arrangement, a decision made by the person alone would not be legally valid.
- 9.4 Some Canadian provinces now permit co-decision making.¹ The Commission believes that co-decision-making arrangements should also be available to assist some Victorians with impaired decision-making ability.

CURRENT LAW

- 9.5 As we noted in Chapter 8 Victorian guardianship law does not provide for co-decision making. While a guardian, administrator or attorney can informally make joint decisions with the represented person, this practice is not legally recognised. The existing mechanisms authorise decision making by the substitute decision maker on behalf of the represented person, not with them.² The substitute decision-maker is the only person recognised as having authority to make the relevant decisions, and may act without the agreement of the represented person.

OTHER JURISDICTIONS

CANADA

- 9.6 Since the mid 1990s, some Canadian jurisdictions have taken the lead by incorporating various models of assisted decision making into their guardianship legislation.³
- 9.7 Recent changes to the guardianship laws in the Canadian provinces of Alberta⁴ and Saskatchewan⁵ have influenced the Commission’s proposals for co-decision making.

1 First in the province of Saskatchewan: see *The Adult Guardianship and Co-decision-making Act* SS 2000 c A-5.3, and subsequently in the province of Alberta: see *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2.

2 See *Guardianship and Administration Act 1986* (Vic) ss 24, 25, 48.

3 A good overview of the various developments is given in Robert M Gordon, ‘The Emergence of Assisted (Supported) Decision-making in the Canadian Law of Adult Guardianship and Substitute Decision-Making’ (2000) 23 (1) *International Journal of Law and Psychiatry* 61. See also Leslie Salzman, ‘Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act’ (2010) 81 *University of Colorado Law Review* 157, 237–9.

4 *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2.

5 *The Adult Guardianship and Co-decision-making Act* SS 2000 c A-5.3.

Alberta—co-decision-making orders for personal decisions

- 9.8 Co-decision making has been available in Alberta since October 2009.⁶ These joint decision-making appointments are made by a court. Unlike guardianship orders, co-decision-making orders must be made with the consent of the person with the decision-making impairment.⁷ Co-decision-making orders in Alberta apply to non-financial decisions only,⁸ and operate by requiring the appointed ‘co-decision maker’ and the person with impaired capacity to work together and agree before proceeding with a decision that is covered by the order.
- 9.9 These arrangements are designed for situations where the court is satisfied that the person’s capacity to make certain decisions is ‘significantly impaired’, but the person would be able to make these decisions if provided with appropriate guidance and support.⁹ Co-decision making allows a person to retain greater control over their personal circumstances than does guardianship, because they are still legally responsible for making their own decisions, albeit with another person. If there is a disagreement between decision makers, the decision of the person with impaired capacity takes precedence.¹⁰ The co-decision-making order can specify that a contract is voidable without the signature of the assisted adult and their co-decision maker,¹¹ and a co-decision maker cannot refuse to sign a contract if ‘a reasonable person could have made the decision and the decision is not likely to result in harm to the assisted adult’.¹²
- 9.10 The co-decision maker is usually a family member or close friend of the person with impaired capacity. The Public Guardian of Alberta cannot be appointed co-decision maker.¹³
- 9.11 The Public Guardian of Alberta suggests that co-decision-making arrangements have the greatest potential to assist people with relatively stable, long-term cognitive impairments.¹⁴ However, even for people with a deteriorating condition such as dementia, the Public Guardian argues that there may be a long period where the person could benefit from a co-decision-making arrangement.¹⁵
- 9.12 The Public Guardian of Alberta argues that the success of co-decision making is highly dependent on there being a stable, trusting relationship, and is unlikely to be successful where there are fractured family relationships and conflict.¹⁶ The Public Guardian’s observations are that people involved in these relationships have generally had a clear idea of the role, and that concerns about the potential for co-decision making to blur into substitute decision making have not been realised.¹⁷

6 *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, div 2. The Commission has spoken to the Office of the Public Guardian in Alberta, who advised that as of March 2011 there were 11 co-decision making orders in place, with 40 applications waiting to be heard. Teleconference with Brenda Lee-Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada (19 May 2011).

7 *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, s 13(4)(c).

8 *Ibid* s 12. The terms of the order specify the areas of decision making over which the order applies, and the Act outlines the types of decisions that can be specified in the order: at s 17(1)–(2).

9 *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, s 4(a). The term ‘significantly impaired’ is further defined in regulations: see *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, reg 2(d).

10 See Government of Alberta, *Understanding Co-decision-making* (2010) <<http://www.seniors.alberta.ca/opg/Guardianship/Publications/OPG5633.pdf>>.

11 *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, s 17(5).

12 *Ibid* s 18(5).

13 *Ibid* s 15.

14 Teleconference with Brenda Lee-Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada (19 May 2011).

15 *Ibid*.

16 *Ibid*.

17 *Ibid*.

Co-decision making

Saskatchewan—co-decision-making orders for personal and financial decisions

- 9.13 The Saskatchewan *Adult Guardianship and Co-decision-making Act*¹⁸ has been in operation since 2001. Like Alberta's legislation, it allows for 'co-decision-making' orders to be made by a court (but not by personal appointment). However, the Saskatchewan legislation goes further than that of Alberta by providing for the appointment of 'property co-decision makers' who make decisions in relation to financial matters in conjunction with the person with the impairment.¹⁹ Unlike in Alberta, the consent of the assisted person is not required before a co-decision maker can be appointed, but the court is directed to appoint someone who has 'a long-standing caring relationship with the adult' where possible.²⁰
- 9.14 Personal and property co-decision-making orders authorise the co-decision maker to:
- advise the adult in relation to the relevant decisions
 - share decision-making authority for those decisions
 - do all things necessary to give effect to their authority.²¹
- 9.15 However, the law also directs co-decision makers to 'acquiesce in a decision made by the adult'.²² Further, where joint signatures of the adult and the co-decision maker are required, the co-decision maker must not refuse to sign the document if a reasonable person could have made the decision in question and no harm to the adult or loss to their estate is likely to result from the decision.²³
- 9.16 Both personal and property co-decision-making orders may be subject to regular review by the court,²⁴ but further additional safeguards apply in the case of property co-decision makers. Upon appointment, property co-decision makers must lodge an inventory of the adult's estate with the court and the Public Guardian and Trustee, and thereafter provide these bodies with annual accounts.²⁵ The court may also require them to provide a bond.²⁶
- 9.17 Although co-decision-making orders have been available in Saskatchewan for 10 years, few applications have been made.²⁷ Possible explanations for this limited use include:
- the significant cost involved in making an application to the court for a co-decision-making or guardianship order in Saskatchewan²⁸
 - a lack of public education about the availability of co-decision making
 - the fact that many people who provide this kind of assistance do so informally, without the need for a court order.²⁹

OTHER AUSTRALIAN JURISDICTIONS

- 9.18 No other Australian jurisdiction currently recognises co-decision-making arrangements. As in Victoria, guardianship laws in other Australian states and territories encourage substitute decision makers to work with the represented person to make decisions, but at law, decision making remains the sole responsibility of the substitute decision maker.

18 *The Adult Guardianship and Co-decision-making Act* SS 2000 c A-5.3.

19 *Ibid* pt III.

20 *Ibid* ss 14(3)(b), 40(3)(b).

21 *Ibid* ss 17(1), 42(1).

22 *Ibid* ss 17(2), 42(2).

23 *Ibid* ss 17(2), 42(2).

24 *Ibid* ss 22(1)(b), 47(1)(b).

25 *Ibid* ss 53, 54.

26 *Ibid* s 55.

27 Consultation with Public Guardian and Trustee, Saskatchewan (27 August 2010); Doug Surtees 'The Evolution of Co-Decision Making in Saskatchewan' (2010) 73 *Saskatchewan Law Review* 75, 91.

28 Consultation with Public Guardian and Trustee, Saskatchewan (27 August 2010).

29 Doug Surtees, 'The Evolution of Co-Decision Making in Saskatchewan' (2010) 73 *Saskatchewan Law Review* 75, 92.

New South Wales

- 9.19 New South Wales, like Victoria, does not have formalised support arrangements. However, when acting as a financial manager, the New South Wales Trustee and Guardian may allow a person to deal with part of their estate without intervention from the financial manager.³⁰ The New South Wales Trustee and Guardian suggests that this power could be used in more cases to facilitate supported decision making.³¹
- 9.20 The 2010 New South Wales Legislative Council Standing Committee on Social Issues report, *Substitute Decision-making for People Lacking Capacity*, recommended that:
- the NSW Government consider amending NSW legislation in which the issue of capacity in relation to decision-making is raised ... to provide for the relevant courts and tribunals to make orders for assisted decision-making arrangements and to prescribe the criteria that must be met for such orders to be made.³²
- 9.21 The New South Wales Trustee and Guardian also intends to develop a supported decision-making trial together with the New South Wales Public Guardian, which is similar to the South Australian trial described in Chapter 8.³³

COMMUNITY RESPONSES

- 9.22 In the consultation paper, the Commission proposed the introduction of a new co-decision making appointment to help people in need of assistance with decision making.³⁴ The Commission suggested that a co-decision maker could be empowered to make decisions jointly with the person, rather than on their behalf. Co-decision-making arrangements could apply to both personal decisions and financial decisions.
- 9.23 The Commission proposed that 'co-decision makers' could be appointed either through written agreement similar to a power of attorney, or through an order by the Victorian Civil and Administrative Tribunal (VCAT). The agreement or order appointing a co-decision maker could specify the areas of decision making covered.
- 9.24 As with the Commission's proposal for supporters, the Commission suggested that the Public Advocate should not be a co-decision maker. This is because a co-decision making role is intended to be a personal role that draws upon the strengths of an existing relationship.
- 9.25 The Commission received a range of responses about the introduction of co-decision makers. While there was support for the proposal, more people expressed reservations about co-decision makers than about supporters.
- 9.26 Some groups supported the entire continuum of decision-making appointments proposed by the Commission, including co-decision makers.³⁵ The Council on the Ageing stated: 'We welcome the introduction of supported and co-decision making mechanisms which facilitate greater flexibility and choice for the donor, and enable a "continuum" of decision-making processes'.³⁶
- 9.27 Responses to our online forum were mixed, with some broadly supporting the idea of co-decision making, but querying how it may operate in practice.³⁷

30 *New South Wales Trustee and Guardian Act 2009* (NSW) s 71.

31 Submission CP 79 (NSW Trustee and Guardian).

32 Standing Committee on Social Issues, NSW Legislative Council, *Substitute Decision-making for People Lacking Capacity* (2010) 63.

33 Submission CP 79 (NSW Trustee and Guardian).

34 See Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) ch 7.

35 Submissions CP 19 (Office of the Public Advocate), CP 29 (STAR Victoria), CP 59 (Carers Victoria), CP 64 (Women with Disabilities Victoria), CP 65 (Council on the Ageing Victoria) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

36 Submission CP 65 (Council on the Ageing Victoria).

37 See generally 'Is co-decision making a good idea?' on Victorian Law Reform Commission, *Guardianship Review Forum* (20 May 2011) <<http://consultations.lawreform.vic.gov.au/topic/is-co-decision-making-a-good-idea>>.

Co-decision making

- 9.28 Some organisations favoured the introduction of ‘supporters’, but not ‘co-decision makers’.³⁸ The Mental Health Legal Centre indicated that while they initially supported the proposal for co-decision makers, negative consumer feedback and concerns about the potential for abuse had changed their view.³⁹
- 9.29 Victoria Legal Aid expressed concern that a co-decision-making arrangement has the potential to be an ‘uneven partnership’, where the co-decision maker may heavily influence the person with a disability to agree with a decision that the co-decision maker thinks is appropriate in the circumstances.⁴⁰
- 9.30 The Federation of Community Legal Centres shared Victoria Legal Aid’s concerns, and argued that ‘the co-decision making model ... seems likely to increase complexity without much associated benefit’.⁴¹
- 9.31 Some organisations opposed the introduction of both supporters and co-decision makers.⁴² State Trustees opposed the introduction of stand-alone co-decision-making arrangements, arguing that similar outcomes are available through adjustments to existing laws.⁴³ As an alternative to co-decision-making orders, State Trustees proposed that a limited form of administration order could be made in some cases. Under this proposal, VCAT could be empowered, ideally with the consent of the individual, to make a variant of an administration order, under which the individual would only be deemed incapable of making his or her own decisions where the administrator (co-decision maker) actively notifies the relevant third party that a particular transaction or type of transaction does not have the administrator’s approval.⁴⁴
- 9.32 The person under the administration order would retain decision-making autonomy except when the administrator opposed a particular transaction.

THE COMMISSION’S VIEWS AND CONCLUSIONS

- 9.33 The Commission has refined its initial co-decision-making proposal in light of both community responses and further research into the operation of these mechanisms in Canada. The major change to the initial proposal has been to recommend that these appointments should be available only when made by a tribunal.

INTRODUCTION OF CO-DECISION MAKERS INTO VICTORIAN GUARDIANSHIP LAWS

- 9.34 The Commission believes that new guardianship laws should permit ‘co-decision-making’ appointments. These arrangements seek to enable people with some impairment to their decision-making ability to participate in decisions that affect their lives to the greatest possible extent without exposing them to potential harm. Together with the availability of ‘supporters’ recommended in Chapter 8, the availability of co-decision-making appointments would provide a new continuum of decision-making arrangements that better reflect the different levels of assistance various people require when making important decisions.
- 9.35 Though co-decision making would limit the decision-making autonomy of a person with impaired decision-making ability, the appointment would expand possibilities for their participation because it would allow the person to remain involved in the decision-making process. Co-decision making requires the agreement of the person

38 Submissions CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

39 Submission CP 78 (Mental Health Legal Centre).

40 Submission CP 73 (Victoria Legal Aid).

41 Submission CP 75 (Federation of Community Legal Centres (Victoria)).

42 For eg, Submissions CP 69 (Australian Medical Association (Victoria)) and CP 77 (Law Institute of Victoria).

43 Submission CP 70 (State Trustees Limited).

44 Ibid.

with impaired decision-making for any decision made pursuant to the order to be valid. The appointment recognises that impaired decision-making ability does not mean the person should lose all opportunity to participate in decision making.⁴⁵ A person with impaired decision-making ability who is assisted by a co-decision-making arrangement is able to control outcomes of decisions affecting them to a far greater degree than a person under a substitute decision-making order. They are also recognised by others as being legal participants in their own decision making.

- 9.36 As with supporters, the Commission believes the appointment of co-decision makers will better reflect the reality of many people's lives. This will be particularly so where a person is already jointly making decisions with another person on an informal basis.
- 9.37 The innovation of new legal arrangements such as co-decision making is consistent with increasing local and international moves towards supported and assisted decision making.⁴⁶ Support is building for these types of tiered decision-making practices to be incorporated into modern guardianship regimes.⁴⁷
- 9.38 For some people, co-decision making will be an effective alternative to the appointment of a guardian or an administrator and more useful than a supporter will be when a person's ability to make their own decisions is questionable. For example, a person in the early stages of dementia may have a trusted life partner appointed as a financial co-decision maker to make decisions with them, rather than have their partner appointed as a financial administrator to make decisions on their behalf.
- 9.39 In other situations, the appointment of a co-decision maker might add legal certainty to a supportive arrangement that has been operating informally. For example, a daughter who has been supporting her father to manage his financial affairs during the early stages of dementia may be better able to deal with banks and other organisations if this relationship is formally recognised.
- 9.40 Co-decision making recognises that while the legal concept of capacity is based on the assumption that there is a clear dividing line between those people 'with capacity' and those who 'lack capacity', the reality is quite different. There is increasing recognition of a continuum of decision-making abilities, and of the difficulty in defining the boundaries of 'capacity'.⁴⁸ There is also increasing recognition of the fact that decision-making ability is not solely dependent on the person's cognitive abilities, but may also be affected by their environment and, in particular, the availability of appropriate support.⁴⁹

POTENTIAL CHALLENGES OF CO-DECISION MAKING

- 9.41 There are a number of important issues to address when considering the introduction of a new co-decision-making arrangement for some people with impaired decision-making ability.

45 Surtees, above n 29, 89.

46 See Robert M Gordon, 'The Emergence of Assisted (Supported) Decision-making in the Canadian Law of Adult Guardianship and Substitute Decision-making' (2000) 23(1) *International Journal of Law and Psychiatry* 61; Makoto Arai, 'Guardianship for Adults in Japan: Legal Reforms and Advances in Practice' (2005) 24 *Australasian Journal on Law and Ageing* S19; Kees Blankman, 'Guardianship Models in the Netherlands and Western Europe' (1997) 20(1) *International Journal of Law and Psychiatry* 47.

47 See, eg, Leslie Salzman, 'Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act' (2010) 81 *University of Colorado Law Review* 157. In the Australian context, the Public Guardian of South Australia has established a 'supported decision making research trial': see South Australian Supported Decision Making Project, *Report of Preliminary "Phase 1"* (2011). The NSW Trustee and Guardian is planning to establish a supported decision-making pilot program: see Submission CP 78 (NSW Trustee and Guardian).

48 See, eg, Kathleen Glass, 'Refining Definitions and Devising Instruments: Two Decades of Assessing Mental Competence' (1997) 20(1) *International Journal of Law and Psychiatry* 5.

49 In England and Wales, for example, a core principle of guardianship laws is that 'a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success': see *Mental Capacity Act 2005* (UK) s 1(3).

Co-decision making

Complexity and abuse

- 9.42 One of the main concerns is the added complexity, and potential confusion, these new legal appointments could create. The same concern was expressed in relation to the Commission's proposal to introduce the appointment of 'supporters' in Chapter 8. This concern is greater for co-decision makers because the relationship itself is more complex. Defining the meaning of a 'joint' decision, identifying the potential users of these arrangements, and describing the responsibilities of third parties who transact with co-decision makers are all important challenges.
- 9.43 Although co-decision making establishes a joint decision-making mechanism, the co-decision maker may be in a position to exert significant influence over a person with impaired decision-making ability. This creates the potential for abuse. In circumstances where a person's decision-making ability fluctuates considerably, it may also be difficult for co-decision makers to determine whether a decision has been jointly made, or whether it is really a substitute decision.
- 9.44 While concerns about added complexity are legitimate, they are not sufficiently compelling to prevent introduction of this new mechanism. The Commission believes that much can be done to educate the public about these new arrangements.⁵⁰
- 9.45 Education of co-decision makers and regular review of orders by the tribunal will safeguard against abuse, as will rigorous scrutiny by the tribunal of the person appointed to this role, and the ability of any person with concerns to apply to the tribunal for review of the order.
- 9.46 The Public Guardian of Alberta has argued that there is a need for flexibility in co-decision making. Some decisions may require substantial support, and may come close to substitute decision making, but this does not necessarily undermine the arrangement provided the co-decision maker involves the person in the decisions and treats them with respect.⁵¹

Amending existing mechanisms instead

- 9.47 It is important to consider whether the introduction of a new legal relationship will meaningfully assist people with impaired decision-making ability.
- 9.48 The Commission believes that there is value in formally recognising the ability of a person to participate jointly with a trusted family member or friend in the decision-making process. While this can occur under a substitute decision-making arrangement, these arrangements:
- do not require the decision maker to work together with the person to the same extent
 - allow the substitute decision maker to make decisions that are opposed by the represented person
 - represent to the world at large that the person with impaired decision-making ability does not have the capacity to make the specified decisions.
- 9.49 Co-decision making is qualitatively different to substitute decision making because the person with impaired decision-making ability continues to have legal responsibility for decisions about their own affairs, even though those decisions require the agreement of another person.

50 The experience in Alberta, where a significant information and education campaign has been embarked upon, suggests this is possible: teleconference with Brenda Lee-Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada (19 May 2011). This is in contrast to the experience in Saskatchewan, where education has been limited, and uptake of co-decision making has been lower: see Surtees, above n 29, 91; consultation with Public Guardian and Trustee, Saskatchewan (27 August 2010).

51 Teleconference with Brenda Lee-Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada (19 May 2011).

9.50 In Chapters 10, 12 and 17 the Commission discusses reforms to the role of substitute decision maker to emphasise the importance of both involving the person as much as possible, and making decisions that are consistent with the person's wishes, views, beliefs and values. These reforms complement the introduction of new supported and co-decision-making arrangements.

HOW SHOULD CO-DECISION MAKERS BE APPOINTED?

9.51 In our consultation paper, the Commission proposed that co-decision makers could be appointed either by personal appointment or by tribunal order.

9.52 Upon further consideration, the Commission believes that co-decision-making appointments should be made by tribunal order only. In both Alberta and Saskatchewan, co-decision makers can be appointed by court order only.

Reasons why co-decision makers should not be personally appointed

9.53 There are two main reasons why the Commission believes it is inappropriate for a co-decision maker to be personally appointed:

- A person who needs a co-decision maker will have impaired decision-making ability.
- Co-decision-making appointments are not an ideal future planning mechanism.

9.54 If a person needs a co-decision maker, they will have diminished ability to make their own decisions. The person's ability to make a sound choice to enter into a co-decision-making arrangement and to appoint a responsible person to undertake that role may be in question. Because of a person's inherent vulnerability in these circumstances, protective considerations are important.

9.55 A person who wishes to have a co-decision maker, or any other person with a genuine interest in that person's affairs, should be able to apply to VCAT for an order. Tribunal oversight of the proposed arrangement provides appropriate external scrutiny as well as a mechanism for ongoing review of any co-decision-making appointment. It would also assure third parties that the arrangement is appropriate in the circumstances.

9.56 Co-decision making is generally not an effective future planning mechanism because it seeks to assist a person with their current decision-making needs. For example, a co-decision-making order may assist a person in the early stages of dementia, or someone with an acquired brain injury who needs support with certain decisions.

9.57 Co-decision making requires an acknowledgment that a person might struggle to make important decisions alone but could make those decisions quite ably in combination with another person. A personal appointment of a co-decision maker might place too much responsibility upon the co-decision maker to determine whether the person with impaired decision-making ability is no longer able to make their own decisions about some (or all) matters but could do so with the assistance of another person.

RECOMMENDATION

Introduction of co-decision-making orders in Victorian law

64. VCAT should be able to appoint a co-decision maker to assist a person in need of decision-making support.

Co-decision making

Criteria for tribunal appointments

- 9.58 Legislative criteria should guide VCAT in making co-decision-making appointments.
- 9.59 Before making a co-decision-making order, VCAT should be satisfied that the person's decision-making ability in relation to relevant decisions is impaired but that the person could make those decisions jointly with another trusted person. The tribunal should also be satisfied that there is a need for the appointment and that other arrangements, such as the appointment of a supporter, would be insufficient to meet the person's requirements.
- 9.60 As with the appointment of supporters, the ongoing consent of the person concerned is of fundamental importance. This is especially true for co-decision makers, as the person and the co-decision maker need to be able to work together and reach agreement to make the relevant decisions. If the person does not consent to the arrangement, it will not work effectively.
- 9.61 The availability of an appropriate co-decision maker is also crucial.
- 9.62 VCAT should be satisfied that the appointment will promote the personal and social wellbeing of the person before it makes an appointment. This is consistent with the approach proposed by the Commission in relation to all other tribunal appointments.

RECOMMENDATION

Criteria for tribunal appointments

65. VCAT should be able to appoint a co-decision maker to assist a person if it is satisfied that:
- (a) the person's ability to make the relevant decisions is impaired and it is unlikely that the person will have the capacity to make relevant decisions alone
 - (b) the person would have the capacity to make decisions jointly with the proposed co-decision maker about the matters referred to in the order
 - (c) the proposed co-decision maker is suitable to act in the role and consents to the appointment
 - (d) there is a need for an appointment to be made
 - (e) the person freely and voluntarily consents to:
 - (i) the appointment of the individual who is proposed to be appointed as a co-decision maker
 - (ii) all other aspects of the order
 - (f) the person's needs could not be met through informal arrangements or through the appointment of a supporter
 - (g) the appointment of the co-decision maker will promote the personal and social wellbeing of the person.

The identity of the co-decision maker

- 9.63 VCAT should be guided by specific criteria when determining whether a particular person is an appropriate co-decision maker. These criteria should include:
- the person's wishes
 - the nature of the relationship between the person and the proposed co-decision maker

- the ability of the co-decision maker to assist the person to make decisions
- the likelihood that the co-decision maker will put the interests of the person first.

9.64 Some people might not have a family member or close friend who is willing and able to be a co-decision maker.

Professional co-decision makers should not be appointed

9.65 Because of the very personal nature of the arrangement, the Public Advocate, State Trustees or other professional administrators should not be appointed as a co-decision maker. This is consistent with the Commission's recommendation in relation to supporters discussed in Chapter 8.

9.66 In Chapter 8, the Commission recommended that the Public Advocate should establish a pilot program linking people in need of decision-making support with appropriate volunteers. The Commission does, however, have some reservations about recommending the establishment of a volunteer co-decision making program. Co-decision making is likely to be a challenging role that requires the ability to work with the person to reach agreement about decisions. It is a very personal, trusting relationship that may prove difficult for a volunteer. The Commission suggests that the Public Advocate consider whether a volunteer co-decision maker program should be implemented when there is more evidence of its need and practicality.

9.67 Though a person may have multiple supportive relationships in their life, the Commission believes that to be workable, only one co-decision maker should be available for appointment in respect of each decision.

RECOMMENDATIONS

The identity of a co-decision maker

66. In determining whether a person is suitable to act in the role of co-decision maker, VCAT must consider:

- the wishes of the person
- the desirability of preserving existing family relationships, and other relationships of importance to the person
- the nature of the relationship between the person and the proposed co-decision maker, and in particular whether the relationship is characterised by trust
- the ability and availability of the proposed co-decision maker to assist the person to make decisions about the matters to be referred to in the order
- whether the proposed co-decision maker will act honestly, diligently and in good faith in the performance of their role
- whether the proposed co-decision maker has a potential conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any potential conflicts.

67. The Public Advocate should not be able to be appointed as a co-decision maker.

68. Co-decision makers should not receive any financial remuneration for the performance of their role.

69. No more than one co-decision maker should be appointed in relation to each type of decision to be made.

Co-decision making

TYPES OF DECISIONS COVERED BY CO-DECISION-MAKING ARRANGEMENTS

- 9.68 The Commission believes that co-decision-making orders should be able to cover the full range of decisions which may be available for personal guardians and financial administrators. We consider those powers in more detail in Chapters 10 and 13.
- 9.69 Because a person may not need support with all types of decisions, VCAT orders should clearly indicate those matters where co-decision-making arrangements will apply. For instance, a co-decision-making order could indicate that the arrangement will govern all real property transactions or all health care decisions.
- 9.70 Further detail might be appropriate in some instances. For example, a financial co-decision-making order might specify that investment decisions involving particular sums of money should fall within the scope of the co-decision-making order, but everyday expenditure decisions should not be included as the person is capable of managing these decisions without formal assistance.

RECOMMENDATIONS

Types of decisions covered by co-decision-making arrangements

70. A co-decision maker should be given the power to assist a person to make decisions in relation to any of the financial or personal matters that a substitute decision maker can be authorised to decide on behalf of another person.
71. The co-decision-making order should specify the types of decisions for which the person needs support.
72. The order may also specify any conditions or limitations upon the appointment.

Financial decisions

- 9.71 Co-decision-making arrangements should be available for both personal and financial decisions.
- 9.72 Co-decision-making arrangements are an effective means of complying with the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention) obligation to provide people with disabilities with 'the support they may require in exercising their legal capacity'.⁵² For some people, co-decision making will be a more appropriate means to support them in exercising their legal capacity than substitute decision making.
- 9.73 The Commission acknowledges that it might take time for some third parties to become familiar with this new decision-making mechanism.
- 9.74 It is unlikely that financial co-decision-making arrangements are more susceptible to abuse than the existing mechanisms of an enduring power of attorney or an administration order. The main concern expressed in consultations and submissions was that a co-decision maker could coerce a person to make particular decisions. While this sort of behaviour is possible, the risk is no greater than with other appointments. The risk of coercion can be managed by:
- appropriate selection of co-decision makers by VCAT

⁵² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(3) ('*Convention on the Rights of Persons with Disabilities*').

- the provision of information and education to appointed co-decision makers
 - regular review of co-decision-making orders by VCAT
 - the ability of any person to apply to VCAT for review of co-decision making orders
 - appropriate penalties for abuse of powers.
- 9.75 If a financial co-decision maker acts beyond the scope of their authority, or contrary to their responsibilities, the implications for third parties are no different to circumstances where an administrator or enduring attorney acts in this way. We discuss accountability measures, including remedies available for breach of fiduciary duties, in more detail in Chapter 18.
- 9.76 The issue of third party recognition of financial transactions entered into by co-decision makers is important. As joint decision-making arrangements have been used in commercial transactions for many years, the use of a broadly similar mechanism by some people with diminished decision-making ability should not cause significant legal and commercial problems. Dual signatory joint bank accounts, for example, are already a common feature of banking arrangements.
- 9.77 Third parties will need to decide how they wish to deal with co-decision makers. In most instances, the precise details of how an institution, such as a bank or a medical practice, wishes to record transactions with co-decision makers is best determined by that institution rather than by a VCAT order.

POWERS OF CO-DECISION MAKERS

- 9.78 The powers proposed for co-decision makers are similar to those of guardians and administrators, but are clearly limited by the requirement that all decisions should be made jointly.
- 9.79 As with supporters, co-decision makers should be permitted to collect information necessary to make the decision, provided this is done with the consent of the person. They should also discuss this information with the person and assist them to make the decision.
- 9.80 A co-decision maker's primary function is to make decisions jointly with the represented person. In some cases this may involve compromise on the part of either the supported person or the co-decision maker. The law should specify that the co-decision maker is not permitted to make decisions on behalf of the person, and must act only with their consent.
- 9.81 Though decisions are made jointly, rather than on behalf of the person, the Commission believes that there should be a prohibition on co-decision makers being involved in conflict transactions unless these have been specifically authorised. This is consistent with the Commission's proposals in Chapters 10 and 12.
- 9.82 Once a joint decision has been made, the co-decision maker will have the authority to do all things necessary to give effect to the decision. This may include signing relevant documentation. However, VCAT should also be able to specify in the co-decision making order that certain decisions require joint signatures.



RECOMMENDATIONS

Powers of co-decision makers

73. A co-decision-making order should authorise a co-decision maker to exercise the following powers, and to do the following things in relation to a decision:
- to access, collect or obtain or assist the person in accessing, collecting or obtaining from any person information that is relevant to assist the person to understand the information
 - to discuss the relevant information with the person in a way they can understand and to assist the person in making the decision
 - to make decisions of the type referred to in the order jointly with the person
 - to do all things necessary to give effect to decisions of the person made with the co-decision maker.

VCAT may specify in the co-decision-making order that a contract in relation to any identified personal or financial matter is voidable if it is not in writing and signed by both the person and the co-decision maker.

74. To avoid doubt, the law should specify that a co-decision maker:
- is not authorised to make decisions on behalf of the person, and may not exercise their authority without the knowledge and consent of the person
 - may not use their authority to access, collect or obtain information that the person could not legally have accessed, collected or obtained if able to do so
 - may not enter into a conflict transaction together with the person, unless the transaction has been specifically allowed in the order.

RECOGNITION OF DECISIONS MADE UNDER CO-DECISION-MAKING ORDERS

- 9.83 To ensure the effectiveness of co-decision-making arrangements, the law should state that decisions made and actions taken by the co-decision maker and the represented person within the scope of their joint arrangement should be treated as if they were acts of the represented person with capacity.⁵³
- 9.84 Ultimately, the responsibility to act within authority and with the consent of the person rests with the co-decision maker. It is a relationship of trust. The Commission does not believe it is reasonable to expect third parties such as medical professionals and financial service providers to investigate whether a co-decision maker is acting appropriately in every case. However, registration of the co-decision-making order will enable third parties to verify the existence of the order, its breadth and whether there are any important conditions that affect its use.
- 9.85 If a person has concerns about the conduct of a co-decision maker, including concerns they are acting without the represented person's consent, they can make an application to VCAT to review the arrangement.

⁵³ This is consistent with the current approach for decisions made by guardians or administrators under sections 24(4), 25(3) and 48(3) of the *Guardianship and Administration Act 1986* (Vic).

RECOMMENDATION

Recognition of decisions made under co-decision-making orders

75. Any decision made, action taken, consent given or thing done by a co-decision maker together with the person in good faith within the authority of the order should be considered to have been made, taken, given or done by the person.

PERSON WITH IMPAIRED CAPACITY DEEMED TO BE INCAPABLE OF MAKING CERTAIN DECISIONS ALONE

- 9.86 Before making a co-decision-making order, VCAT must be satisfied that it is unlikely that a person has the capacity to make the relevant decisions alone, and is in need of a co-decision maker. It is therefore necessary that the law specify that the person is deemed to lack capacity to make the relevant decisions without the support of a co-decision maker. This will provide protection to the person under the order, and ensure clarity and certainty in the operation of the co-decision-making arrangement.

RECOMMENDATION

Person with impaired capacity deemed to be incapable of making certain decisions alone

76. The law should clarify that, to the extent that an area of decision making falls within the terms of a co-decision-making order, the person with impaired decision-making ability is deemed to be incapable of making that decision without the support and consent of the co-decision maker.

RESPONSIBILITIES OF CO-DECISION MAKERS

- 9.87 People who are parties to a co-decision-making arrangement should make decisions jointly. The precise manner in which this will be done will vary depending on the needs of the represented person.
- 9.88 Because of the nature of the relationship, co-decision makers should be obliged to act honestly, diligently and in good faith, and avoid conflicts of interest. These duties should be clearly set out in new guardianship legislation and drawn to the attention of the co-decision maker by a VCAT member before a formal appointment is made. To avoid doubt, the legislation should stipulate that the relationship is one that attracts fiduciary obligations and that the represented person is able to claim all of the general law remedies available for breach of a fiduciary obligation.
- 9.89 A responsibility to avoid conflicts of interest raises particular issues in the context of co-decision-making orders, which are intended for close personal relationships. There will inevitably be circumstances where, as a result of close personal circumstances, a co-decision maker has a conflict of interest in relation to a decision they are assisting the person with. Earlier in this chapter we argued that co-decision makers should be prohibited from entering into 'conflict transactions'. Additionally, co-decision makers should have a general responsibility to identify and respond appropriately to conflicts of interest, even if these are not specifically 'conflict transactions'.
- 9.90 As with guardians, the law should also specify that co-decision makers should respect the privacy and confidentiality of the person, and not use their authority to assist the person to conduct an illegal act.



RECOMMENDATION

Responsibilities of co-decision makers

77. The law should specify that in performing their role, a co-decision maker should:
- (a) make the decisions referred to in the order jointly with the person
 - (b) act honestly, diligently and in good faith
 - (c) act within the limits of the order, and comply with any conditions, limitations or requirements set out in the order
 - (d) identify and respond to situations where the co-decision maker's interests conflict with those of the person, ensure the person's interests are always the paramount consideration, and seek external advice where necessary
 - (e) respect the privacy and confidentiality of the person by:
 - (i) only collecting personal information about the person in their capacity as co-decision maker to the extent this is relevant to and necessary for carrying out the co-decision maker's role, and
 - (ii) only disclosing such information:
 - with the consent of the person assisted under the co-decision-making order, and
 - for a purpose that is relevant to and necessary for carrying out the co-decision maker's role, or
 - for the purposes of any legal proceedings arising out of the Act or of any report of any such proceedings, or
 - with other lawful excuse.
 - (f) not use their authority to assist the person to conduct an illegal activity
 - (g) not coerce, intimidate or in any way unduly influence the person into a particular course of action.

DISAGREEMENTS BETWEEN A PERSON AND THEIR CO-DECISION MAKER

- 9.91 New guardianship legislation must cater for the possibility of disagreement between the person with impaired decision-making ability and their co-decision maker.
- 9.92 Where the person and the co-decision maker are unable to resolve a disagreement themselves or with informal assistance, it should be possible for either the person or the co-decision maker to seek resolution at VCAT. As a first step, VCAT should provide the person and the co-decision maker with the option of appropriate alternate dispute resolution such as mediation.
- 9.93 If the dispute is unable to be resolved through alternate dispute resolution, a VCAT hearing should be held to determine if the co-decision-making arrangement can continue, or be varied or revoked due to the disagreement.

RECOMMENDATIONS

Disagreements between a person and their co-decision maker

78. In the event of an irreconcilable disagreement between the person and the co-decision maker, either party should be able apply to VCAT for review of the order.
79. The co-decision maker should be responsible for informing VCAT if they believe the support relationship has broken down, or if it is no longer possible for the person to be supported under a co-decision-making arrangement.

REVIEW OF CO-DECISION-MAKING ORDERS BY VCAT

- 9.94 As with substitute decision-making orders, and consistent with the requirements of the Convention,⁵⁴ co-decision-making orders should be subject to regular review by VCAT. This will be the main form of oversight for these arrangements.
- 9.95 The Commission believes that a requirement of an initial review within 12 months is appropriate, with VCAT having the discretion to extend the review period following the first year if it appears the arrangement is working well.
- 9.96 Where concerns are raised about the operation of the order, any person—including the co-decision maker and the person—should be able to apply to VCAT for review of the order. In reviewing these matters, VCAT should be guided by specified criteria.

RECOMMENDATIONS

Review of co-decision-making orders by VCAT

80. Co-decision-making orders should be reviewed by VCAT at least once within the first 12 months of making the order, and subsequently at least once every three years.
81. Any person with an interest in the affairs of either party to a co-decision-making arrangement should be able to apply for review of a co-decision-making order.
82. Applications to VCAT for review of co-decision-making orders should be possible on any of the following grounds:
 - (a) the person no longer consents to the order
 - (b) the person no longer has the capacity to participate in a co-decision-making arrangement
 - (c) the co-decision maker no longer has the capacity to participate in a co-decision-making arrangement
 - (d) the co-decision maker is acting in breach of their responsibilities
 - (e) the order is no longer appropriate to the needs of the person
 - (f) the order is contrary to the personal and social wellbeing of the person.

Powers of VCAT upon review

- 9.97 As with other appointments, the Commission believes that VCAT should have the full range of powers necessary to ensure the person's needs are adequately met. This includes the power to continue, vary, or revoke the agreement or order.

⁵⁴ *Convention on the Rights of Persons with Disabilities* art 12(4).

Co-decision making

RECOMMENDATION

Powers of VCAT upon review

83. Upon hearing an application for review, VCAT should have the power to:
- continue the order in its current form
 - amend or vary the order with the consent of the person
 - revoke the order, and where appropriate replace it with a different order.

SAFEGUARDS TO PROTECT PEOPLE WITH IMPAIRED CAPACITY

- 9.98 As with substitute decision-making appointments, the Commission believes the primary mechanism for oversight of co-decision-making appointments should be regular review by VCAT, and the ability of any person to apply for unscheduled review.
- 9.99 Registration of these orders will also make it easier for others to confirm the currency of the appointment, and the scope of the powers.
- 9.100 The Commission is concerned that excessive accountability requirements could prove burdensome for co-decision makers, and discourage people from taking on these roles. In the case of financial co-decision makers, however, VCAT should have a discretionary power to make the lodgement of annual accounts for examination a condition of the order. This is consistent with the Commission's proposal for financial administrators.

RECOMMENDATION

Safeguards to protect people with impaired capacity

84. VCAT may require financial co-decision makers to lodge annual accounts for examination.

REGISTRATION OF CO-DECISION-MAKING ORDERS

- 9.101 In Chapter 16, the Commission proposes the introduction of an online register of personal appointments and VCAT orders. The Commission believes that a register will provide greater certainty for third parties about the currency and authenticity of decision-making arrangements, facilitate decisions made under these arrangements, and provide added protection against abuse for the person.
- 9.102 Consistent with this general approach, the Commission believes that all co-decision-making orders should be included on the register, and should not come into force until they are registered.
- 9.103 Registration will enable third parties to quickly ascertain the existence and terms of a co-decision-making order.

RECOMMENDATION

Registration of co-decision-making orders

85. Co-decision-making orders should be registered and should not take effect until they are registered.

REVOCATION OF CO-DECISION-MAKING ORDERS

- 9.104 The ongoing consent of the person supported under a co-decision-making order is crucial to the effectiveness of the arrangement. Without consent, it is difficult to imagine how the person could be properly supported and how decisions could be jointly made. For this reason, the person should be able to seek revocation of the order at any time through application to VCAT.
- 9.105 As it may be difficult for the person to seek revocation themselves, the co-decision maker should be responsible for notifying VCAT if the person indicates to them that they no longer consent to the arrangement, or if the co-decision maker otherwise believes that the person no longer agrees to the arrangement.

RECOMMENDATIONS

Revocation of co-decision-making orders

86. A person supported under a co-decision-making order should be able to apply to VCAT for revocation of the order at any time.
87. A co-decision maker should be required to notify VCAT if they believe the person no longer consents to the order.
88. Revocation should take effect once the revocation has been completed on the register.

FIDUCIARY DUTIES OF CO-DECISION MAKERS AND LIABILITY

- 9.106 The liability of co-decision makers is a challenging issue. Like guardianship, the co-decision-making relationship is fiduciary—a legal relationship of special trust and confidence. This relationship recognises the vulnerability of the person relative to the co-decision maker, and requires the co-decision maker not to profit from the relationship and to avoid conflicts of interest. The remedies available for breach of these fiduciary duties should be available to the person with impaired decision-making ability, as has been recommended in Chapter 8 if supporters fail to comply with their obligations.
- 9.107 However, because the role is an unpaid, altruistic one, the Commission believes that the law should provide legal immunity for co-decision makers who have acted in good faith, within the terms of their appointment, and in accordance with their legal responsibilities. Any claim or action arising out of a co-decision-making arrangement should ordinarily be a claim against the estate of the person supported under that arrangement.
- 9.108 This protection against liability is analogous to the liability limitation currently enjoyed by ‘limited partners’.⁵⁵ Partnerships are a legal relationship in which partners are fiduciaries for one another, and have a power of agency with the outside world.⁵⁶ However, it is possible for a person to become a ‘limited partner’, whose liability for the conduct of the partnership is limited to the extent of their registered investment in the partnership.⁵⁷ In a similar way, the Commission believes that the liability of co-decision makers should be limited, and they should only be personally liable for decisions made under the co-decision-making arrangement when they act beyond their authority.

⁵⁵ See *Partnership Act 1958* (Vic) pt 3.

⁵⁶ Keith Fletcher, *The Law of Partnership in Australia* (Lawbook Co, 9th ed, 2007) 159–161.

⁵⁷ See *Partnership Act 1958* (Vic) s 60.

9

Chapter 9

Co-decision making



- 9.109 For deliberate misuse or abuse of powers, the Commission believes that co-decision makers should be subject to the same civil and criminal penalties for abuse as substitute decision makers.
- 9.110 We discuss penalties and financial redress in cases of abuse of support and substitute arrangements in more detail in Chapter 18.

RECOMMENDATIONS

Fiduciary duties of co-decision makers and liability

89. To avoid doubt, new guardianship legislation should stipulate that the relationship between a co-decision maker and the person is one which imposes fiduciary obligations upon the co-decision maker.
90. The law should stipulate that co-decision makers are not personally liable for anything done or omitted in good faith while exercising the authority or carrying out the duties and responsibilities of the co-decision maker in accordance with their legal obligations.
91. Co-decision makers should be liable for the same penalties as substitute decision makers for misuse and abuse of their powers, in addition to any other criminal penalties or civil remedies that may be applicable.

Chapter 10

Personal appointments of substitute decision makers

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Personal appointments of substitute decision makers



INTRODUCTION

- 10.1 In the previous chapters, the Commission recommended new mechanisms to assist people with impaired decision-making ability that do not involve complete loss of responsibility for making decisions. In this and the following chapters, the Commission examines mechanisms that do involve other people taking legal responsibility to make decisions for people who are unable to make their own decisions.
- 10.2 This chapter deals with personal appointments of people to act as substitute decision makers at some time in the future. Chapter 11 deals with how a person may document wishes about actions they do or do not want taken in the future. Chapter 12 deals with tribunal appointments of substitute decision makers.
- 10.3 There are two important means by which an adult may direct or influence decisions about their future when they are unable to make their own decisions or experience difficulty doing so.
- 10.4 First, an adult with capacity may appoint a nominated person to make decisions for them in the future, or to support them to make decisions. We call this a **'personal appointment'**. Current Victorian legislation provides for various appointments of this nature¹—for example, an enduring power of attorney (financial) or an enduring power of guardianship.
- 10.5 Secondly, a person may provide written instructions about the decisions they want made if particular circumstances arise in the future and they do not have capacity to provide directions at the time. This type of document is often called an **'instructional directive'**.
- 10.6 A third mechanism combines a personal appointment and an instructional directive (a **hybrid appointment**). It allows a person to appoint someone to make decisions for them in the future and to provide instructions about how that person should exercise their decision-making power. While current Victorian legislation permits this in some circumstances,² the extent of its use is unknown.
- 10.7 A personal appointment of a substitute decision maker or supporter enables an adult with capacity to exercise significantly more autonomy than if an appointment is made by the Victorian Civil and Administrative Tribunal (VCAT) or if a decision maker is automatically appointed under the 'person responsible' provisions of the *Guardianship and Administration Act 1986 (Vic)* (G&A Act).³ A hybrid appointment combines the benefits of both methods by allowing a person to appoint someone who will make decisions for them with instructions about how to exercise that power.
- 10.8 The Commission believes that future planning should be encouraged because it promotes self-determination. A well-functioning system of personal appointments of people with enduring powers has the following advantages:
- It enhances autonomy by allowing a person to choose who will manage their affairs.⁴
 - It avoids the potential stress and embarrassment of a tribunal hearing to determine whether a person lacks capacity.⁵

¹ *Guardianship and Administration Act 1986 (Vic)* s 35A(1); *Instruments Act 1958 (Vic)* s 115; *Medical Treatment Act 1988 (Vic)* s 5A.

² For example, a person who appoints an enduring guardian may give directions in the instrument of appointment about how the guardian should use their powers.

³ For 'person responsible', see *Guardianship and Administration Act 1986 (Vic)* s 37.

⁴ See, eg, Australian Law Reform Commission, *Enduring Powers of Attorney*, Report No 47 (1988) 7; Office of the Public Advocate (Victoria), Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 4 August 2009, 7.

⁵ Australian Law Reform Commission, *Enduring Powers of Attorney*, Report No 47 (1988) 7.

- It provides a private, simple and cheap alternative to VCAT proceedings.⁶
- It reduces the burden on VCAT and bodies such as the Public Advocate and State Trustees.⁷

10.9 The Commission believes that reform is needed to simplify the existing scheme of personal appointments and to encourage their uptake. In Chapter 5, we recommended a single Act to provide an integrated system of personal, automatic and tribunal appointments. The reforms in this chapter aim to provide simple, clear and harmonised methods for making personal appointments and clear, accessible information about the legal effect of these documents.

10.10 To improve and enhance understanding of personal appointments the Commission recommends reforms including:

- reducing the number of personal appointments that are currently available
- modernising terminology
- clearer powers for people appointed to provide decision-making assistance under the new Act and greater clarity about when those powers come into effect
- clearer responsibilities and greater accountability for people exercising powers under personal appointments
- registration of personal appointments and instructions.

VICTORIAN PARLIAMENT LAW REFORM COMMITTEE

10.11 The Victorian Legislative Assembly asked the Victorian Parliament Law Reform Committee (Parliamentary Committee) for proposals that would streamline and simplify power of attorney documents.⁸ The terms of reference requested, among other things, consideration of the requirements for making personal appointments under the *Instruments Act 1958* (Vic) and the G&A Act.⁹ The Parliamentary Committee released its final report, *Inquiry into Powers of Attorney*, in August 2010.

10.12 The Victorian Government's response to the Parliamentary Committee's report, tabled in Parliament on 10 February 2011, indicated broad support for many of the Committee's 90 recommendations. The Government Response also noted that it would further consider a number of the recommendations once it receives the Commission's final report.¹⁰

10.13 The Commission supports most of the recommendations proposed by the Parliamentary Committee and the reforms in this chapter build on those recommendations. This chapter highlights the Parliamentary Committee recommendations that the Commission believes warrant further consideration or modification.

6 See, eg, Keith Bradley, 'Powers of Attorney' (2008) 86 *Precedent* 16, 18; Robin Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *University of Western Australia Law Review* 122, 124; Jonathan Federman and Meg Reed, Government Law Center of Albany Law School, *Abuse and the Durable Power of Attorney: Options for Reform* (1994) 4; House Standing Committee Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law* (2007) 71.

7 House Standing Committee Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law* (2007) 71; Office of the Public Advocate (Victoria), Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 4 August 2009, 7.

8 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) iv ('*Inquiry into Powers of Attorney*').

9 *Ibid.*

10 Victorian Government, *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (10 February 2011), 2 <http://www.parliament.vic.gov.au/images/stories/committees/lawreform/powers_of_attorney/20110210.Irc.poa.GOVRESP.pdf> ('*Government Response to the Parliament of Victoria Law Reform Committee*').

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Chapter 10

Personal appointments of substitute decision makers

CURRENT LAW

PERSONAL APPOINTMENT OF SUBSTITUTE DECISION MAKERS

10.14 The current law is complex because it permits an adult to make four different personal appointments of substitute decision makers under three different Acts.¹¹ There are different processes for each appointment. The existing appointments are:

- general power of attorney
- enduring power of attorney (financial)
- enduring power of guardianship
- enduring power of attorney (medical treatment).

Financial appointments

10.15 There are two ways of personally appointing a substitute financial decision maker—by use of a general power of attorney¹² or an enduring power of attorney (financial).¹³ Both types of appointment are made under the Instruments Act.

General power of attorney

10.16 A person who gives someone a power of attorney (a donor) uses a general power of attorney if they want to authorise another person (the attorney) to act for them for a particular period or purpose—for example, to allow someone to run a business while the donor is on holiday. The powers given to the attorney may be unlimited, or limited for a specific time or purpose. A donor may appoint one person or more than one person. If the donor appoints more than one person, the general power of attorney should specify if they must act together or if they may act jointly and separately.¹⁴

10.17 The donor can specify a date on which the general power will cease. If it does not specify a cessation date, the general power of attorney stops if the donor dies, revokes it or loses legal capacity to make their own decisions.

10.18 The Commission makes no recommendations about general powers of attorney in this report because the Parliamentary Committee dealt adequately with the modernisation of these appointments in its report. Further, these appointments have no direct intersection with guardianship law: a general power of attorney is designed for use when the person or donor has the capacity to make their own decisions but wishes to delegate this power to others for the sake of convenience. The Commission's review concerns laws that assist people with impaired decision-making ability.

Enduring power of attorney (financial)

10.19 A general power of attorney ceases to have any effect if the donor does not have capacity. However, an enduring power of attorney does not cease to operate when the donor loses capacity.¹⁵ The term 'enduring' is used because the appointment endures (or continues) beyond the point when the person who gave the power (the donor) lacks capacity. Enduring powers of attorney were introduced into Australian law by statute to allow people to plan for times when they no longer have capacity to make their own decisions.¹⁶

11 *Instruments Act 1958* (Vic); *Guardianship and Administration Act 1986* (Vic); *Medical Treatment Act 1988* (Vic).

12 *Instruments Act 1958* (Vic) pt XI.

13 *Ibid* pt XIA.

14 *Ibid* ss 107, 119.

15 *Ibid* s 115(2).

16 See generally Robin Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *University of Western Australia Law Review* 122, 121–5. Victoria was the first jurisdiction in Australia to provide enduring powers of attorney: *Instruments (Enduring Powers of Attorney) Act 1981* (Vic).

- 10.20 An enduring power of attorney (financial) allows a person aged 18 years or over to give another adult person, known as an attorney, the power to make financial and legal decisions for them in the future.¹⁷ The person who makes the appointment can decide when the powers come into effect.¹⁸
- 10.21 If the document does not specify when the attorney's powers commence, the power begins immediately and the attorney can act even if the donor still has capacity.¹⁹ If the powers commence when the donor loses capacity, the attorney must determine if the donor is no longer capable of making decisions unless the document contains other arrangements for dealing with this issue.

Appointment of enduring attorney (financial)

- 10.22 An enduring power of attorney (financial) must be appointed in the prescribed form.²⁰ The donor or someone acting at the direction and in the presence of the donor must sign it.²¹
- 10.23 The form must also be signed and dated by two witnesses.²² The two witnesses must certify that the donor signed the document freely and voluntarily in the presence of the witness and the donor appeared to have the capacity to make the enduring power of attorney.²³
- 10.24 The attorney must also accept the appointment by signing and dating a statement of acceptance, which must be in the prescribed form.²⁴

Capacity to make an enduring power of attorney (financial)

- 10.25 In order for the appointment of an enduring attorney (financial) to be valid, the donor must have legal capacity to make the appointment.
- 10.26 The Instruments Act provides that a person only has capacity to make an enduring power of attorney (financial) if they understand the 'nature and effect' of the appointment when the document is signed.²⁵ This is discussed further in Chapter 7.
- 10.27 Section 118 of the Instruments Act includes a note stating that 'it is advisable for the witness to make a written record of the evidence as a result of which the witness considers that the donor understands these matters'.²⁶

Registration

- 10.28 In Victoria, there is no requirement to register an enduring power of attorney (financial).

Discontinuing an enduring power of attorney (financial)

- 10.29 An enduring power of attorney (financial) may be discontinued by:

17 *Instruments Act 1958* (Vic) pt XIA. In common with a general power of attorney, a donor can appoint a single enduring attorney (financial) or more than one: at s 119.

18 *Instruments Act 1958* (Vic) s 117(1).

19 *Ibid* s 117(2).

20 *Ibid* ss 123(1), 125ZL. An approved form is a form approved by the Secretary to the Department of Justice under s 125ZL.

21 *Instruments Act 1958* (Vic) s 123(2).

22 *Ibid* s 123(3). Section 125 details who can be a witness. It provides that: a person cannot be a witness to an enduring power of attorney if they are the donor of the power or the person appointed as attorney; only one of the witnesses can be a relative of the donor of the power or the person appointed as an attorney; and one of the witnesses must be a person authorised by law to witness the signing of a statutory declaration.

23 *Instruments Act 1958* (Vic) s 125A(1). Section 125A(2) provides special witnessing requirements if an enduring power of attorney is signed by someone else for the donor. The witnesses must certify that: the donor of the power directed the person to sign the enduring power of attorney for the donor; the donor of the power gave that direction freely and voluntarily in the presence of the witness; the person signed it in the presence of the donor and the witness; at the time, the donor appeared to the witness to have the capacity necessary to make the enduring power of attorney.

24 *Instruments Act 1958* (Vic) ss 125B, 125ZL. An approved form is a form approved by the Secretary to the Department of Justice under s 125ZL.

25 *Instruments Act 1958* (Vic) s 118(1).

26 *Ibid* s 118.

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- an express revocation by the donor²⁷
- the death of the donor²⁸
- a later enduring power of attorney²⁹
- according to its terms, for example, if it is expressed to operate for a specified period³⁰
- resignation by the attorney³¹
- the attorney ceasing to have legal capacity³²
- the attorney becoming insolvent³³
- the attorney's death.³⁴

10.30 Once the donor loses capacity, they cannot revoke an enduring power of attorney (financial). VCAT has the power to revoke an enduring power of attorney (financial) if the donor has lost capacity.³⁵ It may do so if it is satisfied that it is in the best interests of the donor to revoke the appointment.³⁶ A revocation does not mean that the power is void from the start—actions taken under the enduring power of attorney (financial) before its revocation are valid.

10.31 VCAT may also declare that an enduring power of attorney is invalid.³⁷ It may do so if satisfied that:

- the donor lacked capacity at the time the enduring power of attorney was made
- it does not comply with part XIA of the Instruments Act, or
- it is invalid for any other reason, such as the donor was induced to make it by dishonesty or undue influence.³⁸

If VCAT declares an enduring power of attorney invalid, the appointment has no legal effect from the time it was made.³⁹

10.32 In addition to revoking a power or declaring it invalid, VCAT may also vary⁴⁰ or suspend an enduring power of attorney (financial).⁴¹ VCAT may also give an advisory opinion on any matter relating to an enduring power of attorney (financial).⁴²

Third party protection

10.33 The Instruments Act allows third parties and attorneys to rely on a power exercised under an invalid enduring power of attorney if they acted in good faith and without being aware of the invalidity.⁴³

27 Ibid ss 125H, 125I.

28 Ibid s 125K.

29 Ibid s 125J.

30 Ibid s 125L.

31 Ibid s 125M.

32 Ibid s 125N.

33 Ibid s 125O.

34 Ibid s 125P.

35 *Instruments Act 1958* (Vic) ss 125Q, 125X. For a discussion of VCAT's supervisory powers in relation to enduring powers of attorney, see *DJB (Guardianship)* [2010] VCAT 280 (9 March 2010).

36 *Instruments Act 1958* (Vic) s 125X(1).

37 Ibid s 125Y.

38 Ibid s 125Y(1).

39 Ibid s 125Y(2).

40 Ibid s 125Z(1)(b).

41 Ibid s 125Z(1)(c).

42 Ibid s 125ZA.

43 Ibid s 125U. The sections of the Act that protect third parties and attorneys use 'invalid' in a broader sense than the way it is used if VCAT declares a power of attorney (financial) invalid. It encompasses invalidity because the enduring power of attorney: is not exercisable at the time when, circumstance in which, or occasion on which it is purportedly exercised; has been declared to be invalid by a court or VCAT; has been revoked; was made in another state or territory and does not comply with the requirements of that other state or territory: at s 125Y.

Powers

- 10.34 An enduring attorney (financial) can authorise an attorney to ‘do anything on behalf of the donor that the donor can lawfully authorise an attorney to do’.⁴⁴ The Instruments Act does not provide any further detail about the extent of the powers that can be given to an attorney. The donor can provide instructions and limit the way the attorney should carry out their responsibilities.⁴⁵
- 10.35 Anything done by the attorney within the scope of their powers has the same legal effect as if the donor did it with capacity to act.⁴⁶

Responsibilities of an attorney

- 10.36 An attorney has a number of legal responsibilities, including a fiduciary duty not to act in their own interests instead of the donor’s.⁴⁷ The statement of acceptance signed by the attorney includes an undertaking acknowledging a number of their responsibilities.⁴⁸ We discuss these responsibilities in detail in Chapter 17.

Enduring power of guardianship

- 10.37 Any adult with capacity may appoint another person to become their guardian if they lose the ability to make decisions about personal matters at some time in the future.⁴⁹ The appointed person is called an ‘enduring guardian’, and the document that appoints them is called an ‘enduring power of guardianship’.
- 10.38 The appointment only comes into effect when, and to the extent that, the donor loses capacity to make decisions. Before then, the enduring guardian has no power to make personal decisions on the person’s behalf.⁵⁰
- 10.39 There is no formal process for determining when the person no longer has the capacity to make their own decisions. In most cases, the enduring guardian must determine the lack of capacity that activates the appointment.

Appointment of an enduring guardian

- 10.40 An enduring guardian must be appointed in writing.⁵¹ The G&A Act provides a form that can be used when appointing an enduring guardian.⁵²
- 10.41 The enduring guardian must accept the appointment by signing and dating a statement of acceptance, which must be in the prescribed form.⁵³ The appointment must also be signed and dated by two witnesses.⁵⁴

Who can be an enduring guardian

- 10.42 An enduring guardian must be aged 18 years or over and must not be professionally involved in the care of the represented person.⁵⁵

44 *Instruments Act 1958* (Vic) s 115(1)(a).

45 *Ibid* s 115(1)(b).

46 An enduring attorney has the power to execute instruments for the donor of the power. An instrument executed in this way is as effective as if executed by the donor: *ibid* s 125E.

47 For a discussion of the obligations under a fiduciary relationship, see *Re OAC* [2008] QGAAT 72 (14 October 2008) [13]–[20]. See: *Instruments Act 1958* (Vic) ss 125B(5), 125D, 125M(2).

48 *Instruments Act 1958* (Vic) s 125B(5).

49 *Guardianship and Administration Act 1986* (Vic) s 35A(1). The enduring guardianship provisions were added to the G&A Act in 1999.

50 *Guardianship and Administration Act 1986* (Vic) s 35B(1).

51 *Ibid*. s 35A(1).

52 *Ibid* sch 4 form 1. It is not mandatory to use the preferred form when appointing an enduring guardian, but the instrument appointing an enduring guardian must be ‘to the effect of’ this form: at s 35A(2)(a).

53 *Guardianship and Administration Act 1986* (Vic) s 35A(2)(b).

54 *Ibid* s 35A(2)(c). The witnessing requirements are set out in s 35A(2)(c). The certificate of witnesses provided in sch 4 form 1 requires the witnesses to certify that the appointer and the proposed enduring guardian and alternative enduring guardian (if relevant) signed the document freely and voluntarily in the presence of the witness and appeared to understand it.

55 *Guardianship and Administration Act 1986* (Vic) ss 35A(3)–(4).

Personal appointments of substitute decision makers



Capacity to appoint an enduring guardian

10.43 Although the G&A Act does not expressly state that a person must have capacity to appoint an enduring guardian, a combination of general law principles, the surrounding sections of the Act and the witnessing requirements indicate that capacity is an implied essential requirement.⁵⁶ We discuss capacity in more detail in Chapter 7.

Registration

10.44 There is no requirement to register or file an enduring power of guardianship anywhere. It is valid as soon as it is made, but the powers given to the enduring guardian may not be activated until the principal loses capacity.⁵⁷

Discontinuing an enduring guardianship

10.45 A person with capacity can revoke their appointment of an enduring guardian in writing at any time.⁵⁸ If a person appoints an enduring guardian or alternative enduring guardian, any earlier appointment of an enduring guardian or alternative enduring guardian is revoked.⁵⁹

10.46 An application can be made to VCAT to cancel an enduring power of guardianship.⁶⁰ VCAT may cancel the appointment if it is satisfied that the enduring guardian:

- no longer wants the role
- is no longer willing or able to fulfil the role
- has not acted in the best interests of the person
- has acted negligently or incompetently.⁶¹

10.47 An appointment of an enduring guardian is not revoked if VCAT also appoints a guardian for the person.⁶² The G&A Act does not specify whose powers would prevail except in relation to the medical or dental decisions under the ‘person responsible’ hierarchy, which places a person appointed under a guardianship order with relevant powers above an enduring guardian with relevant powers.⁶³

Advice from VCAT

10.48 An enduring guardian may apply to VCAT for advice or directions about the scope or exercise of their powers.⁶⁴

Powers of an enduring guardian

10.49 The powers of an enduring guardian can be specified in the document that appoints them.⁶⁵ If the powers are unlimited in the appointment document, the enduring guardian has the full powers of a plenary guardian.⁶⁶ Section 24(1) of the G&A Act defines the powers of a plenary guardian as ‘all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child’.⁶⁷

⁵⁶ Ibid sch 4 form 1 certificate of witnesses requires the witnesses to certify that the ‘appointor appeared to understand the effect of the instrument’. See also s 37(1)(d) which is premised on the idea that a person must have capacity at the time they make an enduring guardianship appointment.

⁵⁷ *Guardianship and Administration Act 1986 (Vic)* ss 35A(2), 35B(1).

⁵⁸ Ibid s 35C(2).

⁵⁹ Ibid s 35C(1).

⁶⁰ An application can be made by the Public Advocate, the enduring guardian or alternative guardian, the administrator of the appointor’s estate or any other person who satisfies VCAT that they have an interest in the person or in the estate of the person: *Guardianship and Administration Act 1986 (Vic)* s 35D(2).

⁶¹ *Guardianship and Administration Act 1986 (Vic)* s 35D(1).

⁶² Ibid s 35D(3).

⁶³ Ibid s 37(1).

⁶⁴ Ibid s 35E(1).

⁶⁵ Ibid s 35B(1).

⁶⁶ Ibid ss 35B(2), 24. See also s 35B(3).

⁶⁷ See also *Guardianship and Administration Act 1986 (Vic)* s 35B(3).

- 10.50 When appointing an enduring guardian, a person might indicate in the document specific decisions they want the guardian to make, such as not to agree to living in a particular residential service. These instructions are not legally binding, although the guardian should use them as a guide when their powers come into effect. We discuss these instructions in detail in Chapter 11.
- 10.51 An enduring guardian with health care powers may consent to medical or dental treatment or withhold consent to medical or dental treatment on behalf of the represented person.⁶⁸ We discuss the distinction between withholding consent and refusing consent in Chapter 13.

Responsibilities of an enduring guardian

- 10.52 The responsibilities of an enduring guardian are the same as those of a VCAT-appointed guardian.⁶⁹ An enduring guardian must act in the 'best interests of the donor of the power'.⁷⁰ We discuss these responsibilities further in Chapter 17.

Enduring power of attorney (medical treatment)

- 10.53 The *Medical Treatment Act 1988* (Vic) allows a person to appoint a substitute decision maker to make decisions about medical treatment for them in the future if they become 'incompetent'.⁷¹

Appointment of an agent

- 10.54 A person appointed under the Medical Treatment Act is called an **agent** and is appointed using a document called an enduring power of attorney (medical treatment).⁷² The appointment only comes into effect when the donor loses capacity to make decisions.⁷³
- 10.55 A person appointed under the Medical Treatment Act can refuse treatment on behalf of the donor.⁷⁴ This is done by completing a **refusal of treatment certificate**.⁷⁵

Capacity to make an enduring power of attorney (medical treatment)

- 10.56 The Medical Treatment Act does not specifically require that a person have capacity at the time they appoint an agent. However, the surrounding sections of the Act, the witnessing requirements and the general law strongly suggest that this is a requirement for a valid appointment.⁷⁶
- 10.57 The Medical Treatment Act does not describe the level of capacity required for a person to make a legally effective appointment of an agent.

Who can be an agent

- 10.58 There are no guidelines in the Medical Treatment Act about who can be appointed as an agent.

⁶⁸ *Guardianship and Administration Act 1986* (Vic) ss 42L, 42M.

⁶⁹ *Ibid* ss 35(5), 28.

⁷⁰ *Ibid* s 28(1).

⁷¹ *Medical Treatment Act 1988* (Vic) s 5A. The agent can refuse medical treatment on behalf of the patient by completing a refusal of treatment certificate: at s 5B. The agent may also be a 'person responsible' entitled to consent to medical treatment under the *Guardianship and Administration Act 1986* (Vic) ss 37, 42H.

⁷² *Medical Treatment Act 1988* (Vic) s 5A(2)(a).

⁷³ *Ibid* s 5A(2)(b).

⁷⁴ See Chapter 13 for further discussion of refusal of medical treatment by substitute decision makers.

⁷⁵ *Medical Treatment Act 1988* (Vic) s 5B. This power is also available to a guardian appointed under the G&A Act if the order provides relevantly for decisions about medical treatment: at ss 5A(1)(b), 5B.

⁷⁶ *Medical Treatment Act 1988* (Vic) sch 2 which sets out the form for appointing an agent requires the witnesses to verify that the person making the appointment is of sound mind and understands the import of this document. See also s 5A(4)(a) which implies the person must have capacity when they make the appointment by specifying that 'an enduring power of attorney (medical treatment) is not revoked by the subsequent incapacity of the donor of the power'.

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Chapter 10

Personal appointments of substitute decision makers

Registration

10.59 There is no requirement to register or file an enduring power of attorney (medical treatment).

Discontinuing an enduring power of attorney (medical treatment)

10.60 If a person makes an enduring power of attorney (medical treatment), any earlier power of attorney (medical treatment) given by that person is revoked.⁷⁷ An enduring power of attorney (medical treatment) is not revoked because a guardian is also appointed for the person who granted the power.⁷⁸

10.61 VCAT may suspend or revoke an enduring power of attorney (medical treatment).⁷⁹ It may suspend the power for a specified period if it is satisfied that a refusal of treatment is not in the best interests of the person.⁸⁰ It may revoke the power if it is satisfied that it is not in the best interests of the donor for the power to continue.⁸¹

10.62 In Chapter 13, we take a closer look at statutory appointments relating to refusal of medical treatment. We also consider the interaction between the Medical Treatment Act and the laws relating to consent to medical treatment in the G&A Act.

OTHER SUBSTITUTE DECISION-MAKING ARRANGEMENTS

10.63 There are other substitute decision-making arrangements in Victoria. Some corporations, such as providers of essential services, allow individuals to nominate someone to share information and/or make changes to their account.⁸² Some arrangements operate under other Victorian legislation, such as the *Mental Health Act 1986* (Vic) and the *Disability Act 2006* (Vic). Some operate under Commonwealth legislation such as Centrelink Nominees in the *Social Security (Administration) Act 1999* (Cth).

10.64 A Centrelink 'correspondence nominee' can take action on behalf of another person, including receiving information and applying for benefits under the Social Security (Administration) Act.⁸³ A Centrelink 'payment nominee' can receive benefits on behalf of another person.⁸⁴ These arrangements operate with the consent of the person, or, where a person is unable to sign a form, when Centrelink has sufficient information to be satisfied that a person should act as a nominee.⁸⁵ Once appointed, the nominee must act in the person's best interests.⁸⁶

⁷⁷ *Medical Treatment Act 1988* (Vic) s 5A(3).

⁷⁸ *Ibid* s 5A(4)(b)(ii). The *Medical Treatment Act 1988* (Vic) s 5A(4)(b)(i) provides that this also applies if a person becomes a protected person under the *Public Trustee Act 1958* (Vic). However, this section is unlikely to have any practical relevance because this Act was repealed by the *State Trust Corporation of Victoria Act 1987* (Vic) s 57(1) sch 3, now itself repealed and replaced by *State Trustees (State Owned Company Act) 1994* (Vic) s 24. The G&A Act required the tribunal to hold a hearing in respect of every protected person to determine whether a guardianship or administration order should be made and once a determination was made the person ceased to be a protected person: *Guardianship and Administration Act 1986* (Vic) ss 85(3), (6).

⁷⁹ *Medical Treatment Act 1988* (Vic) s 5C(1).

⁸⁰ *Ibid* s 5C(3).

⁸¹ *Ibid* s 5C(4). VCAT also has powers in relation to an alternate agent. It may revoke, suspend, or declare that the power does not authorise a particular decision: *Medical Treatment Act 1988* (Vic) s 5C(4A).

⁸² For eg, a Telstra account holder can give another person one of a number of various 'access levels' (from 'limited authority' to 'legal lessee', which is akin to the status of person in whose name the account is registered): Telstra, *Personal: Frequently Asked Questions* <http://help.telstra.com/app/answers/detail/a_id/18380/session/L2F2LzEvdGltZS8xMzIzZmJmXmODk0L3NpZC92R0FDSFIaw%3D%3D/-/giving-permission-for-someone-to-make-enquiries-about-your-telstra-accounts>.

⁸³ *Social Security (Administration) Act 1999* (Cth) ss 123C, 123H, 123I.

⁸⁴ *Ibid* s 123B.

⁸⁵ Consultation with Centrelink (30 April 2010).

⁸⁶ *Social Security (Administration) Act 1999* (Cth) s 123O.

- 10.65 Similar arrangements exist for allowing recipients of benefits from the Department of Veterans' Affairs to nominate a person to communicate with the Department on their behalf.⁸⁷ This requires the written consent of the person entitled to the benefit.⁸⁸ The beneficiary of veterans' payments can also appoint a person as their agent to receive their pension,⁸⁹ and the agent must 'manage the pension or allowance in accordance with the pensioner's wishes'.⁹⁰ Alternatively, a trustee can accept and manage a person's pension where that person lacks capacity to manage it themselves.⁹¹ This requires a formal application to the Department and two professionals (one of whom must be a doctor) confirming incapacity.⁹² The trustee has to manage the pension money according to traditional trustee principles: in the beneficiary's best interests and avoiding conflicts of interest.⁹³
- 10.66 A further example of a substitute decision-making arrangement that does not depend on a formal attorney appointment is the ability of an individual to make an 'agreement' with an aged care provider for services for a person without capacity.⁹⁴ The person can be a family member or friend.⁹⁵ Such agreements include 'resident agreements', which stipulate the terms and conditions of care when a person is entering a facility.

COMMUNITY RESPONSES

- 10.67 Community responses to the information paper about the operation of the personal appointments scheme suggested problems in the following areas:
- There is a widespread lack of community understanding about personal appointments that grant enduring powers to another person. Some people are simply unaware that personal appointments exist, and others do not understand the difference between the different types of personal appointments—medical, financial and guardianship.
 - The procedures for personal appointments are outlined in different legislation and are inconsistent.
 - It is difficult for interested third parties, such as medical practitioners and financial institutions, to establish that an appointment is valid and current.
 - There is potential for the abuse of vulnerable people because of insufficient safeguards.
- 10.68 Our responses to these problems are found in this and the following chapters:
- Chapter 5, which recommends the creation of a new consolidated Act to provide for both personal and VCAT appointments and broad community education, as well as new terminology for appointments
 - Chapter 16, which discusses the establishment of an online register of appointments

87 Department of Veterans' Affairs (Commonwealth), *Arrangements for Other People to Act on your Behalf* (2010), 3 <<http://factsheets.dva.gov.au/factsheets/documents/LEG01a.pdf>>.

88 Ibid.

89 *Veterans' Entitlements Act 1986* (Cth) s 58D.

90 Department of Veterans' Affairs (Commonwealth), *Arrangements for Other People to Receive Payments on your Behalf* (2010), 2 <<http://factsheets.dva.gov.au/factsheets/documents/LEG01b.pdf>> ('*Arrangements for Other People to Receive Payments on your Behalf*').

91 *Veterans' Entitlements Act 1986* (Cth) s 202.

92 *Arrangements for Other People to Receive Payments on your Behalf*, above n 90, 2.

93 Ibid.

94 *Aged Care Act 1997* (Cth) s 96.5.

95 Aged Rights Advocacy Service, *Information Sheet: Participating in Decision Making in Aged Care Homes* (2001) <http://www.sa.agedrights.asn.au/files/18_participating_decision_making_in_res_care.pdf>.

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- Chapter 17, which proposes new principles to guide substitute decision making and considerations that should be taken into account when making decisions
- Chapter 18, which recommends a number of accountability mechanisms for supporters and substitute decision makers.

10.69 In this section, we consider community responses to some of the proposals put forward in the consultation paper to improve and enhance understanding of the personal appointments scheme.

FEWER PERSONAL APPOINTMENTS

Combining medical power of attorney and enduring guardian appointments

10.70 In the consultation paper, we asked whether it would be beneficial to streamline and simplify the personal appointment scheme by reducing the number of enduring appointments from three to two.

10.71 Most people who supported a reduction in the number of appointments considered that this would be best achieved by removing the option of appointing an agent under the Medical Treatment Act and by requiring people to use enduring guardianship to appoint a person to make decisions about medical treatment.⁹⁶ One submission suggested combining enduring guardian and enduring power of attorney (financial) appointments but retaining a separate appointment for an enduring power of attorney (medical treatment).⁹⁷ It was suggested this might be a preferable option because it acknowledges the overlap between financial and personal decision making that exists in decisions such as the selection of an aged care facility.⁹⁸

10.72 A common justification for reducing the number of appointments by combining medical power of attorney and enduring guardian appointments was that it 'would provide greater clarity and coherence in the guardianship system, and bring Victoria into line with the majority of other jurisdictions in Australia'.⁹⁹ It was also noted that a separation between lifestyle and personal matters (including medical treatment decisions) and financial matters reflects the current division in the powers that may be given to guardians and administrators.¹⁰⁰

10.73 A small number of submissions proposed that only one type of appointment should be available that allows a range of powers to be given, including personal, medical and financial powers.¹⁰¹

10.74 Submissions highlighted the idea that people may have skills in a particular type of decision making, such as financial decision making, but not in another.¹⁰² A number of submissions emphasised that even if the number of appointment types is reduced, it should be possible to appoint different people to make decisions in different areas.¹⁰³ The Federation of Community Legal Centres submitted that:

'it remains important that if a person wishes to donate the power to refuse medical treatment to a separate person from any appointee who has other guardianship powers, they be able to do so'.¹⁰⁴

96 For eg, Submissions CP 19 (Office of the Public Advocate), CP 20 (Epworth HealthCare), CP 33 (Eastern Health), CP 35 (Ursula Smith), CP 43 (Alfred Health), CP 63 (Shih-Ning Then, Prof Lindy Wilmott & Assoc Prof Ben White (QUT)), CP 65 (Council on the Ageing Victoria), CP 68 (Australian Nursing Federation), CP 70 (State Trustees Limited) and CP 75 (Federation of Community Legal Centres (Victoria)).

97 Submission CP 49 (Respecting Patient Choices Program—Austin Health).

98 Ibid.

99 Submission CP 63 (Shih-Ning Then, Prof Lindy Wilmott & Assoc Prof Ben White (QUT)).

100 Submission CP 65 (Council on the Ageing Victoria).

101 For eg, Submissions CP 8 (Leonie Chirgwin), CP 22 (Alzheimer's Australia Vic), CP 37 (Mildura Base Hospital), CP 43 (Dr Michael Murray), and CP 59 (Carers Victoria).

102 For eg, Submission CP 22 (Alzheimer's Australia Vic).

103 Submissions CP 22 (Alzheimer's Australia Vic) and CP 75 (Federation of Community Legal Centres (Victoria)).

104 Submission CP 75 (Federation of Community Legal Centres (Victoria)).

- 10.75 It was also noted that it is important for the documents making the appointment to clearly and unambiguously identify who is appointed to exercise particular powers.¹⁰⁵
- 10.76 A number of submissions argued that the powers given under an enduring power of attorney (medical treatment) are so significant that a distinction should be maintained between this type of appointment and other enduring appointments.¹⁰⁶ One reason given for retaining three types of appointment was that maintaining a separate power for medical treatment provides safeguards by ensuring that the purpose and limitations of the power are clearly understood by both the person and the appointee.¹⁰⁷ Submissions also noted the different competencies or skills required for different types of appointments.¹⁰⁸ The Catholic Archdiocese of Melbourne considered that:
- appointments to make medical treatment decisions need to be treated very differently and should be separate from appointments for other types of decisions ... the State has obligations to protect health and life and ought not to provide authority to make decisions that are not in the best interests of the represented person.¹⁰⁹

POWERS

- 10.77 The Commission did not specifically seek responses about how to clarify the powers of personal appointees. However, the consultation paper proposed amendments to the powers of VCAT appointees, and the Commission has considered responses to those proposals in making recommendations in this chapter.

Commencement of powers

- 10.78 The Commission proposed that all enduring appointments use a single criterion for activation, for example, loss of capacity in relation to the particular decisions covered by that appointment. Some people expressed concern that the holder of an enduring appointment is required to determine that the person has lost capacity in order to start using the appointment.¹¹⁰ It was suggested that this may be difficult when the person's capacity is fluctuating¹¹¹ or because appointees are sometimes reluctant to make this decision about a close relative.¹¹²
- 10.79 Others suggested that it might be unhelpful to use a single criterion for activation because it is inconsistent with an acceptance of fluctuating capacity and the associated idea of a continuum of decision making.¹¹³ Several people observed that there might be a need to move backwards and forwards between providing support and providing substituted decision making to accommodate fluctuating capacity.¹¹⁴
- 10.80 A number of submissions favoured introducing a consistent approach across all enduring appointments for determining the time for an enduring appointment to come into effect.¹¹⁵

¹⁰⁵ Submission CP 37 (Mildura Base Hospital).

¹⁰⁶ For eg, Submissions CP 23 (Dr Kristen Pearson), CP 27 (Catholic Archdiocese of Melbourne), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

¹⁰⁷ For eg, Submissions CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

¹⁰⁸ For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 71 (Seniors Rights Victoria).

¹⁰⁹ Submission CP 27 (Catholic Archdiocese of Melbourne).

¹¹⁰ For eg, consultation with Australian & New Zealand Society for Geriatric Medicine (7 April 2011).

¹¹¹ For eg, consultations with Australian & New Zealand Society for Geriatric Medicine (7 April 2011) and Alzheimer's Australia Vic and roundtable with people caring for parents with dementia, (8 April 2011); Submission CP 19 (Office of the Public Advocate).

¹¹² Consultation with Australian & New Zealand Society for Geriatric Medicine (7 April 2011).

¹¹³ For eg, consultations with Australian & New Zealand Society for Geriatric Medicine (7 April 2011) and Alzheimer's Australia Vic and roundtable with people caring for parents with dementia, (8 April 2011); Submission CP 19 (Office of the Public Advocate).

¹¹⁴ Ibid.

¹¹⁵ For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 65 (Council on the Ageing Victoria), CP 71 (Seniors Rights Victoria) and CP 78 (Mental Health Legal Centre).

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- 10.81 Some submissions supported achieving consistency by requiring that all appointments should only be able to take effect at the time the person loses capacity.¹¹⁶ Others considered that the best approach would be to allow the person making the appointment to elect whether the powers should take effect immediately, or at a time specified by the person.¹¹⁷
- 10.82 Other people considered that it was either inappropriate or unhelpful to allow all types of enduring powers to be activated at the same time.¹¹⁸ These submissions supported maintaining a distinction between the activation times of different types of enduring appointments based on the powers that are given.¹¹⁹ The Law Institute of Victoria submitted that '[m]ost clients would be unlikely or very reluctant to appoint an enduring guardian with immediate effect because of concerns that an enduring guardian could override their decisions'.¹²⁰
- 10.83 Particular emphasis was placed on the difference between financial and medical appointments.¹²¹ A number of submissions suggested that while there are good reasons why a donor might wish a financial appointment to operate while they still have capacity, this is unlikely to be the case for medical powers. Victoria Legal Aid noted that:

[i]n relation to medical powers, there would seem to be less reason to have a power that applies while the person still has capacity; it is hard to think of a situation requiring medical consent where a person may have capacity but need someone else to consent or transact for them.¹²²

PROOF OF IDENTITY

- 10.84 Proof of identity of those people who make and accept enduring appointments is an important means of guarding against fraud and other dishonest behaviour.
- 10.85 Community responses to the Commission's proposal for an online register noted the importance of proof of identity checks on the parties involved in the appointment.¹²³
- 10.86 It was suggested that high-level proof of identity standards should apply during the process of making an appointment.¹²⁴ This is particularly important if registration becomes proof of a valid appointment.
- 10.87 Because some people do not have sufficient proof of identity documents it will be necessary to devise practices to deal with such situations. We discuss this further in Chapter 16, where we outline recommendations for the new online register.

TRANSITIONAL ARRANGEMENTS

- 10.88 A number of submissions stressed the importance of transitional arrangements to honour appointments made under the existing legislation.¹²⁵

¹¹⁶ For eg, Submissions CP 55 (Office of the Health Services Commissioner), CP 65 (Council on the Ageing Victoria) and CP 78 (Mental Health Legal Centre).

¹¹⁷ For eg, Submissions CP 19 (Office of the Public Advocate) and CP 71 (Seniors Rights Victoria).

¹¹⁸ For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne), CP 35 (Ursula Smith), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria) and CP 75 (Federation of Community Legal Centres (Victoria)).

¹¹⁹ For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria) and CP 75 (Federation of Community Legal Centres (Victoria)).

¹²⁰ Submission CP 77 (Law Institute of Victoria).

¹²¹ For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 77 (Law Institute of Victoria).

¹²² Submission CP 73 (Victoria Legal Aid).

¹²³ Consultations with Victorian Registry of Births, Deaths and Marriages (16 February 2011) and Australian Bankers' Association (16 March 2011); Submission CP 60 (Office of the Victorian Privacy Commissioner).

¹²⁴ An example is the National Proof of Identity framework adopted by BDM (Vic) which requires that proof of identity documents are either authenticated at BDM (Vic) office or photocopies of proof of identity documents are certified by police for postal applications: consultation with Victorian Registry of Births, Deaths and Marriages (16 February 2011). This is discussed in more detail in Chapter 16.

¹²⁵ For eg, Submissions CP 49 (Respecting Patient Choices Program—Austin Health), CP 70 (State Trustees Limited) and CP 77 (Law Institute of Victoria).

MUTUAL RECOGNITION

10.89 Participants in consultations recognised the desirability of nationally consistent laws about enduring appointments.¹²⁶ The Commission has made recommendations relating to this issue in Chapter 27.

CONFLICT TRANSACTIONS

10.90 Community responses emphasised that substitute decision makers should be required to act honestly and respond appropriately to conflicts of interest.¹²⁷ In Chapter 17, we recommend that guardianship laws should specifically require these steps to be taken.

10.91 The Commission notes that a number of people expressed concern that situations where a conflict of interest may arise between substitute decision makers and the represented person are poorly understood.¹²⁸

THE COMMISSION'S VIEWS AND CONCLUSIONS

RETAINING ENDURING PERSONAL APPOINTMENTS

10.92 Enduring appointments play a crucial role in allowing people to plan for their future. The current law is overly complex, providing for three different types of enduring appointment in three different Acts. The process of making an appointment is inconsistent and the terminology used to describe both the person making an appointment and the person appointed is different.

10.93 The Commission believes that new guardianship legislation should continue to allow adults with capacity to make personal appointments. While new laws should encourage these appointments by being as accessible and simple as possible, they should also contain safeguards to protect vulnerable people against abuse.

RECOMMENDATION

Retain enduring powers of attorney

92. An adult with capacity should continue to be able to appoint a person to make decisions for them about personal matters, including medical treatment and financial matters, when they lack capacity to make these decisions in the future.

VICTORIAN PARLIAMENT LAW REFORM COMMITTEE

10.94 The Commission supports nearly all of the recommendations made by the Victorian Parliament Law Reform Committee about powers of attorney.

10.95 Most of the recommendations in this chapter complement the recommendations of the Victorian Parliament Law Reform Committee by seeking to incorporate them within our proposals for reform of guardianship laws. The Commission does not refer to or comment upon all of the Parliamentary Committee's recommendations. In those few instances where the Commission believes that the Parliamentary Committee's recommendations require further consideration or modification, detailed commentary is provided.

¹²⁶ For eg, consultations with Australian Bankers' Association (16 March 2011) and Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society (23 March 2011); Submission CP 23 (Dr Kristen Pearson).

¹²⁷ For eg, Submissions CP 19 (Office of the Public Advocate), CP 21 (Action for More Independence & Dignity in Accommodation), CP 72 (Seniors Rights Victoria) and CP 77 (Law Institute of Victoria).

¹²⁸ For eg, Submission CP 77 (Law Institute of Victoria).

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TERMINOLOGY

- 10.96 The Commission acknowledges the need to strike a balance between familiar terminology and more modern terms that many people will find easier to understand.

Names of substitute decision makers

- 10.97 In Chapter 5, the Commission recommended new terms for people appointed to substitute decision-making roles under personal appointments. When someone appoints another person to make substitute decisions about their lifestyle and personal matters, that person should be known as their ‘enduring personal guardian’. When someone appoints another person to make substitute decisions about their finances, that person should be known as their ‘enduring financial administrator’. These terms complement the Commission’s recommendations for the new terms to describe substitute decision makers appointed by VCAT.
- 10.98 The term ‘attorney’ is confusing because it is used in some places to refer to a lawyer. The Commission believes that it would be wise to abandon use of this word in guardianship law. The Commission prefers consistency with the terms proposed for VCAT appointments. New guardianship laws should refer to the appointment of an enduring ‘personal guardian’ and an enduring ‘financial administrator’.

Names of documents making appointment

- 10.99 The Victorian Parliament Law Reform Committee also proposed new terms for describing the documents in which those appointments are made.
- 10.100 The Commission identified two options for describing an appointment that operates after the person has lost capacity—‘enduring’ or ‘lasting’. While ‘lasting’ is the more modern term, Victorians have dealt with enduring powers of attorney for 30 years. On balance, the Commission favours retaining the term ‘enduring’.

Names of other parties

- 10.101 The Victorian Parliament Law Reform Committee also proposed new terms for describing the people who make personal appointments.
- 10.102 The Victorian Parliament Law Reform Committee recommended that the term ‘principal’ should be used to describe a person who creates an enduring appointment. It also recommended that a person appointed under all types of powers should be called a ‘representative’.¹²⁹
- 10.103 The Victorian Government has indicated that it supports in principle the use of simple and consistent names for parties to an enduring appointment. It indicated it would further consider the use of the generic term ‘representative’.¹³⁰
- 10.104 The Commission supports the recommendation that a person who makes a personal appointment should be called a principal.
- 10.105 The Commission does not support the use of the term representative, regardless of appointment type, recommended by the Parliamentary Committee. We recognise that this term is simple and suggests that the person is representing the principal’s interests, but calling all people appointed under a personal appointment a ‘representative’ will increase confusion about the powers a person may exercise under each appointment. Providing different names for the two appointment types—and indeed other appointments under the new Act—highlights the different roles these people perform. For this reason, the Commission favours the use of two terms to differentiate between someone given financial powers and someone given powers to make decisions about personal matters.

¹²⁹ *Inquiry into Powers of Attorney*, above n 8, 47.

¹³⁰ *Government Response to the Parliament of Victoria Law Reform Committee*, above n 10, 6.

RECOMMENDATIONS

Terminology

93. The documents used to create an enduring appointment should be called 'enduring appointment of a personal guardian' and 'enduring appointment of a financial administrator'.
94. A person who makes an enduring appointment should be called a 'principal'.
95. The people appointed under these documents should be called an 'enduring personal guardian' and an 'enduring financial administrator'.

FEWER APPOINTMENTS—REMOVAL OF MEDICAL AGENTS

- 10.106 In Chapter 5, the Commission recommended the introduction of a new Guardianship Act that contains separate provisions for personal, financial and medical decision making.
- 10.107 The Commission believes it is desirable to streamline and simplify the personal appointment scheme by reducing the number of enduring appointments from three to two. This is best achieved by removing the option of appointing an agent under the Medical Treatment Act and by requiring people to use an enduring guardianship appointment for medical treatment matters. This recommendation reflects the current division of powers between VCAT-appointed guardians and administrators, and would make Victoria consistent with most other Australian jurisdictions. We discuss this recommendation in more detail in Chapter 13 where we consider medical treatment laws.

RECOMMENDATION

Removal of medical agents

96. The range of powers that can be given to an enduring personal guardian should include the power to consent to or refuse medical treatment on behalf of the principal. These new provisions should replace the current provisions in the *Medical Treatment Act 1988 (Vic)* for appointing an agent to make substitute decisions about medical treatment.

REGISTRATION AND TRANSITIONAL ARRANGEMENTS

- 10.108 In Chapter 16, the Commission recommends that an online register of personal appointments and VCAT appointments be established. We consider that it should be compulsory to register an enduring personal appointment for it to be valid. This will provide certainty to third parties and help to ensure that enduring appointments are recognised and respected.
- 10.109 In order to promote certainty, the registration of an appointment of an enduring personal guardian under new guardianship legislation should revoke any previous appointments of an enduring guardian under the G&A Act. The appointment of an agent under the Medical Treatment Act should survive the registration of an enduring personal guardian appointment under new guardianship legislation, unless the enduring personal guardian is given medical treatment decision-making powers, including the power to complete a refusal of treatment certificate.

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- 10.110 The forms for appointing an enduring personal guardian should clearly state that registering an enduring personal guardian appointment will revoke any previous appointments of an enduring guardian under the G&A Act. The forms should also specify the powers that a principal can give to an enduring guardian.
- 10.111 The same approach should be taken for enduring appointments of financial administrators. The form for appointing an enduring financial administrator should clearly state that registering a new appointment will revoke any previous appointments of an enduring attorney under the Instruments Act.

RECOMMENDATIONS

Registration

97. It should be compulsory to register an enduring appointment of a personal guardian and an enduring appointment of a financial administrator for the appointment to be legally valid.
98. After the commencement of new guardianship legislation:
- (a) registering an appointment of an enduring financial administrator will revoke an appointment of an enduring attorney made under the *Instruments Act 1958* (Vic).
 - (b) registering an appointment of an enduring personal guardian will revoke an appointment of an enduring guardian made under the *Guardianship and Administration Act 1986* (Vic).
 - (c) registering an appointment of an enduring personal guardian with decision-making powers in relation to health matters will revoke an appointment of an agent made under the *Medical Treatment Act 1988* (Vic). If the enduring guardian has not been given decision-making powers in relation to health matters, the appointment of the agent under the Medical Treatment Act should survive.
99. The register should indicate if an appointment of an enduring personal guardian or enduring financial administrator is one that grants standard (full) powers or if the powers granted are limited or subject to conditions or restrictions.

TIME TO REGISTER AN EXISTING PERSONAL APPOINTMENT

- 10.112 The Commission believes it is important that personal appointments made under existing legislation be preserved by appropriate transitional arrangements. People should be given five years to register existing appointments. In Chapter 5, the Commission recommended that community education programs about the new Act also include information about this transition period.

RECOMMENDATIONS

Transitional provisions—time to register an existing personal appointment

100. An enduring guardian appointed under the *Guardianship and Administration Act 1986* (Vic), enduring attorney appointed under the *Instruments Act 1958* (Vic) or an agent appointed under the *Medical Treatment Act 1988* (Vic) before the commencement of new guardianship legislation should continue to have the powers provided by the appointment.
101. These appointments should be registered within five years of the commencement date of new guardianship legislation in order to be valid.

POWERS

- 10.113 The Victorian Parliament Law Reform Committee recommended clarifying the powers that may be given to personally appointed substitute decision makers.¹³¹
- 10.114 It is important that both the principal and the substitute decision maker understand the nature of the powers given by an enduring appointment, as well as any limits or conditions on the exercise of those powers.
- 10.115 To promote integration of guardianship laws, the powers that a principal can give to an enduring personal guardian or financial administrator under a personal appointment should be the same powers available to VCAT when it makes appointments.
- 10.116 The Commission recommends a consistent approach with that proposed by the Victorian Parliament Law Reform Committee. The Commission believes that the appointing document should specify the decision-making powers the enduring personal guardian or enduring financial administrator can exercise. The forms should provide the option of giving an enduring personal guardian or enduring financial administrator **full or limited powers**.
- 10.117 The Commission considers legislative clarity is best achieved by providing that an enduring financial administrator may be given powers for **'financial matters'** and an enduring personal guardian may be given powers for **'personal matters'**. Financial matters and personal matters should be defined in the new Act.
- 10.118 There should be a non-exhaustive list of powers that can be given. The definitions should also include a list of restrictions on the powers that can be given to an enduring personal guardian or to an enduring financial administrator.

RECOMMENDATIONS

Powers

102. An adult with capacity (the principal) should be able to appoint an enduring personal guardian to make decisions for them about personal matters, including medical treatment, or an enduring financial administrator to make decisions for them about financial matters.
103. The document appointing an enduring personal guardian or an enduring financial administrator should specify which decision-making powers the enduring personal guardian or enduring financial administrator is to have.
104. 'Financial matters' and 'personal matters' should be defined in the statute. The definitions of 'financial matters' and 'personal matters' should include a non-exhaustive list of powers that can be given. The definitions should also include a list of restrictions on the powers that can be given to an enduring personal guardian or to an enduring financial administrator.
105. A principal may specify conditions and limitations on the powers and exercise of powers by the enduring personal guardian or enduring financial administrator.

¹³¹ *Inquiry into Powers of Attorney*, above n 8, 157.

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Financial matters

106. A financial matter should be defined as a matter relating to the person's financial or property matters. An appointment may give an enduring financial administrator or a financial administrator full powers to make decisions about financial or property matters or specify the powers that are given. Examples of the financial decision-making powers that can be given to an enduring financial administrator or financial administrator are listed in Divisions 3 and 3A of Part 5 of the *Guardianship and Administration Act 1986* (Vic) and include but are not limited to:

- (a) paying sums of money to the person for their personal expenditure
- (b) paying maintenance and accommodation expenses for the person and their dependants, including, for example, purchasing an interest in, or making a contribution to, an establishment that will maintain or accommodate the person or one or more of their dependants
- (c) paying the person's debts, including any fees and expenses to which an administrator is entitled under a document made by the person or under a law
- (d) receiving and recovering money payable to the person
- (e) carrying on a trade or business of the person
- (f) performing contracts entered into by the person
- (g) discharging a mortgage over the person's property
- (h) paying rates, taxes, insurance premiums or other outgoings for the person's property
- (i) insuring the person or their property
- (j) otherwise preserving or improving the person's estate
- (k) investing for the person
- (l) continuing investments of the person, including taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by their existing shareholding
- (m) undertaking a real estate transaction for the person
- (n) dealing with land for the person
- (o) undertaking a beneficial transaction for the person involving the use of their property as security (for example, for a loan or by way of a guarantee) for an obligation
- (p) withdrawing money from, or depositing money into, the person's account with a financial institution
- (q) a legal matter relating to the adult's financial or property matters.

Limitations on financial decision-making powers

107. The financial decision-making powers that cannot be given to an enduring financial administrator or financial administrator, and that should be listed in the statute, include but are not limited to:

- (a) making or revoking the person's will
- (b) managing the estate of the principal upon their death
- (c) consenting to an unlawful act
- (d) making decisions that restrict the person's personal decision-making autonomy, but cannot be reasonably justified in order to ensure proper management of their finances
- (e) a conflict transaction, unless the transaction has been specifically allowed in the order.

Personal matters

108. A personal matter should be defined as a matter relating to the person's personal or lifestyle matters, including medical treatment. An appointment may give an enduring personal guardian or personal guardian full powers to make decisions about personal, lifestyle, and medical treatment, or limit the powers that are given. The personal decision-making powers that can be given to an enduring personal guardian or personal guardian and that should be listed in the statute, include but are not limited to:

- (a) where and with whom the person lives and decisions about restrictions upon liberty (discussed further in Chapter 15)
- (b) with whom the person associates
- (c) whether the person works and, if so, the kind and place of work and the employer
- (d) decisions about health care, including refusal of life-sustaining medical treatment if the conditions for refusal of medical treatment are fulfilled, and consent to forensic examinations (discussed further in Chapter 13)
- (e) what education or training the person undertakes and the place where this occurs
- (f) daily living issues, including, for example, diet and dress
- (g) any legal matters not relating to the person's financial or property matters.

Personal appointments of substitute decision makers

Limitations on personal decision-making powers

109. The personal decision-making powers that cannot be given to an enduring personal guardian or personal guardian, and that should be listed in the statute, include but are not limited to:
- (a) making or revoking the person's will
 - (b) making or revoking an appointment, enduring appointment or common law advance directive, or refusal of treatment certificates or instructional directives
 - (c) voting on the person's behalf in a Commonwealth, state or local election or referendum
 - (d) entering into or dissolution of a marriage or sexual relationship
 - (e) decisions about the care and wellbeing of any children of the person, including a decision in relation to adoption
 - (f) a decision to detain or compulsorily treat the person for reasons other than the personal and social wellbeing of the person
 - (g) consenting to an unlawful act
 - (h) a decision about a special procedure.¹³²

MULTIPLE REPRESENTATIVES

- 10.119 Some people also emphasised that different skills or competencies are required for different types of appointment. The Commission believes that allowing the principal to appoint more than one, but not more than three, enduring personal guardians or financial administrators will resolve this issue.¹³³ This approach simplifies the personal appointment scheme while still allowing the principal to distribute powers based on skills or competencies. A principal will have the option of appointing one enduring guardian to make medical decisions and a different person to make decisions about other matters, such as accommodation. The forms and associated information should be drafted to make this option very clear.
- 10.120 As with the current legislation, in the event that a multiple appointment is not working well, an appointee should be able to apply to VCAT to have the appointment reviewed.¹³⁴ VCAT's current remedial powers to vary the appointment,¹³⁵ provide directions¹³⁶ or revoke an appointment should continue.¹³⁷

¹³² In Chapter 13 the Commission proposes that the special procedure definition and processes that limit authorisation of these processes to VCAT in the *Guardianship and Administration Act 1986* (Vic) be retained in new guardianship legislation. See: at ss 3, 39(1)(a).

¹³³ Our recommendations anticipate that multiple representatives can be appointed to exercise the same or different powers. The *Inquiry into Powers of Attorney*, above n 8, 145, also discussed the appointment of multiple representatives. In their Report, the Committee focused primarily on multiple representatives exercising the same powers. The Committee also discussed the issue of multiple representatives not agreeing, which would be most likely where these representatives are exercising the same powers. The Commission supports Recommendation 40 of the Report which says 'that a principal can appoint multiple representatives to act jointly, jointly and severally, or in any combination, for example as a majority' (147) and Recommendation 41 which proposes that, where multiple representatives disagree, VCAT can provide binding guidance to the representatives (148).

¹³⁴ See *Instruments Act 1958* (Vic) ss 125V, 125ZA.

¹³⁵ *Ibid* s 125Z(1)(b).

¹³⁶ *Ibid* s 125V.

¹³⁷ *Ibid* s 125X.

RECOMMENDATIONS

Multiple representatives

110. The principal should be able to give an enduring personal guardian or an enduring financial administrator as many or as few of the relevant available powers as they wish.
111. The principal should be able to appoint more than one but not more than three enduring personal guardians or enduring financial administrators and should be able to give different powers to each.

CONSENT AND ACKNOWLEDGEMENT OF RESPONSIBILITIES

- 10.121 The Commission believes an enduring personal guardian or enduring financial administrator must formally accept the appointment. Acceptance should be given using a prescribed form set out in the new Act. The statement of acceptance should include an undertaking (as is required currently in the Instruments Act) by the appointee to act in accordance with their responsibilities. We discuss this reform idea in Chapter 18.
- 10.122 Someone who is authorised to witness affidavits should witness the statement of acceptance. This witness may be, but need not be, the same person who witnessed the principal's signature.

RECOMMENDATIONS

Consent and acknowledgement of responsibilities

112. An appointment of an enduring personal guardian or enduring financial administrator should only be effective if the appointee signs a form formally accepting the appointment.
113. Acceptance should be given using a prescribed form. The prescribed forms should be set out in the new statute.
114. The statement of acceptance should include an undertaking by the person accepting the appointment to act in accordance with their responsibilities.

WITNESSING AN APPOINTMENT

- 10.123 The Victorian Parliament Law Reform Committee recommended that new guardianship legislation should require all personal appointments to be witnessed by two people, one of whom is authorised to witness affidavits or is a medical practitioner.¹³⁸
- 10.124 Currently, all personal appointments require two witnesses.¹³⁹ One of the witnesses must be someone who is authorised to sign a statutory declaration.¹⁴⁰ The list of people who are permitted to witness a statutory declaration is quite extensive. It includes justices of the peace and people acting in various professional roles such as lawyers, dentists, vets, pharmacists, school principals, bank managers, local

¹³⁸ *Inquiry into Powers of Attorney*, above n 8, 77.

¹³⁹ *Instruments Act 1958* (Vic) s 123(3); *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c); *Medical Treatment Act 1988* (Vic) s 5A(2)(a).

¹⁴⁰ *Instruments Act 1958* (Vic) s 125(3); *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c)(iv); *Medical Treatment Act 1988* (Vic) s 5A(2)(a).

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councillors and members of parliament.¹⁴¹ The range of people who may currently witness an enduring appointment in Victoria is broad in comparison with many other jurisdictions.¹⁴²

- 10.125 The Victorian Parliament Law Reform Committee suggested that the current class of authorised witnesses is too wide.¹⁴³ Its recommendation narrows the range of people who may witness an enduring appointment to provide better assurance that the authorised witness is able to assess the principal's understanding of the document and identify any evidence of duress.¹⁴⁴
- 10.126 The Victorian Government indicated support in principle for the requirement that all appointments should have two witnesses with appropriate qualifications. The Government wished to consider issues related to limiting authorised witnesses.¹⁴⁵

The Commission's view

- 10.127 The Commission believes it is important to achieve an appropriate balance between stringent witnessing requirements and not discouraging personal appointments by making it too difficult for people to locate eligible witnesses.
- 10.128 The Commission agrees with the reforms proposed by the Victorian Parliament Law Reform Committee. The Commission has also considered whether the witnessing requirements should be different for a principal who is giving powers that relate to medical treatment, but considers that raising the authorised witness requirement to require someone who is authorised to witness an affidavit adequately strikes this balance.¹⁴⁶
- 10.129 In Chapter 11, we consider the witnessing requirements for making a stand-alone instructional directive about medical treatment.

RECOMMENDATION

Witnessing a personal appointment

115. New guardianship legislation should require all personal appointments to be witnessed by two witnesses, one of whom is authorised to witness affidavits or is a medical practitioner.

PROOF OF IDENTITY

- 10.130 The Commission recognises the importance of ensuring that adequate proof of identity checks on the identity of the principal are undertaken to prevent fraudulent registration of enduring appointments.
- 10.131 The Commission considers that the best way to do this is to require the principal to show proof of identity documents to the two witnesses at the time the enduring

¹⁴¹ *Evidence (Miscellaneous Provisions) Act 1958* s 107A.

¹⁴² Some jurisdictions require only one witness but limit the class of possible witnesses to a much narrower range of people acting in a professional role. New South Wales takes this approach. It requires only one witness for an enduring power of attorney (financial), but limits the class of people who may act as witnesses to court registrars, lawyers, conveyancers or appropriately qualified employees of a trustee company. *Powers of Attorney Act 2003* (NSW) s 19. Other jurisdictions have even more rigorous witnessing requirements, requiring two witnesses who each have professional expertise. For eg *Enduring Powers of Attorney Ordinance* (Hong Kong) cap 501, s 5(2)(a). See also: <www.opa.sa.gov.au/cgi-bin/wf.pl?pid=&hi=&mode=show&folder=../html/documents/05_Consent&file=23-Informal_Arrangements_for_People_with_Mental_Incapacity.html>.

¹⁴³ *Inquiry into Powers of Attorney*, above n 8, 77.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Government Response to the Parliament of Victoria Law Reform Committee*, above n 10, 10.

¹⁴⁶ In Chapter 24 the Commission proposes an additional witnessing requirement when a person wishes to appoint an enduring personal guardian with the power to make decisions about psychiatric treatment which override the powers of an authorised psychiatrist under the *Mental Health Act 1986* (Vic) in some instances.

appointment is made. The witness who is the person authorised to witness the document should certify that they have seen appropriate identification documents, which confirm the principal's identity.

RECOMMENDATIONS

Proof of identity

116. The principal should show proof of identity documents to the two witnesses at the time the enduring appointment document is signed.

117. The authorised witness should be required to certify that they have seen appropriate identification documents, which confirm the principal's identity. New guardianship legislation or regulations should detail what combination of documents is eligible as effective proof of identification.

SIGNING FOR THE PRINCIPAL

10.132 The Instruments Act currently allows a donor to authorise an 'eligible person' to sign an enduring power of attorney on their behalf—at their direction and in their presence.¹⁴⁷ The eligible person must be aged over 18 years and must not be a witness to the document, currently appointed as an attorney or nominated as an attorney in the document.¹⁴⁸ If this process is undertaken, witnesses to the appointment must certify that:

- the donor of the power directed the person to sign the enduring power of attorney for the donor
- the donor of the power gave that direction freely and voluntarily in the presence of the witness
- the person signed it in the presence of the donor and the witness
- at the time, the donor appeared to the witness to have the capacity necessary to make the enduring power of attorney.¹⁴⁹

10.133 The Commission believes that this process provides an important means for people who are physically incapable of signing a document to make an appointment, and provides adequate safeguards against abuse. The Commission proposes that this process be extended to all personal appointments of substitute decision makers, and also the appointment of 'supporters', which we consider in more detail in Chapter 8.

RECOMMENDATIONS

Signing for the principal

118. If, because of physical limitations, the principal is unable to sign the documents making an enduring appointment, it should be possible for someone to sign for them on their direction and in their presence.

119. Similar provisions to those contained in sections 123(2)(b), 124 and 125A(2) of the *Instruments Act 1958* (Vic) should be included in new guardianship legislation to provide for this practice.

¹⁴⁷ *Instruments Act 1958* (Vic) s 123(2)(b).

¹⁴⁸ *Ibid* s 124.

¹⁴⁹ *Ibid* s 125A(2).

Personal appointments of substitute decision makers

CONFLICT TRANSACTIONS

- 10.134 The Commission believes that new legislation should clearly define a conflict transaction. It should prohibit someone appointed as an enduring financial administrator from engaging in conflict transactions other than when clearly permitted to do so. We have based our conflict transaction proposal on Queensland legislation.¹⁵⁰
- 10.135 A conflict transaction should be defined as a transaction in which there may be conflict, or which results in conflict, between the duty of an enduring financial administrator towards the principal and their other interests.
- 10.136 There are some situations where conflict transactions should be allowed if properly authorised. New guardianship legislation should provide that an enduring financial administrator must not enter into a conflict transaction unless they have been authorised either by the principal in the appointment before the transaction takes place or by VCAT. Legislation should also allow a principal who has capacity to retrospectively authorise or ratify a conflict transaction and also permit VCAT to ratify a completed conflict transaction.

Gifts

- 10.137 The Victorian Parliament Law Reform Committee also addressed the issue of gifts that an appointee might make on behalf of the principal, either to themselves or to a person with whom the principal is closely involved.¹⁵¹
- 10.138 It recommended that the law should:
- provide that a representative can make a gift of the principal's property, including to the representative, only if:
 - the gift is reasonable in the circumstances, particularly in view of the principal's financial situation AND
 - the gift:
 - *is to a relative or close friend of the principal and is of a seasonal nature or for a special event OR*
 - *the gift is of a type of donation that the principal made when he or she had capacity or might reasonably be expected to make.*¹⁵²
- 10.139 New guardianship legislation should specify that gifts made in accordance with the gifting provisions as recommended by the Victorian Parliament Law Reform Committee do not amount to a conflict transaction. New legislation should also specify that provision made for the maintenance of the principal's dependants in accordance with the legislation would not be a conflict transaction.
- 10.140 A person appointed as an enduring financial administrator will frequently be the spouse or partner of the principal. Often property, such as the family home, will be held jointly. The Commission considers that it is unworkable and overly onerous to classify a transaction as a conflict transaction solely because it involves property jointly held by the enduring financial administrator and the principal. This matter should be expressly dealt with in new legislation.
- 10.141 In Chapter 12, we consider how gifting provisions should apply in tribunal appointments, and particularly the role of VCAT in monitoring compliance with these provisions.

¹⁵⁰ Powers of Attorney Act 1998 (Qld) s 73; Guardianship and Administration Act 2000 (Qld) s 37.

¹⁵¹ Inquiry into Powers of Attorney, above n 8, 200.

¹⁵² Ibid 202.

RECOMMENDATIONS

Conflict transactions

120. New guardianship legislation should define a conflict transaction. It should prohibit someone appointed as a financial administrator or an enduring financial administrator engaging in conflict transactions and set out the relevant exceptions to this rule.
121. A conflict transaction should be defined as a transaction in which there may be conflict, or which results in conflict, between:
- (a) the duty of a financial administrator or an enduring financial administrator towards the principal, and
 - (b) either—
 - (i) the interests of the appointee, or a relation, business associate or close friend of the appointee, or
 - (ii) another duty of the appointee.
122. The legislation should provide that:
- (a) An enduring financial administrator may not enter into a conflict transaction unless they have been authorised prior to the transaction taking place. The enduring financial administrator may be authorised in advance by the principal, who must have the capacity to authorise the conflict transaction, or by VCAT.
 - (b) A principal may authorise a particular conflict transaction, conflict transactions of that type or conflict transactions generally.
 - (c) A principal who has capacity may retrospectively authorise or ratify a conflict transaction.
 - (d) VCAT may authorise a particular conflict transaction, conflict transactions of that type or conflict transactions generally.
 - (e) VCAT may ratify a conflict transaction.
123. New guardianship legislation should specify that:
- (a) Gifts made in accordance with the gifting provisions recommended by the Victorian Parliament Law Reform Committee are not a conflict transaction.
 - (b) Provision made for the maintenance of the principal's dependants in accordance with the legislation will not be a conflict transaction.
 - (c) A transaction is not a conflict transaction only because by the transaction the appointee, in the appointee's own right and on behalf of the principal:
 - (i) deals with an interest in property jointly held, or
 - (ii) acquires a joint interest in property, or
 - (iii) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in (i) or (ii).

10

Chapter 10

Personal appointments of substitute decision makers

COMMENCEMENT OF POWERS

- 10.142 The Victorian Parliament Law Reform Committee recommended that a principal should be able to elect to make a personal appointment effective immediately, or upon a later date or subsequent event regardless of whether it provides guardianship or financial powers. It also recommended that if a principal does not specify when an enduring power commences, it should commence immediately.¹⁵³
- 10.143 The Victorian Government indicated support in principle for allowing a principal to make an enduring power of attorney for financial or guardianship matters effective immediately or upon a later date or event. The Government wished to consider further whether an enduring power should commence immediately if the principal does not specify a date for commencement.¹⁵⁴
- 10.144 The Commission recognises that providing that all types of enduring appointments may come into effect at a time specified by the principal or otherwise immediately provides consistency. However, the Commission believes that enduring powers of guardianship should not be able to come into effect before the principal has lost capacity. Our consultations revealed that there is little support for allowing activation of an enduring guardianship appointment prior to loss of capacity. Strong discomfort was expressed with the idea that medical powers could be used by someone appointed under an enduring appointment when the principal still has capacity.
- 10.145 Because the Victorian Parliament Law Reform Committee's terms of reference did not include consideration of an agent under the Medical Treatment Act, it did not consider the time an enduring appointment should come into effect in relation to decisions about refusal of medical treatment.
- 10.146 The Commission believes that decisions about personal matters such as medical treatment or housing should not be made for a principal while that person still has capacity.
- 10.147 While a principal should be able to elect when the powers given by an enduring appointment of a financial administrator come into effect, the powers of an enduring guardian should only be effective when the principal loses capacity. If no time is specified for the commencement of the powers of an enduring financial administrator, those powers should commence when the principal loses capacity. This approach reflects the primary intent of an enduring appointment, while enabling a principal to make the power exercisable immediately if they wish.

RECOMMENDATIONS

Commencement of powers

124. The appointment of an enduring financial administrator may come into effect immediately, at a date specified by the principal, or on a specified occasion or circumstance.
125. The document making the appointment can include conditions about how a determination should be made that a specified circumstance has occurred.
126. If no date is specified, the powers of an enduring financial administrator come into effect when the principal loses capacity.
127. The powers of an enduring personal guardian should only come into effect when the principal loses capacity.

¹⁵³ *Inquiry into Powers of Attorney*, above n 8, 93.

¹⁵⁴ *Government Response to the Parliament of Victoria Law Reform Committee*, above n 10, 14.

RESIGNATION, REVOCATION AND VARIATION

- 10.148 The Commission proposes no change to the law governing resignation from and revocation of a personal appointment. Under the current law, a representative can resign while the principal retains capacity but once capacity is lost can only do so 'with the leave of a court or the Tribunal'.¹⁵⁵
- 10.149 New guardianship legislation should require that notice of resignation be recorded in a prescribed form that is provided to the registry. The representative should be required to take reasonable steps to inform the principal of the resignation. A resignation should take effect only when registered. The registry should also inform the principal of the resignation.
- 10.150 A principal with capacity should retain the right to vary or revoke a personal appointment at any time.¹⁵⁶

RECOMMENDATIONS

Resignation by the enduring personal guardian or enduring financial administrator

128. An enduring personal guardian or an enduring financial administrator should be able to resign at any time when the principal has capacity. If a principal has lost capacity or there is doubt about their capacity, it should not be possible to resign without the leave of VCAT.
129. An enduring guardian or enduring financial administrator must resign in writing using a prescribed form that is provided to the registry. The enduring guardian or enduring financial administrator should make reasonable attempts to notify the principal of the resignation.
130. A resignation should not be effective until registered.
131. When a resignation is registered, the registry should make reasonable attempts to notify the principal.

VCAT's power to revoke appointments

132. Any person with an interest in the affairs of the principal should be able to apply to VCAT when the principal has lost capacity for an order that a personal appointment be revoked or varied or declared invalid on the ground that:
- the principal lacked capacity at the time it was made
 - the document is not a proper record of the principal's wishes at the time it was made
 - the appointee is not complying with their obligations
 - the appointee lacks capacity to perform their obligations.

¹⁵⁵ *Instruments Act 1958* (Vic) s 125M.

¹⁵⁶ *Ibid* s 125I.

Personal appointments of substitute decision makers

RECOMMENDATIONS OF THE VICTORIAN PARLIAMENT LAW REFORM COMMITTEE REQUIRING FURTHER CONSIDERATION

Excluding some classes of people from witnessing enduring personal appointments

- 10.151 As noted above, the Commission agrees with the Victorian Parliament Law Reform Committee recommendation that new guardianship legislation should require all personal appointments to be witnessed by two witnesses, one of whom is authorised to witness affidavits or is a medical practitioner.¹⁵⁷
- 10.152 The Victorian Parliament Law Reform Committee also recommended that certain classes of people should be excluded from witnessing an enduring appointment document. Those classes of people are a party to the document and any person who could benefit from the document including a relative of a party to the document.¹⁵⁸ It also recommended that the forms for creating all powers of attorney should require each witness to declare that they are not a party to the document and not related to any party to the document.¹⁵⁹
- 10.153 The Victorian Government indicated support in principle for this proposal. The Government indicated it would consider further how to define a person who could benefit from a power of attorney, including a relative of a party to a power of attorney.¹⁶⁰

The Commission's view

- 10.154 The Commission believes that further consideration should be given to whether relatives should be automatically excluded from witnessing appointments. In keeping with the aim of encouraging people to make enduring appointments, it may be prudent to keep the range of non-professional witnesses broad and provide a safeguard by requiring the witness to sign a declaration that they are not going to benefit from the appointment. A relative may often be the most readily available person to witness an appointment, will not necessarily benefit from an appointment and may be well-placed to assess a principal's understanding of the documents. A compromise might be to allow relatives to witness an enduring appointment but exclude relatives from acting as the authorised witness (who would attest that a principal understands and is under no duress). If relatives are automatically excluded from witnessing enduring documents, careful consideration should be given to how a relative is defined.

Excluding unsuitable representatives

- 10.155 The Victorian Parliament Law Reform Committee also recommended that a person who had previously been convicted of an offence involving dishonesty should be excluded from acting as a representative under a financial enduring appointment. However, it was suggested that a principal should be able to apply to VCAT for approval to appoint a person who has previously been convicted of an offence involving dishonesty as a representative under an enduring power of attorney (financial). It recommended that when accepting an appointment as a representative, a person must declare that they are eligible to be appointed as a representative, and that a person who accepts an appointment as a representative who is not eligible should be guilty of an offence.¹⁶¹

¹⁵⁷ *Inquiry into Powers of Attorney*, above n 8, 77.

¹⁵⁸ *Ibid* 79.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Government Response to the Parliament of Victoria Law Reform Committee*, above n 10, 10.

¹⁶¹ *Inquiry into Powers of Attorney*, above n 8, 143.

10.156 The Victorian Government has indicated that it supports excluding unsuitable people from being appointed as representatives, including people who have previously been convicted of an offence involving dishonesty.¹⁶²

Personal monitors

10.157 The Victorian Parliament Law Reform Committee recommended that a principal should be able to appoint one or more personal monitors to oversee the operation of an enduring power of attorney (financial) or an enduring power of attorney (guardianship), and that the Victorian Government should produce simple, easy-to-understand information and educational materials for personal monitors.¹⁶³

10.158 The Victorian Government has indicated that it will consider this proposal as well as the provision of information resources for personal monitors. While recognising potential benefits of the recommendation, the Government considered some matters needed further thought such as the potential powers, duties and liability of a personal monitor.¹⁶⁴

The Commission's view

10.159 The Commission believes that it would be desirable to take a cautious approach to the inclusion of monitors in legislation.

10.160 The Commission notes that a principal can currently attach conditions, limitations and instructions on the exercise of powers by an enduring attorney.¹⁶⁵ These could include conditions or instructions concerning the use of a monitor.

10.161 The Commission sees merit in the view expressed by the Victorian Parliament Law Reform Committee that the principal is best placed to determine the role (if any) of a personal monitor, and for this reason suggests there is little benefit in dealing with the matter expressly in legislation.¹⁶⁶ This proposal requires further consideration by the Victorian Government.

¹⁶² *Government Response to the Parliament of Victoria Law Reform Committee*, above n 10, 19.

¹⁶³ *Inquiry into Powers of Attorney*, above n 8, 200.

¹⁶⁴ *Government Response to the Parliament of Victoria Law Reform Committee*, above n 10, 26.

¹⁶⁵ *Instruments Act 1958* (Vic) s 115(1)(b).

¹⁶⁶ *Inquiry into Powers of Attorney*, above n 8, 199.



Chapter 11

Documenting wishes about the future

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INTRODUCTION

- 11.1 The use of enduring appointments, discussed in the previous chapter, is one way a person can exercise some control over future decisions if they lose capacity. These appointments allow a person to choose a family member or friend in whom they have confidence to make decisions for them when they are unable to do so.
- 11.2 Another option is to give advance written instructions about particular decisions. **'Instructional directives'** can be made without appointing a substitute decision maker. They can be used to provide directions about the decision a person wants made in particular circumstances if they lose capacity. These documents are most commonly used to record directions about medical treatment. The legal status of instructional directives is unclear.
- 11.3 A third possibility is to combine the appointment of an enduring guardian or enduring attorney (financial) with instructions about how to exercise the powers given to the substitute decision maker. These may be 'binding instructions', or non-binding indications of wishes or preferences. The legal status of binding instructions is unclear.
- 11.4 The advantage of combining a personal appointment with an instructional directive is that it allows for the appointment of a trusted person to implement directives in circumstances that have been anticipated and to make decisions about those matters that have not been specifically addressed after bearing in mind any relevant instructions or wishes.

ADVANCE CARE PLANNING

- 11.5 It is important to distinguish between advance care planning and legal recognition of instructions about future decisions. Advance care planning is often used as a generic term to describe the process of planning for future health and personal care. Advance care planning often takes place within a health or aged care setting and is supported by a planning program that involves trained professionals facilitating a discussion.¹ Contemporary advance care planning programs aim to provide a holistic approach, which supports that person to discuss their values, personal goals and preferences.
- 11.6 The Commission recognises the importance of the conversations that take place as part of advance care planning. These conversations are crucial in assisting people to form and articulate their views about future decisions. They also ensure that family members and any other people involved in future decision making, such as medical professionals, understand the person's overarching concerns about future decisions and the goals, values, beliefs and preferences that are important to them.
- 11.7 While the Commission acknowledges the importance of advance care planning programs, our recommendations deal with the narrower issue of the legal rights of an individual to make arrangements for future decisions through personally appointing a substitute decision maker, making an instructional directive, or a combination of both.
- 11.8 Advance care planning programs may lead to the use of statutory mechanisms to record instructions or make appointments. This step might help to ensure that instructions are followed or that third parties will recognise the authority of the substitute decision maker.

¹ For example, the Respecting Patient Choices Program at Austin Health.

RESPECTING PATIENT CHOICES PROGRAM

- 11.9 A well-known example of advance care planning for health care is the Respecting Patient Choices program at Austin Health.² The program seeks to ensure that health professionals find out what people want and that systems are in place to ensure a person's wishes are respected.³ The five aims of the program are to:
- initiate conversations with adults regarding their views about future medical care
 - assist those individuals with advance care planning
 - ensure that the plans are clear
 - ensure that their plans are available when required
 - ensure that their plans are followed appropriately when decisions are required.⁴
- 11.10 The Respecting Patient Choices program aims to treat advance care planning as an ongoing discussion about values and preferences.⁵ The program encourages patients to focus on goals, broader values and beliefs rather than specific treatments or procedure decisions.⁶ The rationale behind this is that outcomes or goals are likely to remain stable over time, whereas treatment options and availability are likely to change over time due to technological advances and best practice considerations.⁷
- 11.11 The Respecting Patient Choices program recommends that individuals undertake a five-step process in order to discuss and document their wishes. The recommended steps are:
- thinking about your future medical care
 - planning your care
 - choosing someone to speak for you
 - writing down your wishes
 - informing others of your decisions.⁸
- 11.12 The identified benefits of advance care planning through the Respecting Patient Choices program are:
- improvement in the quality of care from the perspective of the patient and family
 - a reduction in the likelihood of stress, anxiety and depression in surviving relatives.⁹

2 For further detail see generally Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 171–172; Submission CP 49 (Respecting Patient Choices Program—Austin Health). In response to the success of the Respecting Patient Choices pilot program at the Austin Hospital, the Victorian and Federal Governments support the introduction of the program to other health services in Victoria and interstate: Austin Health, *Respecting Patient Choices® for Professionals* (5 December 2011) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=19&Itemid=20>.

3 Consultation with Respecting Patient Choices Team—Austin Hospital (6 April 2010); Submission CP 49 (Respecting Patient Choices Program—Austin Health).

4 Submission CP 49 (Respecting Patient Choices Program—Austin Health).

5 Consultation with Respecting Patient Choices Team—Austin Hospital (6 April 2010).

6 Detering et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients: Randomised Controlled Trial' (2010) 340:c1345 *BMJ* 5 <<http://www.bmj.com/content/340/bmj.c1345.full.pdf>>. The Austin Hospital has produced information sheets and pro-forma 'statement of choice' forms for both competent and non-competent people. For example, the statement of choice form for a competent person details information such as: the author's medical condition, choices about CPR and life prolonging treatments, details of medical power of attorney, details about what the author values most in life (eg independence, enjoyable activities, talking to family and friends), future situations the author would find unacceptable in relation to their health, specific treatments they would not want considered, who to involve in discussions about the author's treatment, other things the author would like known that might assist with decisions about their future medical treatment: see Austin Health, *Advance Care Plans Documents : VIC* (5 December 2011) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=55&Itemid=45>.

7 Austin Health, *Respecting Patient Choices: Final Evaluation of the Community Implementation of the Respecting Patient Choices Program* (2006).

8 Austin Health, *Advance Care Planning for Everyone* (5 December 2011) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=1&Itemid=2>

9 Detering et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients: Randomised Controlled Trial' (2010) 340:c1345 *BMJ* 5 <<http://www.bmj.com/content/340/bmj.c1345.full.pdf>>.

11.13 The discussion that takes place in the advance care planning process and the resulting Advance Care Plan often lead to the use of formal statutory mechanisms such as an enduring power of attorney (medical treatment) to appoint a substitute decision maker or the completion of a refusal of treatment certificate. These documents are often given to the hospital together with advance planning forms.

CURRENT LAW

11.14 The law concerning the ability of people to give binding directions about future medical decisions is complex. In Victoria, two overlapping statutory regimes use different procedures and terminology to achieve similar outcomes. The scope of common law mechanisms¹⁰ is unclear, and the manner in which the common law and statutory regimes interact is unknown.

11.15 Since the introduction of the *Medical Treatment Act 1988* (Vic), it has been possible for a person to make a binding future direction about refusing all, or some specified, medical treatment for a current condition. It is also possible to appoint an agent with these powers. It is an offence for a medical practitioner to knowingly give a person medical treatment that falls within a refusal of treatment directive.

11.16 It is also possible to appoint an enduring guardian with the power to make decisions about medical treatment. While a principal can give an enduring guardian directions about the use of their powers, there are no statutory provisions that oblige the enduring guardian to follow the directions.

11.17 It might be possible to make an advance directive about medical treatment at common law. The effect of common law advance directives about medical treatment is unknown in Victoria because neither the High Court nor the Victorian Supreme Court has considered the matter. As the Queensland Law Reform Commission recently noted in its *Review of Queensland's Guardianship Laws*, only New South Wales and Tasmania rely on common law advance directives regarding treatment decisions.¹¹ The remaining states and territories have legislation dealing with the issue.¹² We discuss common law advance directives below.

INSTRUCTIONS IN ENDURING APPOINTMENTS

Enduring guardian

11.18 When appointing an enduring guardian, the donor may specify the wishes that they require the enduring guardian to take into account when making decisions for them.¹³ The enduring guardian has a duty to take the wishes of the donor into account as part of the 'best interests' consideration.¹⁴

Enduring attorney (financial)

11.19 The prescribed form for appointing an enduring attorney (financial) includes a section to specify that the appointment is subject to particular conditions, limitations, and instructions.¹⁵

¹⁰ In the glossary we describe common law as law that derives its authority from the decisions of the courts, rather than from Acts of Parliament.

¹¹ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67, (2010) vol 2, 17 ('*A Review of Queensland's Guardianship Laws*').

¹² See *Powers of Attorney Act 1998* (Qld) s 35; *Medical Treatment (Health Directions) 2006* (ACT) ss 7–9; *Natural Death Act* (NT) s 4; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7; *Guardianship and Administration Act* (WA) ss 110P–110RA, 110S, cited in *A Review of Queensland's Guardianship Laws*, above n 11, vol 2, 17.

¹³ *Guardianship and Administration Act 1986* (Vic) sch 4 form 1.

¹⁴ *Ibid* ss 35B(5), 28(1), 28(2)(e). Although s 28(2)(e) of the Act does not specifically provide that wishes expressed in the instrument making the appointment must be taken into account, it does envisage a consultation process.

¹⁵ *Instruments Act 1958* (Vic) ss 123(1), 125ZL. An approved form is a form approved by the Secretary to the Department of Justice under s 125ZL: see Secretary of the Department of Justice (Victoria) '*The Instruments (Enduring Powers of Attorney) Act 2003—Approved Forms*' in Victoria, *Victoria Government Gazette*, No G 9, 26 February 2004, 384, 437. This corresponds with the *Instruments Act 1958* (Vic) s 115(1)(b) which provides that a donor may 'provide conditions and limitations on, and instructions about, the exercise of the power'.

11.20 The *Instruments Act 1958* (Vic) allows the donor to specify in an enduring power 'a time from which, circumstance in which, or occasion on which, a power is exercisable'.¹⁶

Enduring attorney (medical treatment)

11.21 An **agent** appointed under an enduring power of attorney (medical treatment) may refuse treatment on behalf of the donor by completing a **refusal of treatment certificate**.¹⁷ The agent may only do so if one of the following two conditions apply:

- The medical treatment would cause unreasonable distress to the patient.
- There are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to their health and wellbeing, would consider the medical treatment unwarranted.¹⁸

11.22 At the time of making an appointment, a donor could provide written instructions about medical treatments they would consider unwarranted. While these instructions could help to guide an agent's decision, it is unlikely that an agent would be legally obliged to follow them.

REFUSAL OF TREATMENT CERTIFICATES UNDER THE MEDICAL TREATMENT ACT

Background to the Medical Treatment Act

11.23 The Medical Treatment Act provides a statutory scheme for providing advance refusal of medical treatment through a refusal of treatment certificate. The certificate may be given by the person concerned or, if that person becomes 'incompetent',¹⁹ by an agent appointed under an enduring power of attorney (medical treatment) or a guardian (with appropriate powers) appointed by the Victorian Civil and Administrative Tribunal (VCAT).²⁰ The Act was a response to the recommendations in the Social Development Committee's 1987 report, *Inquiring into Options for Dying with Dignity*.²¹ The report noted a significant degree of confusion about the common law right to refuse treatment, and variation in the approach of medical professionals to such refusals.²²

11.24 The committee recommended that:

legislative action clarifying and protecting the existing common law right to refuse medical treatment is desirable and practicable and should be brought about by the enactment of legislation to establish an offence of medical trespass.²³

11.25 It recommended that medical trespass be defined as occurring when a medical practitioner carries out or continues a procedure or treatment where a competent and informed patient freely refuses that procedure or treatment. It also recommended that the legislation include protection for medical practitioners from criminal and civil liability if they act in good faith and in accordance with the expressed wishes of the fully informed, competent patient who refuses medical treatment or procedures.²⁴

¹⁶ *Instruments Act 1958* (Vic) s 117(1).

¹⁷ *Medical Treatment Act 1988* (Vic) s 5B.

¹⁸ *Ibid* s 5B(2).

¹⁹ *Ibid* s 5A(2)(b).

²⁰ *Ibid* s 5B(1).

²¹ Social Development Committee, Parliament of Victoria, *Inquiry into Options for Dying with Dignity: Second and Final Report* (1987).

²² *Ibid* 43.

²³ *Ibid* 142.

²⁴ *Ibid*.



11.26 The Medical Treatment Act was passed in response to these recommendations. The purposes of the Act are to:

- clarify the law relating to the right of patients to refuse medical treatment
- establish a procedure for clearly indicating a decision to refuse medical treatment
- enable an agent to make decisions about medical treatment on behalf of an incompetent person.²⁵

Refusal of treatment certificate by the person concerned

Formal requirements

11.27 In order to be legally effective, a refusal of treatment certificate under the Medical Treatment Act must be set out in a particular form²⁶ and must be witnessed by a registered medical practitioner and one other person, who must each be satisfied that:

- the patient clearly expresses or indicates the decision to refuse medical treatment generally, or medical treatment of a particular kind
- the refusal of treatment relates to a current condition
- the patient's decision is made voluntarily and without inducement or compulsion
- the patient is sufficiently informed about the nature of their condition to an extent that is reasonably sufficient to enable the patient to make a decision about whether to refuse treatment, and that the patient has appeared to understand the information
- the patient is of sound mind and aged 18 years or older.²⁷

Limitations on refusal of medical treatment certificate

Advance refusal only

11.28 Refusal of treatment certificates made in accordance with the Medical Treatment Act do not provide for advance consent to medical treatment. In contrast, the South Australian, Western Australian and Queensland statutory schemes provide for advance refusal and consent.²⁸

Current condition only

11.29 The refusal of treatment certificate allows treatment to be refused for a current condition only.²⁹ It is not possible to use a certificate to give instructions about treatment for a possible future illness. The five Australian jurisdictions, other than Victoria, that have enacted legislation about advance directives all allow directions about treatment for a future illness.³⁰

Must receive information about nature of condition

11.30 The requirement that the patient receives medical information about their condition is also unique to Victoria. This matter appears linked to the Medical Treatment Act requirement that the refusal of treatment certificate be made in relation to a current

²⁵ *Medical Treatment Act 1988* (Vic) s 1.

²⁶ *Ibid* s 5(2).

²⁷ *Medical Treatments Act 1988* (Vic) s 5(1).

²⁸ *Powers of Attorney Act 1998* (Qld) s 35; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7; *Guardianship and Administration Act 1990* (WA) ss 110P–110R.

²⁹ *Medical Treatment Act 1988* (Vic) s 5(1)(a).

³⁰ The legislative schemes in South Australia, the Northern Territory and Queensland provide that the directive can only operate in particular circumstances relating to the type, level and stage of the illness, level of consciousness or level of awareness and chances of recovery: see *Natural Death Act 1988* (NT) s 4; *Powers of Attorney Act 1998* (Qld) s 36(2); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7. For an informative overview and critique of the differences between the legislative schemes in different Australian jurisdictions, see Lindy Willmott, 'Advance Directives and the Promotion of Autonomy: A Comparative Australian Statutory Analysis' (2010) 17 *Journal of Law and Medicine* 556.

condition. The statutory schemes in Queensland, South Australia, the Australian Capital Territory and the Northern Territory do not require that medical information be provided.³¹ While there has been little case law about advance directives at common law, the case of *Hunter and New England Area Health Service v A*,³² discussed below, suggests that lack of prior information does not necessarily mean that an advance directive at common law is invalid.

Cannot be made in relation to palliative care

- 11.31 A refusal of treatment certificate does not allow a person, or their agent or guardian, to refuse palliative care. The Medical Treatment Act permits the refusal of 'medical treatment' in defined circumstances but that term specifically excludes 'palliative care'.³³ Palliative care is defined as including 'reasonable medical procedures for the relief of pain, suffering and discomfort' or 'the reasonable provision of food and water'.³⁴
- 11.32 There has been litigation about the boundary between 'medical treatment' and 'palliative care'. In the leading case, Justice Morris concluded that a guardian could refuse artificial nutrition and hydration via percutaneous endoscopic gastronomy (PEG) for a person with dementia who had not been conscious for three years because it was medical treatment rather than palliative care.³⁵ There have been no attempts to amend the Medical Treatment Act since this decision was delivered in 2003.

Psychiatric treatment

- 11.33 The Commission is not aware of the extent to which either refusal of treatment certificates under the Medical Treatment Act, or instructional directives at common law, are completed in relation to psychiatric treatment. On its face, the definition of 'medical treatment' in section 3 of the Medical Treatment Act encompasses psychiatric treatment and there is no reason why a certificate could not be completed to refuse future psychiatric treatment in relation to an individual's current condition.
- 11.34 There appears to be no reported case law in Victoria explaining how the provisions of the Medical Treatment Act interact with the treatment provisions of the *Mental Health Act 1986* (Vic). However, it is likely that if a person comes within the involuntary treatment provisions of the latter Act, the determinations of the authorised psychiatrist concerning psychiatric treatment would override any refusal of treatment certificate.

COMMON LAW MEDICAL TREATMENT ADVANCE DIRECTIVES

- 11.35 While it is possible to give a statutory advance directive about refusal of medical treatment, this mechanism is available only in the limited circumstances covered by the Medical Treatment Act. It may also be possible to make an advance directive refusing medical treatment at common law but the legal effect in Victoria of such directives is unclear.

31 *Medical Treatment (Health Directions Act) 2006 (ACT); Natural Death Act 1988 (NT); Powers of Attorney Act 1998 (Qld); Consent to Medical Treatment and Palliative Care Act 1995 (SA)*. The Western Australian statutory position is confusing. One of the requirements for a valid advance care directive is that the maker is encouraged to seek legal and medical advice but the statute goes on to say that the validity of an advance health directive is not affected by a failure to comply with this requirement: *Guardianship and Administration Act 1990 (WA)* s 110Q(1)(b), (2). See also Lindy Willmott, 'Advance Directives and the Promotion of Autonomy: A Comparative Australian Statutory Analysis' (2010) 17 *Journal of Law and Medicine* 556, 569–71.

32 *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 94.

33 *Medical Treatment Act 1988* (Vic) s 3.

34 *Ibid* s 3.

35 *Re BWW; Ex parte Gardner* (2003) 7 VR 487. See also *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [35]; *Adult Guardian v Langham* [2006] 1 Qd R 1 [32].



***Hunter and New England Area Health Service v A*³⁶**

- 11.36 The 2009 New South Wales Supreme Court decision in *Hunter and New England Area Health Service v A*³⁷ (*Hunter*) appears to be the first occasion in which an Australian superior court has directly considered the effect of an advance directive at common law.³⁸ In *Hunter*, Justice McDougall determined that the common law allows a competent adult to make an advance directive refusing life-sustaining medical treatment. While of persuasive authority, this decision is not binding on Victorian courts.
- 11.37 *Hunter* was a decision about the legal effect of a document completed by a competent adult providing advance refusal to kidney dialysis. Justice McDougall granted the declarations sought by the hospital that the document was a valid advance care directive and that it would be justified in complying with his wishes as expressed in the directive. Justice McDougall recognised that there is a possible conflict between two interests that are recognised by the common law: a competent adult's right of autonomy or self-determination—the right to control his or her own body—and the interest of the state in protecting and preserving the lives and health of its citizens. However, in line with authorities from the United Kingdom, Canada and the United States, he determined that 'whenever there is a conflict between a capable adult's exercise of the right of self-determination and the State's interest in preserving life, the right of the individual must prevail'.³⁹

Is the advance directive valid?

- 11.38 English and Australian courts have identified two requirements for a common law advance directive to be valid. First, the adult must have capacity at the time the advance directive is given, and secondly, the adult must have acted without undue influence or other legally invalidating factors.⁴⁰ Capacity is a two-limbed test. It requires that the person making the directive has capacity to make the directive and is able to communicate the decision in some way. Capacity is not a fixed state but rather operates on a sliding scale; a person may have capacity in relation to some decisions but not others. The determination as to whether a person has capacity to make a particular decision 'must take into account the importance of the decision'.⁴¹ The question is 'whether that person suffers from some impairment or disturbance of mental functioning so as to render him or her incapable of making the decision'.⁴²

Is the advance directive operative?

- 11.39 In order to have legal effect, the adult who made the directive must have intended it to apply to the particular situation that has arisen.⁴³ This requires a consideration of the scope of the decision. For example, an advance directive not to resuscitate if the person is in the final stages of terminal cancer would not apply if the person who

³⁶ *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88.

³⁷ *Ibid.*

³⁸ See generally, Lindy Willmott, 'Advance Directives and the Promotion of Autonomy: A Comparative Australian Statutory Analysis' (2010) 17 *Journal of Law and Medicine* 556, 558–9.

³⁹ *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 92.

⁴⁰ *Re T (Adult: Refusal of Treatment)* [1992] 4 All ER 649 provides guidance as to what is considered undue influence or other vitiating factors. The Court of Appeal held that Ms T's refusal of future blood transfusions was invalid because it was made under undue influence from her mother who, as a practising Jehovah's Witness, rejected the use of blood transfusions as a medical treatment. Factors identified as relevant to a consideration of whether undue influence was present included: the strength of will of the person, as a person who is tired, in pain or depressed may be less able to resist the imposition of someone else's will; the strength of the relationship of the 'persuader' to the patient and the holding of strong religious beliefs by the persuader that would require refusal of the treatment. Lord Donaldson MR and Butler-Sloss LJ considered that religious beliefs may be especially powerful influences and that the combination of very strong religious belief held by the 'persuader' and a close relationship between them and the patient should alert doctors to the possibility of undue influence.

⁴¹ *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 93.

⁴² *Ibid.*

⁴³ *Ibid.* 94.

made the directive stop breathing following an electric shock.⁴⁴ In *Hunter*, Justice McDougall also accepts that an advance directive will be invalid if it is the result of a misrepresentation or undue influence.⁴⁵ However, as we note above, Justice McDougall expressly rejects the absence of, or failure to provide, adequate information as invalidating advance refusal of treatment.⁴⁶

INTERACTION BETWEEN THE MEDICAL TREATMENT ACT AND COMMON LAW

11.40 The Medical Treatment Act does not alter, and clearly seeks to preserve, any existing common law rights by providing that 'the Act does not affect any right of a person under any other law to refuse medical treatment'.⁴⁷ The legislation in Western Australia⁴⁸ and Queensland⁴⁹ goes a step further in recognising the existence of a parallel common law right by expressly preserving the common law on advance directives.

REFUSAL OF TREATMENT CERTIFICATES AND SUBSTITUTE DECISION MAKERS

11.41 The *Guardianship and Administration Act 1986* (Vic) (G&A Act) provides that if a refusal of treatment certificate under the Medical Treatment Act is in force, treatment contrary to the certificate cannot be performed.⁵⁰ This means that a guardian, or any other substitute decision maker, cannot provide legally effective consent to medical treatment if a refusal of treatment certificate is in place about that treatment.

COMMON LAW ADVANCE DIRECTIVES REFUSING LIFE-SUSTAINING TREATMENT AND SUBSTITUTE DECISION MAKERS

11.42 The ability of a guardian, or any other substitute decision maker, to provide legally effective consent to medical treatment that is contrary to the wishes expressed by a person in a common law advance directive is unclear.

11.43 As outlined above, it may be possible to make an advance directive about medical treatment that is enforceable at common law. There have not been any cases concerning the relationship between common law advance directives about medical treatment and a statutory substitute decision-making regime such as that created by the G&A Act.⁵¹ Consequently, it is unclear whether a common law advance directive is binding on a substitute decision maker or is merely one of the matters that must be taken into account in determining the best interests of the patient.

11.44 The Public Advocate appears to be of the view that a common law advance directive is merely one matter that a substitute decision maker must consider when deciding what would be in the best interests of the patient.⁵²

44 This example of the way in which the scope of an advance directive may be limited is based on the example provided by Lindy Willmott, 'Advance Directives to Withhold Life-Sustaining Treatment: Eroding Autonomy through Statutory Reform' (2007) 10(2) *Flinders Journal of Law Reform* 287, 296.

45 *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 94. McDougall J refers to *Re T (Adult: Refusal of Treatment)* [1992] 4 ALL ER 649, 662–3, 668 in which Lord Donaldson MR and Butler-Sloss LJ suggest that the scope of Ms T's refusal to a blood transfusion was limited. She believed that there would be effective alternatives to blood transfusion and that it was unlikely that it would be necessary to transfuse her. In reality, there were not adequate alternatives and the chances of transfusion were high.

46 *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 94.

47 *Medical Treatment Act 1988* (Vic) s 4(1). In *Qumsieh v Guardianship and Administration Board* (1998) 14 VAR 46 the Victorian Court of Appeal made no direct ruling on whether a common law advance directive is binding on health professionals. Nor did it address the relationship between a common law advance directive and the provisions of the Medical Treatment Act. See also Cameron Stewart, 'Advanced Directives, the Right to Die and the Common Law: Recent Problems with Blood Transfusions' (1999) 23 *Melbourne University Law Review* 161, 182–3.

48 *Guardianship and Administration Act 1990* (WA) s 110ZB.

49 *Powers of Attorney Act 1998* (Qld) s 39. However, this attempt to preserve the common law on advance directives in Queensland was probably ineffective due to a drafting error. See Lindy Willmott, 'Advance Directives to Withhold Life-Sustaining Treatment: Eroding Autonomy through Statutory Reform' (2007) 10(2) *Flinders Journal of Law Reform* 287, 293–4.

50 *Guardianship and Administration Act 1986* (Vic) s 41. However, under the *Medical Treatment Act 1988* (Vic) ss 5C–5D VCAT can overturn a refusal of treatment certificate made by an agent. For further detail see Chapter 13 Medical treatment.

51 See *H Ltd v J & Another* [2010] SASC 176.

52 See Office of the Public Advocate (Victoria), *Principles and Practice Guidelines: PG 12 Not for Resuscitation* (March 2004), 2 <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG12_Not_for_Resuscitation_09.pdf>.



11.45 If common law advance directives are not legally binding, then a substitute decision maker under the G&A Act would only need to consider it as part of the best interests evaluation, which requires the person responsible to take a number of factors into account including ‘the wishes of the patient, so far as they can be ascertained’.⁵³

EXPOSURE DRAFT MENTAL HEALTH BILL

11.46 The former Minister for Mental Health released an Exposure Draft Mental Health Bill 2010 for public comment in October 2010.⁵⁴ The Exposure Draft Mental Health Bill 2010 included provision for people to make advance statements that specify ‘their wishes and preferences in the event that their capacity to make decisions is significantly impaired by a mental illness which requires treatment’.⁵⁵

11.47 The Victorian Government is currently considering revised policy for the new Act—taking into account all feedback on the Exposure Draft Bill—in preparation for drafting a Bill for introduction to Parliament.⁵⁶

NATIONAL FRAMEWORK FOR ADVANCE CARE DIRECTIVES

11.48 In 2009, the Australian Health Ministers Council requested the Clinical, Technical and Ethical Principal Committee to develop nationally consistent best practice guidelines for the use and application of advance care directives within the broader context of advance care planning.⁵⁷

11.49 Following consultation on a draft National Framework for Advance Care Directives, a post-consultation draft was released in April 2011, and a final report in September 2011.⁵⁸

11.50 The National Framework includes a Code for Ethical Behaviour and a set of Best Practice Standards.⁵⁹ It also suggests common terminology to describe advance care directives.⁶⁰

11.51 The Commission’s recommendations about advance care directives are consistent with the overall policy objectives of the National Framework for Advance Care Directives.

COMMUNITY RESPONSES

INSTRUCTIONAL MEDICAL DIRECTIVES

11.52 In the consultation paper, the Commission identified a number of specific problems associated with medical instructional directives made either through a refusal of treatment certificate under the Medical Treatment Act or at common law. Those problems are:

- uncertainty about the status of common law advance directives

53 *Guardianship and Administration Act 1986* (Vic) s 38(1)(a).

54 Minister for Mental Health (Lisa Neville MP), *Mental Health Bill Update* (2 September 2010) Victorian Government Health Information <<http://www.health.vic.gov.au/mentalhealth/mhactreview/>>.

55 Department of Health (Victoria), Exposure Draft Mental Health Bill 2010 (Vic) cl 151(1). The Exposure Draft Mental Health Bill 2010 cl 154 provides that advance statements are not legally binding on third parties. A person making decisions about the treatment of the patient is permitted to make decisions that are inconsistent with the wishes and preferences expressed in the advance statement. The decision maker must have regard to a valid advance statement made by the patient. If they make a decision that is inconsistent with the wishes and the preferences the patient expressed in the advance statement, the decision maker must record the reasons for doing so and provide information about the circumstances and reasons to the patient, the Mental Health Commissioner, the nominated person and the authorised psychiatrist (where they did not make the decision).

56 State Government of Victoria, Department of Health, *Review of the Mental Health Act 1986* (22 July 2011) <<http://www.health.vic.gov.au/mentalhealth/mhactreview/>>.

57 The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers’ Advisory Council, *A National Framework for Advance Care Directives: Consultation Companion Guide for the Draft Framework 2010* (2010) 3.

58 The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers’ Advisory Council, *A National Framework for Advance Care Directives - September 2011* (2011) (*A National Framework for Advance Care Directives - September 2011*).

59 *Ibid* 14–42.

60 *Ibid* 9.

- a refusal of treatment certificate under the Medical Treatment Act may only be made in limited circumstances—for a current condition
- uncertainty about whether common law advance directives are binding on substitute decision makers or merely provide non-binding guidance to them in reaching a decision
- difficulties in identifying that an advance directive exists, which means they might not be followed
- lack of community and professional awareness about common law advance directives and refusal of treatment certificates
- instructional directives, such as a refusal of treatment certificate, may not provide an accurate reflection of a person’s wishes because their views may change over time, and because of changes in medical treatment options
- uncertainty about whether the current law allows a person to give an enduring guardian binding directions.

11.53 One option advanced in the consultation paper was to broaden and clarify the statutory right to make instructional medical directives in order to provide people with increased certainty that their instructions would be followed if they lost capacity in the future. The Commission noted that this change is preferable because the status of common law advance directives is unclear and the medical profession is more likely to recognise directions about medical treatment made in accordance with a statutory scheme.

11.54 The majority of submissions that commented on this issue supported this option.⁶¹ The principal reasons given in support were:

- to provide increased certainty that the person’s wishes will be followed,⁶² to deal with uncertainty about the status of common law directives and to overcome confusion about the current system⁶³
- to overcome practical problems that might cause doctors not to follow a directive, such as concerns about the validity or currency of the directive or whether the person completely understood the implications of the directive⁶⁴
- to reduce the burden on family members to make decisions about medical care⁶⁵
- to enhance compliance with the United Nations’ *Convention on the Rights of Persons with Disabilities* (the Convention)⁶⁶ and the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).⁶⁷

11.55 Many of the submissions that supported this reform option commented on the importance of retaining any existing common law rights to make advance directives. This would provide a safety net for situations not envisaged by the statutory provisions.⁶⁸

61 For eg Submissions CP 13 (Dying with Dignity Victoria), CP 22 (Alzheimer’s Australia Vic), CP 33 (Eastern Health), CP 35 (Ursula Smith), CP 37 (Mildura Base Hospital), CP 43 (Alfred Health), CP 50 (Margaret Brown), CP 55 (Office of the Health Services Commissioner), CP 63 (Shih-Ning-Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)), CP 65 (Council on the Ageing Victoria), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 68 (Australian Nursing Federation), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

62 For eg, Submissions CP 55 (Office of the Health Services Commissioner) and CP 35 (Ursula Smith).

63 For eg, Submissions CP 63 (Shih-Ning-Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)) and CP 71 (Seniors Rights Victoria).

64 For eg, Submission CP 63 (Shih-Ning-Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)).

65 For eg, Submission 65 (Council on the Ageing).

66 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force May 2008).

67 Submission CP 63 (Shih-Ning-Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)) and CP 65 (Council on the Ageing).

68 For eg, Submission CP 73 (Victoria Legal Aid).



- 11.56 Some of the submissions that supported broadening the statutory right to make instructional medical directives supported all three possible changes raised in the consultation paper:
- allowing refusal for future as well as current conditions
 - allowing advance consent as well as advance refusal
 - removing the requirement that exists under the Medical Treatment Act that the person making the certificate must receive information about the nature of their condition.⁶⁹
- 11.57 Other responses that, in principle, supported broadening the statutory right to make instructional medical directives expressed concern about the suggestion that the requirement to receive information might be removed. The importance of basing medical decisions on informed consent was emphasised.⁷⁰
- 11.58 One submission, which argued against a requirement that an individual should have to be provided with information about their condition or treatment options, suggested adopting the Western Australian approach as a compromise. There the legislation encourages a person to obtain advice before completing a directive but failure to obtain this advice does not invalidate the directive.⁷¹
- 11.59 A number of submissions did not favour broadening and clarifying the right to make instructional medical directives.⁷² The main concerns expressed were that:
- statutory instructional directives might be used to provide for euthanasia or assisted suicide⁷³
 - people may make decisions about future treatments for hypothetical situations without supporting information or knowledge of outcomes and that directives for future events cannot be adequately informed⁷⁴
 - it could require health providers to act in a way that is inconsistent with their conscience⁷⁵
 - it may not take into account the needs of others in the circumstances.⁷⁶
- 11.60 Several submissions expressed a preference for relying upon enduring substitute decision makers to make decisions about medical treatment rather than giving binding legal status to written directions about future treatment.⁷⁷
- 11.61 The Public Advocate preferred retaining the refusal of treatment certificate scheme and suggested that legislation should require substitute decision makers to consider any advance directive signed by the patient.⁷⁸
- 11.62 The submission from the Respecting Patient Choices Program emphasised that its approach in assisting people to ‘develop advance care plans is to focus more on

69 For eg, Submission CP 55 (Office of the Health Services Commissioner).

70 For eg, Submission CP 73 (Victoria Legal Aid).

71 Submission CP 63 (Shih-Ning-Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)) — referring to Western Australian legislative model (*Guardianship and Administration Act 1990* (WA) s 110Q(1) and (2)) as a good compromise.

72 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne), CP 52 (Ad Hoc Interfaith Committee) and CP 53 (Plunkett Centre for Ethics). While the Public Advocate supported the legislative articulation of instructional directives, and retention of the Refusal of Treatment Certificate scheme, she did not wish to broaden the situation in which binding directives could be made: Submission CP 19 (Office of the Public Advocate).

73 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 31 (Australian Christian Lobby).

74 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 49 (Respecting Patient Choices Program—Austin Health).

75 For eg, Submission CP 27 (Catholic Archdiocese of Melbourne).

76 For eg, Submission CP 52 (Ad Hoc Interfaith Committee).

77 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 53 (Plunkett Centre for Ethics).

78 Submission CP 19 (Office of the Public Advocate).

desired patient outcomes than treatments'.⁷⁹ It expressed concern that the proposal to broaden and clarify the statutory right to make instructional medical directives 'may undermine current understanding and acceptance of advance care planning by presenting a rather "black and white" view of blanket acceptance or refusal of specific treatments'.⁸⁰ It suggested that:

It would be more productive for a person to state their desired outcomes in terms of what level of physical and mental function they would consider an acceptable outcome, so that in the event of an actual condition, their agent would be able to discuss treatment options and likely outcomes with the treating team and make decisions accordingly.⁸¹

INSTRUCTIONAL PSYCHIATRIC DIRECTIVES

- 11.63 The Mental Health Legal Centre expressed a preference for the introduction of 'comprehensive advance directive legislation ... which does not separate psychiatric from non-psychiatric medical treatment directives'.⁸²
- 11.64 It also submitted that advance directives should 'have equal legislative recognition and consistent enforceability and implementation whether under guardianship or mental health laws'.⁸³
- 11.65 Victoria Legal Aid supported retaining a distinction between psychiatric and non-psychiatric treatment. It submitted that:

The law currently distinguishes between psychiatric and non-psychiatric medical treatment decisions, and VLA believes this distinction should be maintained. However, it is important for consistency's sake that the law relating to instructional medical directives be considered alongside the proposals and recommendations in the mental health law reforms.⁸⁴

INSTRUCTIONAL DIRECTIVES—PERSONAL, LIFESTYLE, FINANCIAL

- 11.66 A significant number of submissions supported an ability to make instructional directives about matters other than medical treatment.⁸⁵
- 11.67 The advantages identified for providing legislative recognition of instructional directives on lifestyle or financial matters were:
- it allows older people to document their wishes with more confidence that these wishes will be taken into account⁸⁶
 - it may reduce family conflict⁸⁷
 - it maximises individual autonomy in accordance with the principles of the Convention⁸⁸
 - matters other than medical treatment may be very important to people.⁸⁹

79 Submission CP 49 (Respecting Patient Choices Program—Austin Health).

80 Ibid.

81 Ibid.

82 Submission CP 78 (Mental Health Legal Centre).

83 Ibid.

84 Submission CP 73 (Victoria Legal Aid).

85 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 35 (Ursula Smith), CP 37 (Mildura Base Hospital), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 59 (Carers Victoria), CP 65 (Council on the Ageing), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 68 (Australian Nursing Federation), CP 69 (Australian Medical Association (Victoria)), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

86 Submission CP 65 (Council on the Ageing Victoria).

87 Ibid.

88 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

89 Submission CP 78 (Mental Health Legal Centre).



11.68 Many matters were identified as appropriate for inclusion in an instructional directive. Specific examples include:

- preferences for support, accommodation and residential care⁹⁰
- preferences that financial assets are used to provide a superior level of care rather than preserved for inheritance⁹¹
- lifestyle, including religious and cultural considerations⁹²
- preferences about who the person wishes to have contact with.⁹³

11.69 A number of submissions supported the idea that people should be able to include directions about whatever is most important to them.⁹⁴ The Mental Health Legal Centre suggested that documents for providing instructions should not be overly prescriptive, but rather should allow and encourage people to include the information that they think is important.⁹⁵

11.70 A number of submissions noted that in some circumstances instructional directives about matters other than medical treatment should be unenforceable.⁹⁶ For example, an expressed preference for accommodation may not be available because of finances, or may be unsafe for the person.

11.71 The difficulties and impracticalities in implementing an instructional directive on matters other than medical treatment were noted. State Trustees Limited submitted that 'if stand-alone statutory instructional directives are introduced they should not be binding on an attorney or an administrator in respect of financial matters'.⁹⁷

PERSONAL APPOINTMENTS AND INSTRUCTIONAL DIRECTIVES

11.72 In the consultation paper, the Commission suggested that combining a personal appointment with an instructional directive would encourage people to plan, discuss their wishes with loved ones, document those wishes and ensure that people who need to know are aware of those wishes. This practice appears to provide a more holistic approach to advance planning and avoids the difficulties associated with instructional directives made without a full appreciation of all the circumstances that might be relevant when making an important decision. The Commission asked whether the wishes expressed in a personal appointment should be binding but displaceable in certain circumstances or whether decision makers should only be required to provide reasons for departing from stated wishes.

11.73 A number of submissions supported the approach of requiring personally appointed decision makers to consider any wishes expressed in a document making a personal appointment but not making these wishes binding.⁹⁸

11.74 Many responses favoured a requirement that a personally appointed decision maker be required to record their reasons for departing from wishes.⁹⁹ The Law Institute of Victoria supported this approach, suggesting that personally appointed decision makers 'should be required to record their reasons and retain them in case of a future

90 For eg, Submissions CP 22 (Alzheimer's Australia Vic) and CP 33 (Eastern Health).

91 Submission CP 47 (Dr Michael Murray).

92 Submissions CP 24 (Autism Victoria) and CP 35 (Ursula Smith).

93 For eg, Submission CP 19 (Office of the Public Advocate).

94 For eg, Submissions CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 78 (Mental Health Legal Centre).

95 Submission CP 78 (Mental Health Legal Centre).

96 For eg, Submissions CP 22 (Alzheimer's Australia Vic) and CP 35 (Ursula Smith).

97 Submission CP 70 (State Trustees Limited).

98 For eg, Submissions CP 19 (Office of the Public Advocate), CP 33 (Eastern Health), CP 59 (Carers Victoria), CP 65 (Council on the Ageing Victoria) and CP 77 (Law Institute of Victoria).

99 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 24 (Autism Victoria) and CP 35 (Ursula Smith).

VCAT application seeking to revoke their appointment'.¹⁰⁰ State Trustees Limited supported a similar approach specifically in relation to enduring appointments of financial decision makers.¹⁰¹

11.75 Other submissions considered that instructional directives made as part of an enduring appointment should be binding on personally appointed substitute decision makers and should only be overridden with authorisation from VCAT.¹⁰²

11.76 A similar view was put forward in response to the Commission's online forum, which asked questions about the enforceability of instructional directives that are included with personal appointments:

I do believe that the law should be much clearer about advanced statements, but it should be able to be reviewed by VCAT or something along those lines. I think there are times when we can make decisions that [are] not necessarily what will be best for us ... Advanced statements are important, and they should as far as possible be binding, but there [need] to be times when they are able to be overturned, and at an absolute minimum the person should have to justify the reasons for what they are doing and have that approved by either VCAT or the [Public Advocate].¹⁰³

11.77 An alternative option suggested in submissions was to allow the person making an enduring appointment combined with an instructional directive to specify whether the instructional directive is intended to be binding on the personally appointed decision maker or merely act as a guide for decision making.¹⁰⁴

11.78 The majority of responses that considered whether the same rules should apply to enduring guardians and enduring attorneys (financial) thought that the same rules should apply to both types of appointment.¹⁰⁵

11.79 Victoria Legal Aid proposed that there might be a case for slightly different rules for enduring guardians and enduring attorneys (financial). It proposed a general requirement that a substitute decision maker seek a VCAT order to overturn the person's wishes. However, where an attorney (financial) cannot implement a decision because they do not have the funds to do so, they should be able to depart from the person's wishes if they provide a statement outlining the basis of their decision to VCAT and the person. VCAT should be permitted to order compliance with the person's wishes if it concludes that they can be implemented.¹⁰⁶

SANCTIONS

11.80 Some submissions considered what should happen in circumstances where a binding instructional directive is overridden without proper lawful authority.

11.81 One suggestion was that the override be investigated and referred to VCAT or the police as appropriate.¹⁰⁷

100 Submission CP 77 (Law Institute of Victoria).

101 Submission CP 70 (State Trustees Limited).

102 For eg, Submissions CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

103 bj2circeleb, 'Documenting wishes about your future' on Victorian Law Reform Commission, *Guardianship Review Forum* (9 May 2011) <<http://consultations.lawreform.vic.gov.au/topic/what-weight-should-be-given-to-previous-medical-directives>>.

104 Submissions CP 13 (Dying with Dignity Victoria), CP 63 (Shih-Ning Then, Prof Lindy Wilmott & Assoc Prof Ben White (QUT)). This proposal was made specifically in relation to appointments combined with instructional directives that are intended to provide for medical treatment decisions.

105 For eg, Submissions CP 22 (Alzheimer's Australia Vic), CP 24 (Autism Victoria), CP 35 (Ursula Smith), CP 47 (Dr Michael Murray), CP 59 (Carers Victoria), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

106 Submission CP 73 (Victoria Legal Aid).

107 For eg, Submissions CP 24 (Autism Victoria) and CP 35 (Ursula Smith).



11.82 The Catholic Archdiocese of Melbourne did not support the creation of new offences. It submitted that:

The Church would not support creating new offences for people failing to comply with instructional directives. The issue is one of trust. The purpose of giving a power of attorney is to entrust matters to that person. If there were offences associated with holding a power of attorney, then it would be foolish to be prepared to accept the role and their function would be undermined and be likely to fall into disuse.¹⁰⁸

11.83 State Trustees Limited expressed a similar view that the introduction of further sanctions for overriding an instructional directive might discourage people from accepting an enduring appointment. The submission noted that sanctions already exist under general law, such as an action for a breach of fiduciary duty, and that the legislation provides the power to revoke an enduring power of attorney.¹⁰⁹

11.84 Other submissions supported sanctions for unlawfully overriding a valid directive.¹¹⁰ The Public Advocate considered that penalties should be consistent with the penalties that exist for breaches of other duties by substitute decision makers.¹¹¹

11.85 The Mental Health Legal Centre submitted that:

We strongly support sanctions for unlawfully overriding an advance directive. Such sanctions must also be enforceable through a robust body which reports directly to parliament. It would be appropriate for sanctions to be severe in cases of gross violations of the law. In our view it is also imperative that data is collected on the frequency and circumstances of overrides of advance directives and that the responsible body have the power and resources to investigate individual cases and systemic issues.¹¹²

THE COMMISSION'S VIEWS AND CONCLUSIONS

11.86 The Commission recognises the desirability of allowing people to make statutory advance care directives to guide future decision making about them if they lose capacity. Advance directives promote autonomy and dignity and they reduce the burden on state-supported substitute decision makers.

11.87 It is important to recognise that members of the community have a range of views on how they wish to guide future decision making. These views may be influenced by their cultural background, religion or personal life experience. In order to provide the maximum respect for each person's dignity and to allow them to guide decision making in a way that reflects their values and preferences, it is desirable to provide a range of mechanisms that enable people to guide decision making about them beyond the loss of capacity.

11.88 In some instances, it will be impossible for people to predict the type of decisions that may need to be made for them in the future. For this reason it will often be preferable to provide for future decision making by combining an appointment of a trusted person as a substitute decision maker with instructions that guide, rather than bind, decisions. It is also important that people are encouraged to discuss their goals, values and preferred outcomes with the person they are appointing, as well as with friends and family. This means that recorded instructions are more likely to be understood and followed.

¹⁰⁸ Submission CP 27 (Catholic Archdiocese of Melbourne).

¹⁰⁹ Submission CP 70 (State Trustees Limited).

¹¹⁰ For eg, Submissions CP 19 (Office of the Public Advocate), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

¹¹¹ Submission CP 19 (Office of the Public Advocate).

¹¹² Submission CP 78 (Mental Health Legal Centre).

11.89 However, consultations also highlighted that some people may want to provide directions or instructions and not appoint a substitute decision maker. Some people are very reluctant to give decision-making responsibility to someone else. Other people may not have anyone who they want to appoint to make decisions for them but may still wish to provide instructions about future decisions. Some people may consider decision making that involves refusal of medical treatment too stressful for a family member or friend, and might choose instead to make those decisions themselves when they are still able to do so.

A RANGE OF MECHANISMS TO ACCOMMODATE FUTURE WISHES

11.90 The Commission believes new guardianship legislation should permit people to plan for future decision making in three ways:

- appointing an enduring personal guardian or enduring financial administrator¹¹³ without providing any instructions or conditions
- appointing an enduring personal guardian or enduring financial administrator and combining this with an instructional directive that provides limitations, conditions, or instructions about the exercise of their powers
- making a 'stand-alone' instructional directive without the appointment of a substitute decision maker that provides binding or guiding instructions about health care or guiding instructions about other future decision making.

11.91 This approach, which seeks to promote autonomy, reflects the principle in the National Framework for Advance Care Directives that a person's culture, background, history or spiritual and religious beliefs may mean that a person exercises their autonomy in a variety of ways. Some people prefer to exercise their autonomy by making the decision on their own behalf, while others prefer delegating decisions to others or making collaborative decisions with close family members or friends.¹¹⁴

RECOMMENDATIONS

Ways of documenting wishes, instructions or directions

133. New guardianship legislation should enable a person with capacity to document instructions about future decision making by:

- (a) appointing an enduring personal guardian or enduring financial administrator with no instructions about how to exercise or how not to exercise their decision-making powers, or
- (b) appointing an enduring personal guardian or enduring financial administrator with instructions about how to exercise or how not to exercise their decision-making powers, or
- (c) making a stand-alone 'instructional directive'.

Instructional directives

134. An instructional directive should be able to provide:

- (a) binding instructions or advisory instructions about health matters
- (b) advisory instructions about personal and lifestyle matters, other than health matters and financial matters, that should be taken into account and followed where reasonably possible but should not be legally binding.

113 In Chapters 5 and 10, the Commission recommends replacing the term 'enduring guardian' with 'enduring personal guardian' and 'enduring attorney (financial)' with 'enduring financial administrator'.

114 *A National Framework for Advance Care Directives - September 2011*, above n 58, 25.



‘STAND-ALONE’ INSTRUCTIONAL HEALTH CARE DIRECTIVES

11.92 The Commission believes that the statutory right to make binding instructional directives about health care should be broader than the circumstances currently provided for by refusal of treatment certificates under the Medical Treatment Act. A statutory scheme should provide for binding instructional directives about medical treatment in a broader range of circumstances. To reflect these changes, the name ‘refusal of treatment certificate’ should be replaced with ‘instructional health care directive’.

RECOMMENDATIONS

Replace ‘refusal of treatment certificate’ with ‘instructional health care directive’

135. The ability to make refusal of treatment certificates under the *Medical Treatment Act 1988* (Vic) should be replaced with a statutory scheme that provides for binding instructional directives about health care to be made in a broader range of circumstances. To reflect these changes, the name ‘refusal of treatment certificate’ should be replaced with ‘instructional health care directive’.

Existing refusal of treatment certificates—transitional arrangements

136. Refusal of treatment certificates made under the *Medical Treatment Act 1988* (Vic) prior to the introduction of new provisions for instructional directives should retain their force as a legally valid way of refusing treatment to the extent that this was authorised by the Medical Treatment Act.

Preservation of common law

11.93 A key policy aim in providing for statutory instructional health care directives is to provide certainty for the person providing the directions and for health professionals. There is no intention to reduce or alter any existing rights. For this reason, the Commission considers that any existing common law rights to make advance statements about consent to or refusal of treatment should be retained to deal with any situations not contemplated by the proposed statutory scheme and to protect people who have already prepared common law statements.

RECOMMENDATION

Preservation of common law

137. New guardianship legislation should provide that the existence of statutory provisions to make an instructional health care directive does not affect any existing common law right to make an advance directive about medical treatment.

Scope of instructional health care directives

Future as well as current conditions

11.94 The Commission believes that people should be able to make instructional health care directives about future as well as current conditions. The existing requirement under the Medical Treatment Act that a refusal of treatment certificate may only be made about a current condition is inconsistent with the law in the other five Australian jurisdictions that have enacted legislation of this nature. The Commission also notes

that this approach is consistent with the principle in the National Framework for Advance Care Directives that '[d]irections can be written to apply to any period of impaired decision-making capacity, and are not limited to the end of life'.¹¹⁵

- 11.95 People are unlikely to take the step of making an instructional health care directive refusing or consenting to treatment unless they have strongly held views about the matter. For many people, this would only arise if they have a condition that requires them to consider treatment options and have received advice about it. However, the Commission considers that people with capacity should have the right to refuse a particular type of treatment or to refuse all medical treatment for reasons that might be deeply personal. Some people have strongly held ethical or religious views about medical treatment and for these reasons may not wish to receive treatment regardless of the outcome. Such people may wish to provide a binding instruction to this effect about treatment of future conditions and not rely on a substitute decision maker to enforce their beliefs.

Instructional directive cannot be used to request an unlawful intervention

- 11.96 The Commission acknowledges the concern expressed in some submissions that instructional health directives might be seen as a means of authorising interventions that unlawfully hasten death. To avoid doubt, new guardianship legislation should state that an instructional health care directive cannot be used to request an unlawful act and a health provider is not required to follow a direction that is unlawful. This approach is consistent with the policy recommended in the National Framework for Advance Care Directives.¹¹⁶

Conscientious objection

- 11.97 The Commission accepts that a lawful direction may be inconsistent with a health professional's conscience. New guardianship legislation should permit a health professional to refer a patient to another health professional if their personal views or beliefs prevent them from complying with lawful directions in a valid instructional health care directive. The National Framework for Advance Care Directives supports this approach.¹¹⁷

Advance consent and advance refusal

- 11.98 The Commission believes that a principal¹¹⁸ should be able to provide advance consent as well as advance refusal to treatment. The South Australian, Western Australian and Queensland statutory schemes provide for this step and the Commission considers this would be a useful addition to Victorian law.

- 11.99 There are two situations where an ability to provide advance consent may be particularly important. The first is where an individual is concerned that family members or close friends may not consent to treatment that they wish to have and prefer to provide this direction on their own behalf. An individual may wish to provide a binding direction to consent to a particular treatment without discussing this with family or friends. This may occur when the family and friends have a strong religious or ethical belief that a particular treatment should be refused, but the individual does not adhere to this belief and wishes to consent to this treatment.

- 11.100 The second situation is where the individual has personal experience of an illness and particular treatments and wishes to consent to a particular treatment because it is effective; this may be combined with the refusal of another type of treatment.

¹¹⁵ Ibid 14.

¹¹⁶ Ibid 32.

¹¹⁷ Ibid 41.

¹¹⁸ In Chapter 10, the Commission recommends replacing the term 'donor' (a person who makes an enduring appointment) with 'principal'.

Not to be used to demand treatment

11.101 The Commission notes the concern that an instructional health care directive not be used to demand particular medical interventions or treatment. The Commission agrees with the principle expressed in the National Framework for Advance Care Directives that 'health care professionals are not required to offer treatment that they consider neither medically beneficial nor clinically appropriate'.¹¹⁹ New guardianship legislation should include this limitation on the use of an instructional health care directive.

RECOMMENDATIONS

Scope of instructional health care directives

138. An instructional health care directive should allow the principal to:

- (a) give directions about health care and medical treatment for their future health care
- (b) give information about their directions
- (c) provide information about exercising the power.

139. The principal should be able to make instructional health care directives about future as well as current conditions.

140. The principal should be able to provide advance consent to treatment as well as advance refusal. However, a principal cannot demand treatment that is not offered.

141. To avoid doubt, new guardianship legislation should specifically provide that an instructional health care directive allows the principal to give directions about requiring a life-sustaining measure to be withheld or withdrawn in particular circumstances.

Instructional health care directives cannot authorise euthanasia or assisted suicide

142. New guardianship legislation should include a statement that an instructional health care directive cannot authorise, justify or excuse taking positive steps to assist someone to end their life unlawfully.

Conscientious objection

143. A health professional should be required to refer the patient or enduring personal guardian to another health professional if their personal views or beliefs prevent them from complying with lawful directions in a valid instructional health care directive.

Psychiatric treatment

11.102 The Commission is not proposing that instructional health care directives made in relation to psychiatric treatment should be binding when the person becomes an involuntary patient under the *Mental Health Act 1986* (Vic). The Commission has made this decision for two reasons:

- These matters are currently being considered by the Victorian Government's review of the Mental Health Act and lie within the domain of that review.

¹¹⁹ A National Framework for Advance Care Directives - September 2011, above n 58, 15.

- The complexity of issues in relation to instructional directives for psychiatric treatment is such that, in the Commission’s view, it is preferable for the person to appoint an enduring personal guardian and to provide that person with instructions about their treatment wishes. This matter is discussed in detail in Chapter 24.

RECOMMENDATION

Psychiatric treatment

144. Any directions in an instructional health care directive about psychiatric treatment are not binding if a person becomes an involuntary patient under the *Mental Health Act 1986* (Vic).

Requirement for advice and informed decision making

11.103 The Commission recognises that it is desirable that a person making an instructional health care directive receive information about the consequences of refusing or consenting to a particular medical treatment. The forms created for instructional health care directives should encourage this step.

11.104 The Commission considers that while people should be encouraged to seek information about medical treatment referred to in an instructional directive, this step should not be mandatory. A requirement that the person making the directive receive information would be inconsistent with the National Framework for Advance Care Directives, which states that ‘[l]aw and policy must not require that a competent adult ... be medically informed or seek or follow medical advice’.¹²⁰ This requirement does not exist at common law and nor is it required by the statutory schemes in Queensland, South Australia, the Australian Capital Territory and the Northern Territory.

Prescribed forms

11.105 It is important that the forms for instructional directives are as easy to use as possible. The forms should be developed in consultation with a wide range of stakeholders. The Commission considers that it would be desirable to develop these forms at the same time as forms for personal appointments and supporters. This would encourage consistency in format and avoid unnecessary repetition of work.

11.106 The Commission believes it should be mandatory to use the approved form. This will help ensure that information provided to a person making an instructional health care directive is consistent and increases the chances that formal requirements, such as witnessing, are followed.

¹²⁰ Ibid 32.

RECOMMENDATIONS

Prescribed forms

145. New guardianship legislation should provide that an instructional health care directive must be in the prescribed form.
146. The forms should be developed by a multidisciplinary team in consultation with a wide range of community members as well as representatives from professional organisations and interest groups.
147. The forms should be user-friendly, simple, written in plain English and provide appropriate information about how to complete them. The forms should have a consistent design.
148. The forms and any associated information and educational material should be available in a range of community languages. Translated forms should be in a bilingual format that includes both English and the community language.

Witnessing requirements

- 11.107 Two of the most important functions of witnesses to documents of this nature are to check understanding and to provide safeguards against abuse. Witnesses should confirm:
- the age and identity of the person making the instructional health care directive
 - that the person understands the contents of the instructional health care directive and the implications of completing it
 - that the person is signing the directive voluntarily without inducement or coercion.
- 11.108 The Commission considers that the witnessing requirements for an instructional health care directive should correspond with those for enduring personal appointments which are considered in detail in Chapter 10. This step is desirable in the interests of simplicity and consistency and because the range of powers that an enduring personal guardian may be given include powers to consent to or refuse medical treatment.
- 11.109 Consistent with the recommendations for personal appointments in Chapter 10 there should be two witnesses to an instructional health care directive:
- One witness should either be authorised to witness an affidavit or be a registered medical practitioner (authorised witness).
 - The other witness need not have any special qualification (non-authorised witness).
- 11.110 The Commission notes that these witnessing requirements are more stringent than those suggested by the National Framework on Advance Care Directives. The Framework suggests that one independent witness should be required and that witnesses should not be limited to a defined set of professional groups.¹²¹ The Commission considers that a balance between adequate safeguards and not making witnessing unnecessarily cumbersome is provided by requiring two witnesses, one of whom is an authorised witness who is either eligible to witness affidavits or is a registered medical practitioner.

¹²¹ Ibid 31.

- 11.111 The Commission considered whether the authorised witness should be a medical practitioner. However, given the conclusion that a person need not seek medical advice in order for the instructional health care directive to be followed, the Commission believes that there should not be a formal requirement that one of the witnesses is a registered medical practitioner. This view is consistent with the National Framework on Advance Care Directives.¹²²
- 11.112 As discussed in Chapter 10, the Commission considers that further thought should be given to who should be automatically excluded from witnessing documents. In that chapter, the Commission suggested allowing relatives to witness an enduring appointment if they are a non-authorised witness, but excluding relatives from acting as the authorised witness. The same approach could be taken in relation to witnessing of instructional health care directives.

RECOMMENDATION

Witnessing requirements

149. An instructional health care directive should be signed and dated by two witnesses who are present at the time the instructional health care directive is made. One of the witnesses must be a person who is authorised to witness an affidavit or a registered medical practitioner. The witnesses must be satisfied that:

- (a) the principal is at least 18 years old
- (b) the authorised witness has seen appropriate identification documents, which confirm the principal's identity. The Act or regulations should detail what combination of documents is eligible as effective proof of identification
- (c) the principal's decision is made voluntarily and without inducement or compulsion
- (d) the principal understands the nature and likely effects of each direction in the instructional health care directive
- (e) the principal understands that a direction in an instructional health care directive operates only while the principal lacks capacity to make decisions about the matter covered by the direction
- (f) the principal understands that they may revoke a direction in the instructional health care directive at any time they have capacity
- (g) the principal understands that, at any time they are incapable of revoking a direction, they are unable to effectively oversee the implementation of the direction.

Enforceability of an instructional health care directive

- 11.113 New guardianship legislation should specify that an instructional health care directive is binding if it is valid and the direction governs circumstances that have arisen.
- 11.114 If a health care professional or substitute decision maker considers the directive may be invalid or the maker would not have intended the direction to apply in the circumstances that have arisen, they should be required to apply to the tribunal for a determination concerning its effect.

¹²² Ibid.



11.115 The legislation should contain a non-exhaustive list of the circumstances in which the directive is not binding because the principal would not have intended that it be followed. These should include situations where:

- Circumstances, including advances in medical science, have changed since the completion of the instructional directive to the extent that the principal, if they had known of the change in circumstances, would have considered that the terms of the direction are inappropriate.
- The instructional health care directive is uncertain or there is persuasive evidence to suggest that the instructional health care directive is based on incorrect information or assumptions.

RECOMMENDATIONS

Enforceability of an instructional health care directive

150. An instructional health care directive should be binding on health providers and substitute decision makers if it is valid and the direction operates in the circumstances that have arisen.

151. A direction in an instructional health care directive does not operate if the maker would not have intended it to apply in the circumstances that have arisen. This occurs if one of the following applies:

- (a) Circumstances, including advances in medical science, have changed since the completion of the instructional health care directive to the extent that the principal, if they had known of the change in circumstances, would have considered that the terms of the direction are inappropriate.
- (b) The instructional health care directive is uncertain.
- (c) There is persuasive evidence to suggest that the instructional health care directive is based on incorrect information or assumptions.

Offence of medical trespass

11.116 The offence of medical trespass in section 6 of the Medical Treatment Act should be extended to apply to a health provider who knowingly provides medical treatment to a person that is contrary to the person's wishes as expressed in an instructional health care directive and that is not otherwise authorised by law. The requirement that the offence be limited to those circumstances where a health provider *knowingly* provides treatment despite the views expressed in a directive protects those health professionals who act in good faith when assisting people who appear to be in need of treatment.

11.117 A medical practitioner who knowingly provides medical treatment to a person that is contrary to the person's wishes as expressed in an instructional health care directive would also be liable to professional sanctions for misconduct and would be at risk of civil or criminal proceedings for assault.

RECOMMENDATION

Offence of medical trespass

152. The offence of medical trespass in section 6 of the *Medical Treatment Act 1988* (Vic) should be extended to apply to a health provider who knowingly provides medical treatment to a person that is contrary to that person's wishes as expressed in an instructional health care directive and that is not otherwise authorised by law.

Registration

11.118 The Commission considers that certainty is best provided by requiring that instructional health care directives are registered. However, because of privacy concerns about medical matters, some people might be discouraged from making an instructional health care directive if registration is compulsory. In time, these privacy concerns might evaporate if the register is seen to operate successfully in relation to personal and tribunal appointments of supporters and substitute decision makers.

11.119 The Commission recommends voluntary registration in the first instance. However, health providers should be required to check the online register to determine if an instructional health care directive is in place before providing treatment. The Commission does not believe that this requirement will be overly burdensome if the online register discussed in detail in Chapter 16 is introduced.

RECOMMENDATION

Registration

153. It should not be compulsory to register an instructional health care directive.

Protection for health providers for non-compliance with instructional health care directives

11.120 A health provider should be protected from liability when they are acting in good faith without actual knowledge either that an instructional health care directive exists or when they comply with a directive that is invalid. This protection should only apply if the health provider has checked the online register before proceeding.

Emergency treatment

11.121 The legislation should also permit a health provider to act in emergencies where time is of the essence without any reference to an instructional health care directive. This protection should extend to circumstances where emergency treatment is required and the health provider knows there is an instructional health care directive in place but has reasonable grounds for believing that it is inoperative. The protection should be limited to circumstances where the health provider believes on reasonable grounds that one of the following applies:

- Circumstances, including advances in medical science, have changed since the completion of the instructional directive to the extent that the principal, if they had known of the change in circumstances, would have considered the terms of the direction inappropriate.
- The instructional health care directive is uncertain or there is persuasive evidence to suggest that the instructional health care directive is based on incorrect information or assumptions.



RECOMMENDATIONS

Protection for health providers for non-compliance with instructional health care directives

154. New guardianship legislation should provide the following protection for health providers:

- (a) A health provider is not affected by an instructional health care directive to the extent that the health provider, acting in good faith, does not have actual knowledge that the person has an instructional health care directive.
- (b) A health provider who—acting in good faith and without actual knowledge that an instructional health care directive is invalid—acts in reliance on the directive, does not incur any liability to the principal or anyone else because of the invalidity.
- (c) A health provider has a duty to determine whether an instructional health care directive is in place by checking the register before providing treatment. A health provider who fails to check the register and provides treatment that is inconsistent with the directive will not be protected from liability by the provisions providing protection for a lack of actual knowledge. A health provider is not required to check the register if emergency treatment is required.

Emergency treatment

155. If emergency treatment is required and the health provider is aware of an instructional health care directive but does not have time to apply to the tribunal to determine if it is valid or if a direction in the directive is operative, and they believe on reasonable grounds that one of the following applies:

- (a) circumstances, including advances in medical science, have changed since the completion of the instructional health care directive to the extent that the principal, if they had known of the change in circumstances, would have considered the terms of the direction inappropriate
- (b) the instructional health care directive is uncertain
- (c) there is persuasive evidence to suggest that the instructional health care directive is based on incorrect information or assumptions

then the health provider does not incur any liability, either to the principal or anyone else, if the health provider does not act according to the directive.

Copies of instructional health care directives

11.122 The Commission believes that hospitals and nursing homes should be required to take measures to ensure that any instructional health care directive is placed with the patient's clinical records so that all relevant staff are alerted to it. There is a similar provision in the Medical Treatment Act for refusal of treatment certificates.¹²³

¹²³ *Medical Treatment Act 1988* (Vic) s 5E.

RECOMMENDATION

Copies of instructional health care directives

156. The chief executive officer of a hospital or a nursing home must take reasonable steps to ensure that a copy of any instructional health care directive applying to a patient in the hospital or home, and of any notification of the cancellation of such directive, is placed with the patient's record kept by the hospital or home.

Tribunal declaration about an instructional health care directive

- 11.123 The Commission believes that a health care provider, substitute decision maker or any person with a special interest in the affairs of the principal who considers that an instructional health care directive is invalid or should not be followed should be able to apply to VCAT for a determination about its effect.
- 11.124 VCAT should have the power to determine the validity of the directive and to declare whether any of the provisions of a valid directive are no longer operative because the maker would not have intended it to apply in the circumstances that have arisen. In cases of this nature, the tribunal should also have the power on its own motion to appoint a personal guardian to make the health care decision in question.

RECOMMENDATION

Tribunal declaration about an instructional health care directive

157. If a health provider, substitute decision maker or any person with a special interest in the affairs of the principal considers that an instructional health care directive is not or may not be valid, or that a direction in an instructional health care directive does not operate because the principal would not have intended it to apply in the circumstances that have arisen, they can apply to VCAT to make a determination about the effect of the directive.

Recognition of instructional health care documents made in other Australian jurisdictions

- 11.125 It is desirable to recognise instructional health care directions made in other Australian jurisdictions whenever reasonably possible.
- 11.126 At present, Western Australia and Queensland are the only Australian jurisdictions that recognise interstate instructional health care directives.¹²⁴ Queensland recognises a directive made in another jurisdiction if it complies with the laws of that other jurisdiction.¹²⁵ The Commission supports adopting this approach in Victoria.

¹²⁴ *Guardianship and Administration Act 1990* (WA) s 110ZA; *Powers of Attorney Act 1998* (Qld) s 40.

¹²⁵ *Powers of Attorney Act 1988* (Qld) s 40.

RECOMMENDATION

Recognition of instructional health care documents made in other Australian jurisdictions

158. Instructional health care documents made in other states should be recognised in Victoria to the following extent:

- (a) If a document prescribed by regulation is made in another state and complies with that state's document requirements, then, to the extent the document's provisions could have been validly included in an instructional health care directive made under the Victorian Act, the document must be treated as if it were an instructional health care directive made under, and in compliance with, this Act.

INSTRUCTIONAL DIRECTIVES—PERSONAL AND FINANCIAL MATTERS

- 11.127 The Commission agrees with the widely expressed view that people should be able to provide instructional directives about the things that are most important to them. These matters should not be limited to medical treatment decisions but may encompass broader matters such as preferences for support, accommodation and residential care, or preferences that financial assets are used to provide a certain level of care.
- 11.128 Instructions or preferences are likely to function best when the appointment of a substitute decision maker is combined with an instructional directive and discussed with friends, family and the appointed substitute decision maker. Educational programs about advance care directives should encourage this approach. The forms created for documenting instructional directives should encourage people to think broadly about their views and wishes and discuss these with significant people in their lives.
- 11.129 The Commission also recognises that some people may not be able, or may not wish, to appoint a substitute decision maker. These people should still have a right to express their preferences and have them followed wherever possible. This maximises their autonomy and provides people with more confidence that their wishes, values and preferences will be taken into account when important decisions are made. It is the Commission's view that a right to make instructional directives on lifestyle or financial matters should be recognised by statute.
- 11.130 New guardianship legislation should permit people to make instructional directives about personal or financial matters. In many circumstances, however, instructional directives about matters other than medical treatment will be unenforceable. For example, an expressed preference for a particular accommodation type may be impossible because it no longer provides an appropriate level of care or because finances may be unavailable.
- 11.131 For this reason, the Commission believes that statutory instructional directions about matters other than about health care decisions should be taken into account and followed where reasonably possible, but should not be legally binding. The Commission believes that if instructions are not followed, the reasons for doing so should be recorded to help ensure that the instructions are properly considered and to assist if any future challenge to the decision arises.

RECOMMENDATIONS

Instructional directives—personal and financial matters

159. A principal may create an instructional directive that provides advisory instructions about personal and lifestyle matters and financial matters. These matters should be taken into account and followed where reasonably possible but should not be legally binding.
160. A substitute decision maker who is aware of any instructional directive should be required to follow the wishes expressed in an instructional directive where reasonably possible.

Enduring appointments combined with instructional directives

161. A person should be able to appoint an enduring personal guardian or enduring financial administrator and combine the appointment with a personal instructional directive.

ENDURING APPOINTMENTS COMBINED WITH INSTRUCTIONAL HEALTH CARE DIRECTIVES

- 11.132 If a principal wishes to appoint an enduring personal guardian with health care powers and combine the appointment with an instructional health care directive, the principal should be able to specify if the instructional health care directive is binding for the matters it covers, or intended as a guide only. In situations where the principal specifies that the instructional directive is binding for the matters it covers, the enduring personal guardian should act as an advocate to ensure that health professionals comply with the directive. It should only be possible to override a binding instructional health care directive by tribunal order.
- 11.133 If the principal specifies that the instructional health care directive is for guidance only, the enduring personal guardian should be required to take the direction into account when making a decision that is in the person's personal and social well-being as part of the substituted judgment consideration. We discuss this further in Chapter 17.

RECOMMENDATION

Enduring appointments combined with instructional health care directives

162. A principal who combines the appointment of an enduring personal guardian with an instructional health care directive should be able to specify if the instructional health care directive is binding for the matters it covers, or intended as a guide only.
163. If the principal specifies that the instructional health care directive is binding, the enduring personal guardian should act as an advocate to ensure that the medical treatment complies with the directive.
164. It should only be possible to override a binding instructional health care directive as set out in recommendation 151 above.
165. If the principal specifies that the instructional health care directive is to provide guidance only, the enduring personal guardian should consider the direction but is not bound to follow it.



Enduring appointments combined with instructional directives about personal or financial matters

- 11.134 A principal who combines the appointment of an enduring personal guardian or enduring financial administrator with an instructional directive, other than an instructional health care directive, should be able to specify express conditions or limitations on the exercise of power. If the conditions or limitations are sufficiently specific and clear they should be binding on the enduring personal guardian or enduring financial administrator. An example of a limitation or condition might be a direction not to invest the principal's funds in particular companies or industries or not to sell a particular item of property. It should only be possible to override express conditions or limitations of this nature by order of the tribunal.
- 11.135 A principal should be able to provide general guidance about their values, wishes or preferences in an instructional directive by use of non-binding instructions. For example, they may state that they wish to remain in their home as long as possible, or nominate people they wish to see. They also might wish to express ethical values and indicate a preference that investment decisions support these values.
- 11.136 The Commission accepts the point made in consultations that these types of instructions will not always be able to be enforced. Requiring the tribunal approval for each departure would make it very difficult for a substitute decision maker to do their job, would place a strain on the tribunal and could discourage people from accepting an enduring appointment. For these reasons, the Commission believes that instructions other than express and specific limitations or conditions should guide decision making as part of a substituted judgment consideration, but should not be legally binding on enduring personal guardians or enduring financial administrators.

RECOMMENDATION

Enduring appointments combined with instructional directives about personal or financial matters

166. A principal who combines the appointment of an enduring personal guardian or enduring financial administrator with an instructional directive, other than an instructional health care directive, should be able to specify binding conditions or limitations on the exercise of power and non-binding instructions to guide decision making.

OUTCOMES-BASED INSTRUCTIONAL DIRECTIVES

- 11.137 The Commission believes it is important that people are encouraged to create instructional directives using outcomes-based terms. The Commission agrees with Respecting Patient Choices' observation that outcomes or goals are more likely to remain stable over time and provide the greatest assistance to those people who strive to implement directives long after they were recorded.
- 11.138 People should be encouraged to discuss their instructions, wishes and values with family, medical professionals and anyone they are appointing as an enduring personal guardian or enduring financial administrator. Some of the steps suggested by

Respecting Patient Choices for advance planning are applicable to planning for all types of decision making in the future:

- thinking about your future medical care/decisions that are important to you
- choosing someone to speak for you
- writing down your wishes
- informing others of your decisions.¹²⁶

RECOMMENDATION

Outcomes-based instructional directives

167. People should be encouraged to write an instructional directive using outcomes-based terms. It should be possible to record personal values, ethics, religious and cultural beliefs, wishes and life goals. Any forms created should encourage this.

168. People should be encouraged to discuss their instructions, wishes and values with family, medical professionals and anyone they are appointing as an enduring personal guardian or enduring financial administrator. Any forms created should encourage these discussions.

¹²⁶ Austin Health, *Advance Care Planning for Everyone* (1 December 2011) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=1&Itemid=2>.



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Tribunal appointments of substitute decision makers

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Chapter 12

Tribunal appointments of substitute decision makers

INTRODUCTION

- 12.1 While it is highly desirable that people appoint their own substitute decision makers and supporters, it will not always be possible for them to do so. There will continue to be a need for appointments by a public body to assist people who have not chosen to make a personal appointment or who are unable to do so.
- 12.2 Tribunal appointments of substitute decision makers have been an effective and relatively inexpensive part of Victoria's guardianship laws and should be retained. They are an important part of the range of decision-making mechanisms the Commission recommends for new guardianship legislation.
- 12.3 In this chapter, the Commission makes recommendations for reform of the law governing the Victorian Civil and Administrative Tribunal's (VCAT) appointment of substitute decision makers. We consider:
- the criteria for appointing personal guardians and financial administrators
 - what decisions they should be empowered to make
 - how the two appointments should relate to one another
 - who should be appointed to the roles
 - when appointments should be reassessed.
- 12.4 This chapter is concerned with the nature of substitute decision-making appointments rather than the processes that are followed by VCAT when determining whether to make such an appointment. VCAT procedures are dealt with in Chapter 21.
- 12.5 The Commission has also been asked to consider whether the law strikes an appropriate balance between the confidentiality requirements in the *Guardianship and Administration Act 1986* (Vic) (G&A Act) and the principle of transparent decision making.¹ In this chapter, we consider the rights of all substitute decision makers, including those appointed personally and by the tribunal, to access private information about the person they are representing or assisting.² We also consider third party disclosure of information about a represented person.
- 12.6 We also explore 'succession planning' in this chapter. Succession planning allows people to express wishes about who they think should make decisions about someone they are caring for in the future when they are no longer able to do so. This matter is of particular concern to ageing parents and carers of people with lifetime disabilities.

CURRENT LAW

- 12.7 Our discussion about the current law in this section is limited to those areas where the Commission proposes reform. The consultation paper describes the current law relating to VCAT appointments more fully.
- 12.8 Provisions for guardianship and administration orders are set out in parts 4 and 5 of the G&A Act.
- 12.9 A person who is assisted by a VCAT appointed guardian or administrator is known as a **represented person**. In Chapter 5, the Commission recommends that the names of VCAT appointments change to **personal guardians** and **financial administrators** in new guardianship legislation.

1 Victorian Law Reform Commission, *Guardianship Review Terms of Reference* (May 2009) 3(k).

2 In Chapter 17 the Commission considers the responsibilities of these people to keep information about the person they are representing or assisting private. In Chapters 8 and 9 we consider these rights and responsibilities for supporters and co-decision makers. In Chapter 21 we consider the way VCAT balances the issues of confidentiality and procedural fairness when it considers applications for VCAT appointments and manages its files.

CRITERIA FOR APPOINTMENT

- 12.10 VCAT has the power to appoint a guardian or administrator for a person if it is satisfied that the person:
- has a disability³
 - is unable 'by reason of the disability to make reasonable judgments' (either about matters relating to their personal circumstances in the case of appointing a guardian⁴ or about the matters relating to their estate in the case of appointing an administrator⁵) and
 - is 'in need of' a guardian or administrator.⁶

The limited body of case law concerning the appointment of guardians and administrators indicates that the three requirements are both separate and cumulative.⁷

- 12.11 The appointment of a substitute decision maker is discretionary.⁸ Both section 22 and section 46 of the G&A Act stipulate that VCAT *may* make an appointment if it finds the three criteria satisfied. While the G&A Act does not describe VCAT's required level of satisfaction before making an appointment, it appears that the normal civil standard—on the balance of probabilities—is used in practice.

Disability

- 12.12 The G&A Act defines a person with a disability as someone with an 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.⁹ It appears that this very broad definition seeks to describe the range of conditions that might cause a person to be incapable of making, or communicating, their own decisions.

Reasonable judgments

- 12.13 The G&A Act does not define 'reasonable judgments'. While the term might seem to be value-laden and to invite VCAT to evaluate the worth or quality of the decisions a person makes, in practice it seems to have been given the same meaning as 'capacity'.¹⁰ The test is subjective in the sense that VCAT must measure a person's capacity in relation to their actual property and affairs, rather than against an objective standard.¹¹ In *XYZ v State Trustees (XYZ)*, Justice Cavanough emphasised that 'a person's inability to make reasonable judgments'¹² must be assessed separately to the issue of whether a person has a disability and whether the person needs a substitute decision maker'.

Need

- 12.14 The G&A Act describes a range of matters that must be considered when deciding whether a person is 'in need' of a guardian or administrator. These are:
- whether the needs of the person about whom the application is made could be met by other means less restrictive of the person's freedom of decision and action
 - the wishes of the proposed represented person, as far as they can be ascertained.¹³

3 *Guardianship and Administration Act 1986* (Vic) ss 22(1)(a), 46(1)(a)(i).

4 *Ibid* s 22(1)(b).

5 *Ibid* s 46(1)(a)(ii).

6 *Ibid* ss 22(1)(c), 46(1)(a)(iii).

7 *XYZ v State Trustees Ltd* [2006] VSC 444 [44] ('XYZ').

8 *Public Advocate v RCS (Guardianship)* [2004] VCAT 1880 [7]–[8].

9 *Guardianship and Administration Act 1986* (Vic) s 3.

10 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [55]–[57].

11 *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [53]–[55]; *Guardianship and Administration Act 1986* (Vic) s 46(1)(a)(ii).

12 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [43].

13 *Guardianship and Administration Act 1986* (Vic) ss 22(2), 46(2).

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12.15 When deciding whether to appoint a guardian, two additional matters must be considered:

- the wishes of any nearest relatives or other family members of the proposed represented person
- the desirability of preserving existing family relationships.¹⁴

12.16 In *XYZ*, Justice Cavanough commented on the criterion of need in relation to the appointment of an administrator:

Generally speaking, the question of 'need' will be answered primarily by reference to the availability or otherwise of alternative arrangements outside administration (such as family support) to compensate for or deal with the person's identified 'inability'.¹⁵

Overarching objects

12.17 When exercising its discretionary power to appoint a guardian or administrator, VCAT is also required to consider the overarching objects in section 4(2) of the G&A Act. Those objects are that:

- The means that are the least restrictive of a person's freedom of decision and action as is possible in the circumstances are adopted.
- The best interests of the person with a disability are promoted.
- The wishes of the person with a disability, are, wherever possible, given effect to.¹⁶

WHO SHOULD BE APPOINTED AS GUARDIAN OR ADMINISTRATOR

12.18 VCAT may appoint either a private individual or a public body to be a guardian or administrator. The Public Advocate may be appointed as a guardian of last resort when no other suitable person is available.¹⁷ There is no formal public administrator of last resort. In practice, State Trustees is often appointed as an administrator where no other suitable administrator is available.¹⁸

12.19 Sections 23 and 47 of the G&A Act guide the choice of a guardian and administrator respectively. A guardian or administrator should be a person who:

- will act in the best interests of the represented person¹⁹
- is not in a position of conflict of interest with the represented person²⁰
- is suitable to act in the role.²¹

12.20 In determining suitability to act in the role, the Act requires, for both guardians and administrators, that VCAT takes into account:

- the wishes of the proposed represented person, so far as they can be ascertained²²
- the compatibility of the proposed guardian with an administrator, and vice-versa.²³

¹⁴ Ibid ss 22(2)(b)–(c).

¹⁵ *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [44].

¹⁶ *Guardianship and Administration Act 1986* (Vic) s 4(2).

¹⁷ Ibid s 23(4).

¹⁸ State Trustees report that the number of VCAT orders appointing State Trustees as a percentage of total VCAT orders made increased slightly in the past year, from 39.1% in 2009–10 to 40.1% in 2010–11: State Trustees, *Annual Report 2011* (2011) 9.

¹⁹ *Guardianship and Administration Act 1986* (Vic) ss 23(1)(a), 47(1)(c)(i).

²⁰ Ibid ss 23(1)(b), 47(1)(c)(ii).

²¹ Ibid ss 23(1)(c), 47(1)(c)(iii).

²² Ibid ss 23(2)(a), 47(2)(a).

²³ Ibid ss 23(c), 47(2)(b).

12.21 VCAT must consider further matters in relation to the suitability of a guardian:

- the desirability of preserving existing family relationships²⁴
- whether the person proposed as guardian will be available and accessible to the proposed represented person.²⁵

12.22 Other matters that VCAT must consider when choosing who to appoint as administrator include whether the person has sufficient expertise to administer the estate or if there is a special relationship or other special reason why that person should be appointed as administrator.²⁶

POWERS OF SUBSTITUTE DECISION MAKERS

Guardians

12.23 A guardian has power to make decisions about a person's welfare or lifestyle. A decision made by a guardian, in accordance with the terms of a guardianship order, has the same legal effect as if it were made by the represented person and they had legal capacity.²⁷

12.24 The G&A Act allows for two types of guardian—plenary guardians and limited guardians.

Plenary guardians

12.25 Section 24(1) of the G&A Act provides that:

A guardianship order appointing a plenary guardian confers on the plenary guardian in respect of the represented person all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child.

12.26 Section 24 provides a non-exhaustive list of the types of decisions that a plenary guardian is authorised to make. They include where and with whom the represented person will live, what work they may or may not be permitted to undertake, what health care they will receive and what contact with other people they may have.²⁸ However, the term 'plenary guardian' is unclear and the description of that person's powers as being those that a parent has in relation to a child is an outdated shorthand way of describing the welfare or lifestyle powers that one person could possess in relation to another.

12.27 Plenary orders should only be made if a more limited order will not meet the needs of the represented person.²⁹ Plenary orders are rarely made.³⁰

Limited guardians

12.28 Section 25 of the G&A Act allows VCAT, when appointing a guardian, to limit the appointment to one or more of the powers and duties that a plenary guardian could be given. In practice, matters such as housing, health care, and access to services are common areas in which limited guardianship orders are made.

²⁴ Ibid s 23(2)(b).

²⁵ Ibid s 23(2)(d).

²⁶ Ibid s 47(1)(c)(iv) and also whether the person was a member of the Tribunal as constituted for a proceeding under the Act s 47(2)(c). Section 47(2A) then goes on to provide that VCAT may appoint such a person only if it considers that in the circumstances it is appropriate for that person to act as an administrator.

²⁷ *Guardianship and Administration Act 1986* (Vic) ss 24(4), 25(3).

²⁸ Ibid s 24(2).

²⁹ Ibid s 22(4).

³⁰ The Public Advocate estimates that plenary orders constitute less than 2% of guardianship orders where the Public Advocate has been appointed (2009–2010 financial year): email from the Public Advocate to the Victorian Law Reform Commission, 22 July 2010.

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Administrators

12.29 The powers of administrators are set out in divisions 3 and 3A of part 5 of the G&A Act. These provisions deal with the various functions that can be part of managing an estate. Section 58B of the Act gives an administrator a number of specific powers and duties including:

- general care and management of the estate
- collecting, receiving and recovering income
- investing money
- renting, leasing, selling or mortgaging property
- paying debts
- carrying on trades, businesses and professions
- bringing and defending legal actions
- signing deeds, instruments and other documents
- paying money for the person's maintenance
- paying money to the person for their own use.

12.30 The G&A Act does not specifically provide for plenary and limited administrators. Instead, the VCAT order specifies whether the administrator is to manage all or part of a person's estate and whether there are any variations to the 'standard' statutory powers.³¹ It is common for an order to appoint an administrator to manage all of a person's estate and to give an administrator the full range of powers, which, in effect, amounts to a plenary administration order.

ACCESS TO PERSONAL INFORMATION ABOUT A REPRESENTED PERSON

12.31 The G&A Act says nothing about the right of a guardian to access information—confidential or otherwise—about the person they are representing.

12.32 While the G&A Act also says nothing about the right of an administrator to access information about the person they are representing, administrators are usually given a range of powers that imply a right of access to information concerning the financial affairs of a represented person. In most cases, an administrator will be entitled to exercise all of the powers in section 58B of the G&A Act, which amplify the administrator's general authority to care for and manage the estate of the represented person.³² These powers appear to give an administrator the right to access information generally regarded as confidential, such as the amount of money the represented person has in a bank account.

Privacy and health legislation

12.33 Commonwealth and Victorian information privacy laws³³ regulate the handling of 'personal information' by government agencies and some private organisations. These Acts deal with the collection, accuracy, security, use and disclosure of personal information. They also give people the right to access personal information about themselves held by a government agency or relevant private organisation in order to check its accuracy. The *Health Records Act 2001* (Vic) regulates the handling of health information by Victorian government agencies and private health service providers.

31 *Guardianship and Administration Act 1986* (Vic) s 48(1).

32 *Ibid* 58B(1)(a).

33 *Privacy Act 1988* (Cth); *Information Privacy Act 2000* (Vic).

12.34 The rights granted to people by information privacy and health laws are not diminished because the person has a guardian or administrator. Victorian privacy and health information statutes give a guardian or administrator the same rights to access and correct information as the person they are representing.³⁴ However, they do not authorise the disclosure of personal or health information by a public authority or health provider to a guardian or administrator.

DISTINCTION BETWEEN GUARDIANS AND ADMINISTRATORS

12.35 In practice, the division between the roles and responsibilities of guardians and administrators is not always clear. In some instances, financial and personal decisions overlap. For example, the decision about where a person should live is a personal or lifestyle decision that also involves significant financial considerations. Although a guardian may be able to make the decision that a person should live in a particular place, the administrator would be required to release funds to pay for the accommodation.

12.36 The G&A Act does not provide any guidance on how the roles of guardians and administrators are to intersect, other than to require that, in choosing a person for either of these roles, VCAT should consider their compatibility with one another.³⁵ There is no requirement in the G&A Act that a guardian and administrator consult with each other.

12.37 Although the G&A Act maintains a distinction between the roles of guardians and administrators, it does not prevent VCAT from appointing the same person to fulfil both roles. In practice, this sometimes happens when a member of the represented person's family is appointed to both roles.

LENGTH AND REVIEW OF ORDERS

12.38 The current legislation deals with the length of orders primarily through its provisions for reassessments. This means that orders (other than temporary orders) do not typically have an expiry date but contain a time for reassessment. When an order is reassessed it can be continued, varied, replaced or revoked as VCAT sees fit.³⁶

12.39 A reassessment must occur:

- within 12 months after making the order, unless VCAT orders otherwise,³⁷ and
- at least once within each three year period after making the order, unless VCAT orders otherwise.³⁸

12.40 In practice, VCAT often orders reassessments of guardianship orders every 12 months, and reassessments of administration orders every three years.

12.41 VCAT may also make a self-executing order that expires after a designated period or event, unless an application is made to extend the order. These are more common for guardianship than administration orders.³⁹

12.42 In Chapter 21, we examine reviews and appeals of VCAT orders.

34 See *Information Privacy Act 2000* (Vic) s 64; *Health Records Act* (Vic) s 85.

35 *Guardianship and Administration Act 1986* (Vic) ss 23(2)(c), 47(2)(b).

36 *Ibid* s 63(1).

37 *Ibid* s 61(1)(a).

38 *Ibid* s 61(1)(b).

39 Anstat, *Victorian Civil and Administration Tribunal: Guardianship and Administration* (September 2008) pt 6–6 [61.01].

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COMMUNITY RESPONSES

RETAINING TRIBUNAL APPOINTMENTS

- 12.43 In the consultation paper, the Commission proposed that guardianship law should continue to provide for VCAT-appointed substitute decision makers.
- 12.44 While some people expressed concerns about VCAT's processes and discretionary decision making, the Commission did not receive any submissions arguing that the VCAT system of appointing substitute decision makers should be abolished altogether.
- 12.45 Carer groups tended to express the greatest reservation about VCAT appointments. Some felt that in the majority of cases appointments should be made automatically, without the need to go to VCAT.⁴⁰ Nonetheless, Carers Victoria supported a continuing role for VCAT in the appointment of substitute decision makers, albeit one that needs to be more sensitive to the needs and roles of carers.⁴¹

CRITERIA FOR APPOINTMENT: DISABILITY AND INCAPACITY

- 12.46 In the consultation paper, the Commission proposed that 'disability' should no longer be a separate criterion for the appointment of a guardian or administrator. However, we proposed that new guardianship legislation should require a causal link between a person's lack of capacity to make decisions and a disability.
- 12.47 There was widespread support for the Commission's proposal.⁴² We discuss these responses in more detail in Chapter 7. In that chapter, we also recommend expanding the definition of 'disability' to include autism spectrum disorder.

CRITERIA FOR APPOINTMENT: NEED

- 12.48 In the consultation paper, the Commission suggested that the G&A Act's current requirement of 'need' usually means that in practice VCAT makes an order only when it finds that a decision needs to be made for a person with impaired decision-making ability immediately or in the near future.⁴³ For the most part, the pending decision needs to be one of consequence and, in most cases, one where a third party—such as a bank or a service provider—requires certainty and clear authority before it will respond to the decision. This has meant that guardianship orders tend to be less common and more limited than administration orders, especially because the criterion of need is generally much easier to satisfy when dealing with the management of a person's affairs.⁴⁴
- 12.49 It can be argued that the current practice is unnecessarily crisis-driven and does not encourage effective advance planning for people with seriously impaired decision-making ability who might need a guardian or administrator at some time. This approach might also promote the use of unaccountable informal decision-making practices for people who are unable to make their own decisions.

40 For eg, roundtables with carers in Hastings (in partnership with Carers Victoria) (29 March 2011) and carers, advocates and service providers in Bendigo (in partnership with Regional Information & Advocacy Council) (30 March 2011).

41 Submission CP 59 (Carers Victoria).

42 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 29 (STAR Victoria), CP 56 (Disability Discrimination legal Service), CP 57 (Aged Care Assessment Service in Victoria), CP 58 (The Australian Psychological Society) and CP 71 (Seniors Rights Victoria).

43 *Re BWV* [2003] VCAT 121 (28 February 2003).

44 Information provided to the Commission by State Trustees and the Office of the Public Advocate reveals that the average duration of a guardianship appointment is 12 months: email from Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010. The average length of administration orders (excluding administration orders that are currently in force) is 5.08 years. The average duration of administration orders (including administration orders that are currently in force) is 6.72 years: email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

- 12.50 The Commission’s preferred reform option in the consultation paper was to allow guardians and administrators to be appointed in anticipation of future need. The aim of this proposal was to recognise that some people with lifelong significantly impaired decision-making ability might need a substitute decision maker for decisions that have to be made in the future on an ongoing basis.
- 12.51 While there was widespread agreement that substitute decision makers should only be appointed when a need arises, the views about how need should be conceptualised and understood varied significantly.
- 12.52 A considerable number of responses indicated support for retaining the current understanding of need—that is, that there is a decision that must be made now or in the near future and that it could not be effectively made unless a substitute decision maker is appointed to make it.⁴⁵
- 12.53 Several submissions expressed concern about the Commission’s proposal.⁴⁶ The human rights implications of appointing a substitute decision maker in anticipation of future need were highlighted by the Victorian Equal Opportunity and Human Rights Commission:
- Anticipation of future need for a guardian or administrator, a need that may never eventuate, is not enough of a justification to limit the rights of a person under section 7 of the Charter ... It also seems not to be consistent with the safeguards under the CRPD [the Convention] such as ensuring guardianship orders ‘apply for the shortest time possible’.⁴⁷
- 12.54 The Public Advocate argued that the proposal could undermine informal arrangements:
- In effect the proposal removes the criterion of need from the legislation. Over time the implementation of this proposal would have an effect on the informal way in which decisions are made by, with and for people with profound disabilities, and would tend to see guardianship and administration become more highly utilised than currently they are.⁴⁸
- 12.55 Some responses, especially from carer groups, suggested, however, that the current understanding of need is too narrow and that VCAT overlooks two important areas of need:
- situations where there are ongoing but relatively minor disagreements between a carer and a service provider where, in the absence of formal authority from the carer, the service provider becomes a de facto guardian⁴⁹
 - situations where the carer is already the person’s substitute decision maker in an informal capacity, and this arrangement is working well, but the carer may be required to carry out their decision-making role more formally at some stage in the future.⁵⁰

WHO SHOULD BE APPOINTED AS GUARDIAN OR ADMINISTRATOR?

- 12.56 There were no major concerns expressed in community responses about the matters VCAT is directed by the G&A Act to consider when it decides who it should appoint as a guardian or administrator.

45 For eg, consultation with John Billings (23 February 2011); Submission CP 19 (Office of the Public Advocate).

46 For eg, Submissions CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

47 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

48 Submission CP 19 (Office of the Public Advocate).

49 For eg, consultation with Gippsland Carers Association (19 April 2011).

50 For eg, Submission CP 6a (Marianne Dalton).

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- 12.57 In the consultation paper, the Commission indicated that there is a tendency for VCAT to appoint the Public Advocate as guardian and State Trustees as administrator, rather than attempt to unravel complex family conflicts.⁵¹ The Commission asked for community responses about how the issue of recognising existing family relationships could be better addressed.
- 12.58 The view that VCAT is ‘anti-family’ was expressed in a number of consultations with carers.⁵² It was suggested by some people that greater priority should be given to the appointment of family members.⁵³

POWERS OF SUBSTITUTE DECISION MAKERS

- 12.59 In the consultation paper, the Commission noted that the G&A Act does not provide clear and accessible guidance about the powers of guardians and administrators. Most submissions generally agreed that the law needs to be clearer in describing the powers of substitute decision makers. The Commission’s preferred option for achieving this, by including a non-exhaustive list of decision-making powers and restrictions for substitute decision makers in the legislation, was broadly supported.⁵⁴
- 12.60 The Law Institute of Victoria suggested that the issue of plenary guardianship and administration could be better managed through a clearer legislative description of the powers available to substitute decision makers.⁵⁵
- 12.61 A number of responses to the consultation paper offered suggestions for the types of decisions that guardians should and should not be able to make. For example, Senior Rights Victoria suggested that guardians should be able to make decisions in relation to:
- living arrangements
 - litigation concerning lifestyle matters
 - settlement of claims and proceedings
 - accessing personal information
 - health matters
 - nutrition and hygiene
 - employment
 - education.⁵⁶
- 12.62 Senior Rights Victoria also suggested that guardians should not be able to make decisions in relation to:
- voting
 - personal relationships
 - marriage and divorce
 - making a will
 - consent to sexual relationships
 - adoption of children

51 Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 15 (2011) 230.

52 For eg, roundtable with metropolitan carers (in partnership with Carers Victoria) and Gippsland Carers Association (19 April 2011).

53 For eg, Submissions CP 24 (Autism Victoria) and CP 54 (JacksonRyan Partners).

54 For eg, Submissions CP 19 (Office of the Public Advocate), CP 23 (Dr Kristen Pearson), CP 29 (STAR Victoria), CP 56 (Disability Discrimination Legal Service), CP 59 (Carers Victoria), CP 70 (State Trustees Limited), CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

55 Submission CP 84 (Law Institute of Victoria—Supplementary Submission).

56 Submission CP 71 (Senior Rights Victoria).

- welfare and wellbeing of children of the represented person
 - ending the person’s life
 - consent to ‘special procedures’
 - acting as a personal legal representative of a deceased estate.⁵⁷
- 12.63 The Law Institute of Victoria and the Mental Health Legal Centre also suggested similar limitations on the powers of guardians.⁵⁸
- 12.64 Other matters that were suggested as areas where guardians or administrators should not be able to make decisions included:
- obtaining a driver licence⁵⁹
 - decisions in respect of criminal proceedings⁶⁰
 - decisions about whether to opt out of attendance at a VCAT hearing (if such a provision is introduced)⁶¹
 - carrying out psychiatric treatment⁶²
 - detention of the represented person, unless the primary goal is the protection of the represented person (rather than the protection of others).⁶³

Anti-ademption provisions

- 12.65 In the consultation paper, the Commission asked if there is a need to change the anti-ademption provisions of the current G&A Act.⁶⁴ These provisions provide protection to third parties who have been given property in the will of a represented person that an administrator has subsequently sold. The same protections do not exist in relation to similar decisions made by enduring attorneys (financial).
- 12.66 State Trustees argued that the law needs to provide greater clarity about this issue, and to provide the same protections to all third parties, regardless of whether the loss is suffered through the decision of a personally appointed, or a tribunal-appointed, substitute decision maker.⁶⁵

ACCESS TO PERSONAL INFORMATION ABOUT A REPRESENTED PERSON

- 12.67 In consultations, some participants referred to difficulties in accessing information about the people they were caring for or assisting.⁶⁶
- 12.68 On the other hand, some people with disabilities emphasised the importance of maintaining their privacy even if someone else is helping them to make decisions.⁶⁷
- 12.69 In the consultation paper, the Commission suggested that guardianship legislation should clarify the right of substitute decision makers to gather information about a represented person, the authority of the holder of the information to disclose it, and the responsibility of the substitute decision maker to respect the confidential nature of that information. The latter two issues are discussed in Chapter 17.

⁵⁷ Ibid.

⁵⁸ Submission CP 78 (Mental Health Legal Centre) and CP 84 (Law Institute of Victoria—Supplementary Submission).

⁵⁹ Submission CP 67 (Trustee Corporations Association of Australia).

⁶⁰ Submission CP 70 (State Trustees Limited).

⁶¹ Ibid.

⁶² Submission CP 19 (Office of the Public Advocate).

⁶³ Ibid.

⁶⁴ *Guardianship and Administration Act 1986* (Vic) s 53.

⁶⁵ Submission CP 70 (State Trustees Limited).

⁶⁶ Submissions IP 11 (Tony and Heather Tregale) and IP 23 (Mental Illness Fellowship Victoria).

⁶⁷ Consultation with VALID Northern Regional Client Network (3 March 2010).

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- 12.70 In the consultation paper, the Commission proposed that a substitute decision maker should have a right to access confidential and private information on a ‘need to know basis’ only. There was widespread support for this proposal,⁶⁸ which seeks to strike an appropriate balance between the protection of privacy and a guardian’s ability to make informed decisions.⁶⁹
- 12.71 There were some concerns about how the phrase ‘need to know’ would be interpreted.⁷⁰ State Trustees argued that if it were viewed narrowly it may ‘impede the proper administration of the affairs of the represented person’.⁷¹ On the other hand, it was also argued that if it were interpreted too widely, it might result in an unnecessary infringement of a person’s privacy.⁷² In the event of a dispute, State Trustees and Victoria Legal Aid suggested that VCAT should determine whether information should be provided to the substitute decision maker.⁷³
- 12.72 State Trustees also raised concerns about current provisions in the G&A Act that provide that when a represented person dies or ceases to be represented by an administrator, the administrator is obliged to:
- provide the represented person or their representative with all documents relating to the estate⁷⁴
 - allow the represented person or their representative to inspect and copy all books, accounts and documents relating to the estate.⁷⁵
- 12.73 State Trustees noted that it will rarely if ever be appropriate for a corporate administrator to be compelled to provide its ‘entire file’, because of the likelihood that it will contain third party information of a sensitive and confidential nature.⁷⁶

DISTINCTION BETWEEN GUARDIANS AND ADMINISTRATORS

- 12.74 In Chapter 5, the Commission identified that the distinction between guardians and administrators should be retained in new guardianship legislation.
- 12.75 In the consultation paper, the Commission asked whether it should continue to be possible for the roles of guardian and administrator to be undertaken by the same person. We asked if these dual roles should be available to public appointees—the Public Advocate and State Trustees—as well as to private appointees.
- 12.76 Both the Public Advocate and State Trustees supported a system that allows only private individuals to be appointed as both guardians and administrators.⁷⁷ This proposal reflects the current practice even though the G&A Act does not prevent State Trustees from being appointed as guardian and nor does it prevent the Public Advocate being appointed as administrator.

68 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer’s Australia Vic), CP 24 (Autism Victoria), CP 33 (Eastern Health), CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 73 (Victoria Legal Aid).

69 For eg, Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

70 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne), CP 70 (State Trustees Limited) and CP 77 (Law Institute of Victoria).

71 Submission CP 70 (State Trustees Limited).

72 Ibid.

73 Ibid and CP 77 (Law Institute of Victoria).

74 *Guardianship and Administration Act 1986* (Vic) s 58D(1)(b).

75 Ibid s 58E.

76 Submission CP 70 (State Trustees Limited).

77 Submissions CP 19 (Office of the Public Advocate) and CP 70 (State Trustees Limited).

12.77 Some responses to the consultation paper supported retaining the flexibility of these current legislative provisions, allowing any person to be appointed as guardian and administrator.⁷⁸ Victoria Legal Aid argued that dual appointments should not be allowed in any circumstances, in order to better protect against conflicts of interest.⁷⁹

RELATIONSHIP BETWEEN GUARDIANS AND ADMINISTRATORS

12.78 In the consultation paper, the Commission suggested that the lack of clarity about who should make certain decisions, or how overlapping roles should be managed, may result in disputes between guardians and administrators that require resolution by VCAT. Further, in practice administrators may make guardianship decisions because a guardian has not been appointed or because there is a lack of clarity about roles when both have been appointed.

12.79 There was broad agreement that the overlap between personal and financial decision making can sometimes be complex and confusing.⁸⁰ To manage the overlap between guardians and administrators, the Commission proposed:

- legislative clarification of the powers available to guardians and administrators
- the creation of a legislative duty for guardians and administrators to consult with each other when they are both appointed
- legislative guidance about whether the decision of a guardian or an administrator prevails in the event of a dispute
- new formal processes to address disputes between guardians and administrators
- increased training for guardians and administrators about their roles (we consider this last reform option in more detail in Chapters 5, 17 and 20).

12.80 These proposals were broadly supported.⁸¹

12.81 The Public Advocate suggested that the decision of a guardian should prevail over the decision of an administrator to the extent of any inconsistency, but that the administrator must still have the ability to take the matter to VCAT for determination if they wish to do so. This view—which the Victorian Parliament Law Reform Committee proposed in its *Inquiry into Powers of Attorney* for dealing with personal appointments of enduring guardians and attorneys⁸²—was also supported by the Law Institute of Victoria.⁸³

12.82 State Trustees did not support a legislative ‘trump card’ for guardians and advocated collaborative processes for resolving disputes, followed by VCAT determination if agreement is impossible.⁸⁴ Seniors Rights Victoria shared this view.⁸⁵

LENGTH AND REVIEW OF ORDERS

12.83 As noted earlier, the G&A Act does not impose any time limits on the duration of guardianship and administration orders. The statutory requirement that orders be reassessed at regular intervals acts as a defacto time-limiting device. In the consultation paper, the Commission asked whether the duration of orders should be legislatively restricted in keeping with the practice in many other jurisdictions.

78 Submissions CP 24 (Autism Victoria), CP 67 (Trustee Corporations Association of Australia) and CP 71 (Seniors Rights Victoria).

79 Submission CP 73 (Victoria Legal Aid).

80 For eg, Submission CP 19 (Office of the Public Advocate), CP 22 (Alzheimer’s Australia Vic), CP 24 (Autism Victoria) and CP 57 (Aged Care Assessment Service in Victoria).

81 Ibid.

82 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 165 (*‘Inquiry into Powers of Attorney’*).

83 Submissions CP 19 (Office of the Public Advocate) and CP 77 (Law Institute of Victoria).

84 Submission CP 70 (State Trustees Limited).

85 Submission CP 71 (Seniors Rights Victoria).

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- 12.84 Views about the length of orders varied considerably in responses to this question. Some people felt that orders are reviewed too infrequently and others felt that the current review period is too short.⁸⁶
- 12.85 While there was disagreement about whether VCAT should be able to make indefinite orders,⁸⁷ there was general agreement that setting times for review ensures that orders are regularly re-evaluated.⁸⁸
- 12.86 The importance of ensuring that the length of an order is tailored to the particular needs of the individual was emphasised in some submissions.⁸⁹ The Victorian Equal Opportunity and Human Rights Commission linked this issue to the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention):
- The [Victorian Equal Opportunity and Human Rights] Commission does not think that new guardianship legislation should specify a maximum period for all guardianship and administration orders. The Commission does believe, however, that new guardianship legislation should specifically require VCAT when making orders to ensure they meet the safeguards required by article 12 of the [Convention]. This includes ensuring such orders 'apply for the shortest time possible'.⁹⁰
- 12.87 In Chapter 21, the Commission discusses recommendations about the length and review of tribunal orders.

SUCCESSION PLANNING

- 12.88 Victorian guardianship laws do not provide for succession planning.
- 12.89 Some parents who care for children with lifelong disabilities are worried that there is no effective way for them to express wishes about who should care for their children when they are no longer able to do so. Some people suggested that these parents should be able to appoint a future guardian or administrator for their child.
- 12.90 In the consultation paper, the Commission asked whether parents and carers of children with disabilities should be able to file a document with VCAT containing their wishes about future guardianship or administration arrangements, which VCAT should be required to consider when making any subsequent appointments.
- 12.91 There was widespread support for the principle of succession planning. However, there were diverse views about what form it should take and what weight should be given to views expressed in a succession planning document.
- 12.92 Some carers, for example, felt that succession documents created by parents of people with lifelong intellectual disabilities should be binding unless the person proposed in the document is unwilling or unable to carry out the role.⁹¹ Other carers suggested that while the views expressed in succession documents should ordinarily be implemented, they should be able to be challenged at VCAT.⁹²
- 12.93 A common view was that succession documents should be able to be lodged with VCAT and considered at any future guardianship or administration hearing, but that VCAT should not be bound by those views.⁹³

86 For eg, consultation with Mental Health Legal Centre (28 April 2011); Submission CP 54 (JacksonRyan Partners).

87 For eg, Submissions CP 19 (Office of the Public Advocate), CP 56 (Disability Discrimination Legal Service) and CP 73 (Victoria Legal Aid) arguing for a limited duration for all orders, and Submissions CP 70 (State Trustees Limited), CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 24 (Autism Victoria).

88 For eg, Submission CP 67 (Trustee Corporations Association of Australia).

89 For eg, Submissions CP 22 (Alzheimer's Australia Vic) and CP 59 (Carers Victoria).

90 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

91 Roundtable with carers in Hastings (in partnership with Carers Victoria) (29 March 2011).

92 Consultation with Carers Victoria (15 April 2011).

93 For eg, Submissions CP 19 (Office of the Public Advocate), CP 27 (Catholic Archdiocese of Melbourne), CP 29 (STAR Victoria), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 67 (Trustee Corporations Association of Australia), CP 70 (State Trustees Limited), CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

12.94 The Mental Health Legal Centre was opposed to the concept of succession planning, particularly for people with a mental illness. It was concerned that this reform would give elevated status to parents and this may sometimes be at the expense of the wishes of the person themselves.⁹⁴

OTHER JURISDICTIONS

12.95 While other jurisdictions have similar provisions to those in the G&A Act concerning tribunal (or court) appointments of substitute decision makers,⁹⁵ there are some important differences that should be highlighted because they are particularly relevant to the reform recommendations proposed by the Commission:

- In Queensland, a person is not required to have a disability for a substitute decision maker to be appointed. Instead, the legislative criteria focus on the issue of incapacity, regardless of its cause, and of the need for a decision to be made that could not be made without the formal appointment of a substitute decision maker.⁹⁶
- Currently no Australian jurisdiction specifically provides for the appointment of a substitute decision maker in anticipation of future need. Some jurisdictions, such as Queensland⁹⁷ and the Australian Capital Territory,⁹⁸ require consideration of whether there are decisions to be made now or in the near future, while other jurisdictions look at the issue of need more broadly, still focusing on the current, rather than anticipated, circumstances of the proposed represented person.
- Most jurisdictions allow orders that give a guardian broad, unspecified, decision-making powers, similar to Victoria's current plenary orders. Some jurisdictions describe the powers in parent and child terms like the current Victorian legislation.⁹⁹ Others unhelpfully describe a guardian as having 'all of the functions that a guardian has at law or in equity'.¹⁰⁰ Some Canadian jurisdictions, such as Alberta, Saskatchewan and Ontario, do not have plenary orders. Instead, they list the possible powers of guardians in the legislation, and require the order to specify which of those powers the guardian is to have.¹⁰¹
- No Australian jurisdiction gives legislative priority to one substitute decision maker over another when there are disagreements between personal and financial decision makers. The Queensland legislation contains a process for resolving disagreements.¹⁰² In New Zealand, legislative priority is given to the decisions made by a substitute decision maker under a personal order over those of a property manager (administrator) to the extent of any inconsistency between the two.¹⁰³
- In New Zealand, if an order appointing a substitute decision maker does not contain an expiry date, the appointment will cease to operate either a year after the order is made or when all things provided for in the order have been completed.¹⁰⁴

94 Submission CP 78 (Mental Health Legal Centre).

95 A more detailed discussion of the law in other Australian jurisdictions for tribunal appointments is contained in the consultation paper.

96 *Guardianship and Administration Act 2000* (Qld) s 12(1).

97 *Ibid.*

98 *Guardianship and Management of Property Act 1991* (ACT) s 7.

99 See, eg, the provisions for full orders in the *Adult Guardianship Act 1988* (NT) ss 15, 17.

100 See, eg, *Guardianship Act 1988* (NSW) s 21(1)(b).

101 *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, ss 33(1)–(2); *Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3, s 15; *Substitute Decisions Act*, SO 1992, c 30, ss 22, 55.

102 *Guardianship and Administration Act 2000* (Qld) ss 40–2.

103 *Protection of Personal and Property Rights Act 1988* (NZ) ss 16, 42.

104 *Ibid* s 17.

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- No Australian jurisdiction enables a family member, carer or substitute decision maker to file a document with the relevant guardianship tribunal stating their wishes about the future appointment of a substitute decision maker, should the current decision maker die or become incapacitated. The Queensland Law Reform Commission reviewed the issue of binding directions by parents regarding future appointments for their children but ultimately rejected the proposal because it diverts attention away from the central issue that the tribunal must assess, namely, a person's capacity.¹⁰⁵ It did recommend, however, that the Tribunal bring to the parents' attention the Tribunal's ability 'to make successive appointees for a matter',¹⁰⁶ which means that a different person could become the substitute decision maker when a parent can no longer act in the role.¹⁰⁷

Access to personal information

- 12.96 The New South Wales *Mental Health Act 2007* (NSW) allows a patient's primary carer to access information on their behalf.¹⁰⁸ The primary carer is defined in a hierarchical list in the Act,¹⁰⁹ or can be appointed by patients themselves.¹¹⁰
- 12.97 Provisions for patients to nominate a person to access information on their behalf have been included in the Exposure Draft of the Victorian Mental Health Bill.¹¹¹ The Bill establishes a 'nominated person's scheme', which enables patients to choose a person to receive information about their treatment and care. Under the scheme, the nominated person has the right to receive information, including sensitive and confidential information, on behalf of the patient.¹¹²
- 12.98 The *Adult Guardianship and Trusteeship Act 2008* in Alberta, Canada, gives a guardian the power to collect or obtain personal information from a range of organisations and people about the represented adult 'that is relevant to the exercise of the guardian's authority and the carrying out of the guardian's duties and responsibilities'.¹¹³

THE COMMISSION'S VIEWS AND CONCLUSIONS

- 12.99 While the Commission recommends retaining most aspects of the current system for tribunal appointments of substitute decision makers, we also recommend a number of important changes that aim to:
- provide more guidance about the criterion of 'need' for tribunal appointments
 - describe the powers of personal guardians¹¹⁴ and financial administrators more clearly
 - ensure consistency between the powers that may be given to substitute decision makers by tribunal and personal appointments

105 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 3, 315.

106 *Ibid* vol 3, 317.

107 *Ibid* vol 3, 316.

108 *Mental Health Act 2007* (NSW) ss 73–9.

109 *Ibid* s 71.

110 *Ibid* s 72.

111 See Department of Health (Victoria), *Review of the Mental Health Act 1986* (22 July 2011) <<http://www.health.vic.gov.au/mentalhealth/mhactreview/index.htm>> for information about the current status of Victoria's Mental Health Act review.

112 Mental Health Bill 2010 (Exposure Draft) cls 156–7. Note the Victorian Government has indicated that the Mental Health Bill will be redrafted to reflect policy changes in response to community engagement and will be introduced into Parliament in 2012. The Government anticipates the new Act will become operational in 2013: Department of Health (Victoria), *Mental Health Act Review: Information Sheet* (May 2011) <[http://docs.health.vic.gov.au/docs/doc/A886BEE05026CF25CA257895007C24A9/\\$FILE/Information%20sheet%20-%20May%202011.pdf](http://docs.health.vic.gov.au/docs/doc/A886BEE05026CF25CA257895007C24A9/$FILE/Information%20sheet%20-%20May%202011.pdf)>.

113 *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 41(4).

114 In Chapter 5, the Commission recommends replacing the term 'guardian' with 'personal guardian' and the term 'administrator' with 'financial administrator'.

- better manage the overlap of powers between personal guardians and financial administrators
- provide greater clarity about the length of tribunal orders and the timing of reviews.

RETAINING TRIBUNAL APPOINTMENTS

12.100 While personal appointments should be the preferred way of appointing a substitute decision maker, tribunal appointments will continue to be required for people who have not made a personal appointment or are unable to do so. The Commission agrees with the view first championed by the Cocks Committee 30 years ago,¹¹⁵ and subsequently highlighted by Terry Carney,¹¹⁶ that giving a tribunal rather than the courts the power to appoint substitute decision makers is a central feature of this important branch of the law that has greatly benefited the community by enhancing accessibility.

RECOMMENDATION

Retaining tribunal appointments

169. New guardianship legislation should continue to provide for tribunal appointments of substitute decision makers.

CRITERIA FOR APPOINTMENT: DISABILITY AND INCAPACITY

- 12.101 The Commission received a range of responses to the question of whether ‘disability’ should continue to form part of the criteria for the appointment of a substitute decision maker.
- 12.102 There was widespread support for the proposal that disability should no longer be a criterion in its own right but that the tribunal must be satisfied that a person’s incapacity is caused by a disability before it can appoint a substitute decision maker.
- 12.103 As we discussed in Chapter 7, without a causal link to disability, there is potential for incapacity assessments to become overly subjective. There is a risk that without any required connection with a disability, incapacity could be determined in some cases by making value judgments about the merits of the decisions a person makes.
- 12.104 A requirement that there be a causal link with disability provides an objective safeguard. It provides extra assurance that the person’s decision-making ability is actually impaired because the person’s disability can be assessed using various widely accepted tests.

Incapacity to make particular decisions

- 12.105 In recognition of the fact that incapacity is often both decision-specific and time-specific, it is important that any finding of incapacity is based on those matters for which an appointment is sought rather than that the person has impaired decision-making capacity in a general sense. A tribunal should not appoint a personal guardian or a financial administrator to make particular substitute decisions for a person unless the tribunal is satisfied that the person is unable to make those decisions.
- 12.106 The **capacity assessment principles** recommended by the Commission in Chapter 7 will assist the tribunal’s deliberations on this issue.

¹¹⁵ Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 28.

¹¹⁶ See, eg, Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 1–9.

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Definition of disability

- 12.107 In Chapter 7, the Commission recommended that expanding the definition of disability to clearly indicate that it includes a person with an autism spectrum disorder, regardless of whether that person has an intellectual disability.
- 12.108 The Commission does not recommend any other changes to the definition of 'disability'. 'Physical disability' should continue to be included in the definition even though physical disability does not in itself affect a person's ability to make decisions. However, severe physical disability can sometimes impair a person's ability to communicate. Where this disability prevents a person from communicating their wishes and a means of enabling them to communicate has not been found, the person may meet all of the criteria for a finding of incapacity. The recommendation that the definition of capacity should include the ability to communicate decisions is discussed more fully in Chapter 7.

RECOMMENDATIONS

Criteria for appointment—disability and incapacity

170. Disability should no longer be a separate criterion for the appointment of a substitute decision maker.
171. New guardianship legislation should contain a definition of 'disability' that includes the definition in the current *Guardianship and Administration Act 1986* (Vic) and adds 'autism spectrum disorder'.
172. New guardianship legislation should provide that, before appointing a substitute decision maker, the tribunal must be satisfied that the person:
- (a) has decision-making incapacity caused by that person's disability
 - (b) has decision-making incapacity in relation to the matters for which the appointment is sought.
173. New guardianship legislation should provide that the tribunal must apply the capacity assessment principles (discussed in Chapter 7) when determining whether a person has decision-making incapacity.

CRITERIA FOR APPOINTMENT: NEED

The current understanding of need

- 12.109 The current legislative requirement that VCAT find that a person 'is in need of' a guardian¹¹⁷ or an administrator¹¹⁸ before it can make an appointment is both unclear and controversial.
- 12.110 While the G&A Act seeks to give some guidance when considering the question of 'need', the relevant statutory provisions are vague¹¹⁹ and there have been very few attempts in the case law to explain the meaning of this central concept.

Would an informal arrangement suffice?

- 12.111 When considering whether to appoint a guardian or an administrator, VCAT is required to consider whether the person's needs could be met 'by other means less restrictive of the person's freedom of decision and action'.¹²⁰ This appears to be

¹¹⁷ *Guardianship and Administration Act 1986* (Vic) s 22(1)(c).

¹¹⁸ *Ibid* s 46(1)(a)(iii).

¹¹⁹ *Ibid* ss 22(2), 46(2).

¹²⁰ *Ibid* ss 22(2)(a), 46(2)(a).

a slightly opaque direction to consider using informal arrangements. VCAT is also required to consider the person's wishes 'so far as they can be ascertained'.¹²¹

12.112 These legislative provisions require consideration of two separate matters when determining 'need':

- the possibility of relying on informal decision-making arrangements
- the attitude of the person concerned to the proposal that some other person be appointed to make decisions for them.

12.113 The provisions are not particularly helpful because they merely restate two of the overarching considerations set out in section 4(2) of the G&A Act¹²² that must be considered when exercising any powers under the Act.

12.114 As indicated earlier, Justice Cavanough considered the relevance of informal arrangements in the context of an administration application and suggested that 'the question of "need" will be answered primarily by reference to the availability or otherwise of alternative arrangements outside administration (such as family support)'.¹²³

Family wishes and existing family relationships

12.115 VCAT is also required to consider the wishes of family members¹²⁴ and 'the desirability of preserving existing family relationships' when considering the need for a guardianship order.¹²⁵ While these provisions appear to amplify the requirement to consider the possibility of relying on informal decision-making arrangements, they also appear to require consideration of family views about the desirability of relying upon informal arrangements. This issue does not appear to have received any attention in the case law.

A decision to be made

12.116 It also appears that there must be a decision to be made before the requirement of 'need' is satisfied. In *Re BWV*, VCAT stated:

The Public Advocate submitted that a guardian should not be appointed unless there is a decision required to be made or there is a reasonable likelihood that a decision will be required to be made in the foreseeable future. He submitted, further, that it follows that for a decision to be required to be made there must be a decision which can be made. The Tribunal accepts those submissions.¹²⁶

Decision-making assistance and formal recognition of decisions

12.117 There are two senses in which the word 'need' is often used by people with an interest in guardianship laws and which are sometimes confused with one another:

- First, a person might 'need' someone to make decisions on their behalf because, due to their cognitive impairment, they cannot make those decisions themselves and family members do not support using informal arrangements or feel unable to rely upon them.
- Secondly, a person might 'need' a formally appointed substitute decision maker so that those decisions are formally recognised by others as valid decisions made on behalf of the person.

121 Ibid ss 22(2)(ab), 46(2)(b).

122 Ibid ss 4(2)(a), (c).

123 *XYZ v State Trustees* [2006] VSC 444 [44].

124 *Guardianship and Administration Act 1986* (Vic) s 22(2)(b).

125 Ibid s 22(2)(c).

126 *Re BWV* [2003] VCAT 121, 11.

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12.118 At present it appears that guardians and administrators are usually only appointed in the second situation. In practice, a third party's 'need' for legal certainty when dealing with a person with impaired decision-making capacity often triggers an appointment. Sometimes an applicant for a guardianship or administration order might feel that the first scenario—involving a family member with lifelong inability to make important decisions—is also a sufficient need to warrant a VCAT appointment.

12.119 These issues have not been explored in VCAT case law. While the comments by Justice Cavanough in XYZ are helpful, there have been very few Supreme Court cases dealing with the G&A Act since it commenced operations over 25 years ago. As such, it is unlikely that the definition of 'need' for a substitute decision maker will be developed over time by decisions in particular cases. Legislative action is therefore required to respond to those instances where family members are unwilling to rely on informal arrangements.

Refining the criteria of need

12.120 The Commission believes that the concept of need should be clarified in new guardianship legislation and broadened so that it encompasses situations where:

- decisions need to be made now or in the foreseeable future that could not be made without appointing a substitute decision maker, or
- ongoing decisions need to be made and the personal and social wellbeing of the person would be best promoted by appointing a substitute decision maker to make those decisions, or
- a person is unable to make, and is likely to continue to be unable to make, their own decisions in relation to one or more matters, and those decisions are already being made informally for them in a way that promotes their personal and social wellbeing.

Decisions to be made now or in the reasonably foreseeable future

12.121 The first of these three indicators of need is essentially the way in which the concept is currently applied. The Commission recommends that this criterion is retained.

Ongoing decisions

12.122 Sometimes there are ongoing decisions that need to be made in a person's life that they cannot make themselves and that seem relatively minor when viewed in isolation. Examples include a person's activities in a day service, their diet in a residential service, or their recreational activities. While these are all typical and routine decisions, collectively they have a profound effect on the person's life because they are decisions that need to be made every day.

12.123 As noted in our discussion of community views, some carers believe that VCAT sees decisions of this nature as insufficient to warrant the appointment of a guardian and suggests that they be made informally. It also suggests that disagreements between the carer and service providers should be resolved through negotiation rather than through the appointment of a guardian.

12.124 In situations of this nature, service providers may become the defacto guardian of a person who is unable to make their own decisions. The Commission does not believe that this should always be the case. For this reason, the Commission recommends that the legislative indicators of need extend to situations where there are ongoing decisions to be made in relation to the person's lifestyle or finances and the social wellbeing of the person can best be promoted by appointing a personal guardian or a financial administrator to make those decisions. This recommendation expands the focus of need beyond immediate single decisions.

Substitute decision-making arrangements currently in place without appointment

- 12.125 The Commission also acknowledges the challenges that arise for everyone concerned in situations where there is little doubt that a person with a lifelong disability will never have the capacity to make their own decisions, even with significant support.
- 12.126 Currently guardianship orders are often sought and made for people with a lifelong disability in times of crisis only, because these orders are not made in anticipation of future need. This practice of awaiting a crisis is unnecessary and should not continue.
- 12.127 The Commission believes that the rights of a person with significantly impaired decision-making ability that is unlikely to change are compromised by delaying an appointment until there is a crisis. Their 'freedom of decision and action' is not restricted by making a suitable appointment before there is an immediate need for a formal decision maker. In fact, that freedom is likely to be advanced if a close family member or friend with long experience of their preferences is appointed to make important decisions that might arise in the future.
- 12.128 In the consultation paper, the Commission proposed that a tribunal be permitted to appoint guardians in anticipation of future need in some limited circumstances. This proposal, as noted above, met with a range of responses, including concern that it would allow substitute decision makers to be appointed when they were not required. The Commission has now refined this proposal to better capture its intent. Instead of allowing appointments to be made in anticipation of future need, the Commission believes it is more helpful to characterise the issue as recognising that a particular person has a current and ongoing need for a substitute decision maker which, while being currently met informally, may need to be formalised in the future.
- 12.129 For this reason, the Commission recommends a further indicator of need for a tribunal appointment where:
- the person's decision-making capacity is of a nature that they are unable, and are unlikely in the future, to make their own decisions, even with significant support, and
 - decisions are currently being made for them by a decision maker who has been making those, or similar, decisions for a major proportion of the person's life, and
 - that decision maker is likely to continue to be the appropriate person for the role.

The idea of 'reserve formality'

- 12.130 Appointing a personal guardian or financial administrator in these circumstances would provide formal recognition of an arrangement that is currently operating informally. In this situation, the person's need for a decision maker is already clear, but the need for the formality of the arrangement might not yet have arisen.
- 12.131 An appointment made in these circumstances therefore provides some 'reserve formality' to an existing informal substitute decision-making arrangement. This arrangement would allow the appointed person to act quickly as a personal guardian or financial administrator should circumstances necessitate use of this formal authority in the future.
- 12.132 Keeping these formal powers 'in reserve' is an important, but potentially difficult, aspect of this recommendation. It is not intended that a person appointed under this provision should use their formal decision-making authority in situations where it would be more appropriate for decisions to be made collaboratively, such as when negotiating with service providers about the person's support needs. The Commission believes that appointments of this nature should be regularly reviewed to ensure that

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the formal powers are not being used prematurely or unnecessarily. We discuss these review mechanisms later in this chapter.

Who the criteria are intended to assist—people with lifelong, profoundly impaired capacity

- 12.133 The Commission acknowledges the challenges associated with reformulating the concept of ‘need’ in this way, particularly because of the difficulty in determining whether a person’s decision-making ability is likely to change significantly in the future.
- 12.134 This proposal is particularly relevant for a person who has a lifelong severe or profound intellectual disability. In these situations, it would be incorrect to argue that the person does not need a substitute decision maker. The central question is whether the arrangement should be formalised. The need for a formal appointment is not determined by the person’s impaired decision-making capacity, but often because of the requirements of third parties, or because of conflicts arising in negotiations with them. In these situations, the Commission believes that it is preferable to appoint an appropriate informal decision maker as a personal guardian or financial administrator on the condition that the formal powers are used only if the need to do so arises.
- 12.135 There will be many situations where this sort of appointment would be inappropriate, including where a person has:
- an acquired brain injury—it is much more difficult to predict future capacity for people with these injuries¹²⁷
 - a mental illness—because their capacity to make their own decisions will often fluctuate
 - a mild or moderate intellectual disability—because they may be able to participate in their own decisions in the future, if support is available.
- 12.136 The Commission believes that appointments based on this indicator of need should only be made if there is compelling evidence that the proposed represented person is unlikely to be able to participate in their own decision making, with or without support, in the foreseeable future.

Who should be appointed under this provision—long-term existing informal decision makers

- 12.137 In cases of this nature, the tribunal should be satisfied that the proposed represented person already has someone making decisions for them on an informal basis and that this person has been doing so for a substantial proportion of the person’s life without significant concerns having been raised by anyone with a genuine interest in the person.
- 12.138 It is important that the tribunal be satisfied that the person appointed as a guardian will make appropriate decisions for the proposed represented person and will use their formal powers with discretion. These discretionary appointments should not be made lightly or in inappropriate circumstances, such as when a person is in the early stages of dementia.
- 12.139 In situations where the tribunal is aware that there is significant conflict or concern about the decisions made by an informal substitute decision maker—for example, concerns about overly restrictive decisions, or overly reckless decisions—the tribunal should not make a guardianship order of this nature. The tribunal should satisfy itself that carers and other people with an interest in the wellbeing of the person agree that the proposed substitute decision maker is, and is likely to continue to be, a suitable person to fulfil this role.

¹²⁷ Submission CP 58 (The Australian Psychological Society).

Additional safeguards

12.140 A number of additional safeguards should be included in new guardianship legislation for appointments made in response to this indicator of need. These are:

- The appointment should not be made if there is evidence that the proposed represented person would object to it if able to do so.
- The appointment should not be made without first considering whether the person might be able to be assisted through supported decision-making or co-decision-making arrangements in the future.
- The order should be reviewed within one year of being made and at least every three years thereafter to ensure that the represented person's circumstances have not changed significantly and that an authority given to the personal guardian under the order has not been used inappropriately or prematurely.

How this proposal impacts on the rights of the person with the disability

12.141 The Commission does not believe that allowing for appointments based on this indicator of need is at odds with our more general recommendations that new guardianship legislation should promote respect for autonomy and comply with the Convention's requirement that interventions be proportional and apply for the shortest time possible. The Commission believes that appointments of this nature will enable a trusted informal decision maker, who is already widely accepted as the appropriate decision maker for the person, to carry out their role with legal authority when it is necessary to do so.

12.142 A person appointed in this way would have the same responsibility as any other personal guardian to act according to the decision-making principles for personal guardians (discussed in Chapter 17), including the responsibility to involve that person, as much as possible, in any decisions made on that person's behalf, and would be subject to the same accountability requirements recommended in Chapter 18.

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Tribunal appointments of substitute decision makers



RECOMMENDATIONS

Criteria for need

174. New guardianship legislation should provide that the tribunal can appoint a personal guardian or a financial administrator only if it is satisfied that an appointment is needed.
175. New guardianship legislation should contain guidance about the circumstances in which a personal guardian or financial administrator may need to be appointed.
176. In determining the need for an appointment, the tribunal must be satisfied of one of the following:
- (a) There are decisions to be made now, or reasonably soon, and:
 - (i) those decisions would not be able to be made without a personal guardian or financial administrator being appointed, or
 - (ii) the personal and social wellbeing of the person can best be promoted by appointing a personal guardian or a financial administrator to make those decisions.
 - (b) There are ongoing decisions to be made in relation to the person's lifestyle or finances, and the personal and social wellbeing of the person can best be promoted by appointing a personal guardian or a financial administrator to make the decisions.
 - (c) The person's decision-making ability is so significantly impaired and enduring that they are unlikely at any time in the future to make their own decisions, even with significant support and:
 - (i) decisions are currently being made for the person by a decision maker who has been making those, or similar, decisions for a significant period of time and
 - (ii) there is broad consensus among carers and others with an interest in the person's wellbeing that the decision maker is, and is likely to continue to be, appropriate for the role and
 - (iii) the person, if able to communicate their wishes, would not object to the appointment being made.

SITUATIONS WHERE A TRIBUNAL APPOINTMENT IS INAPPROPRIATE

12.143 Substitute decision makers should not be appointed when other less intrusive arrangements will meet a person's requirements for assistance in making important decisions. The Commission believes it is important to identify some of the circumstances in which appointing a substitute decision maker would be inappropriate. This should give some guidance about the meaning of the concept of 'the least restrictive alternative' in current legislation. It should also draw attention to alternative arrangements, such as:

- the appointment of a decision-making supporter or a co-decision maker
- the use of processes such as negotiation or mediation
- the desirability of using informal arrangements when it is appropriate to rely upon them.

12.144 The Commission believes that new guardianship legislation should require the tribunal to consider the viability of these alternatives before appointing a substitute decision maker. This recommendation seeks to ensure that substitute decision-making appointments are made only after all other reasonable options have been considered.

RECOMMENDATION

Situations where a tribunal appointment is inappropriate

177. New guardianship legislation should direct the tribunal to only appoint a substitute decision maker for a person after it has considered and rejected all other reasonable means of providing that person with decision-making assistance, including whether:

- (a) the person could be supported to make the decision themselves through the appointment of a supporter
- (b) the person could be assisted to make the decision with another person through the appointment of a co-decision maker
- (c) other than when an appointment is being made under recommendation 176 (c) any decisions that need to be made now or in the foreseeable future are more suitably made by informal means
- (d) the decisions that need to be made could reasonably be made through negotiation, mediation or similar means.

MULTIPLE ARRANGEMENTS—CONCURRENT ORDERS

12.145 In view of the Commission's proposals that new guardianship legislation contain a broader range of mechanisms to assist people with decision making it is important that the tribunal be required to ensure that any combination of appointments is not overly cumbersome. For example, a person may be able to manage one part of their estate with the assistance of a co-decision maker, but need a substitute decision maker to manage another part of their estate. In this situation, the tribunal would need to consider whether the benefits of appointing both a financial administrator and a co-decision maker concurrently in relation to different parts of the person's estate are outweighed by the complexities of having these arrangements operating together. While the principle of the least restrictive alternative might suggest the need for concurrent appointments, consideration of the arrangement's workability might suggest that a financial administrator should be appointed for all financial decisions.

12.146 New guardianship legislation should require the tribunal to consider the practicality of multiple appointments.

RECOMMENDATION

Concurrent orders

178. New guardianship legislation should require the tribunal to consider the extent to which two or more proposed concurrent orders will be able to operate effectively together.

WHO SHOULD BE APPOINTED AS PERSONAL GUARDIAN OR FINANCIAL ADMINISTRATOR?

12.147 Sections 23 and 47 of the G&A Act direct VCAT to consider a range of matters when deciding whether a particular person is suitable for appointment as a substitute

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Chapter 12

Tribunal appointments of substitute decision makers

decision maker for the proposed represented person. These provisions did not attract significant criticism in responses to the Commission's consultation paper.

- 12.148 While the Commission accepts that the existing considerations are appropriate and should be retained, some relatively minor additions would be beneficial. They are:
- acknowledging the value of preserving all of the person's important relationships, not only those with their family—which may be particularly important to people who have strong networks of friends, or a domestic partner who is not recognised by the family
 - acknowledging the general desirability of appointing a substitute decision maker who has a personal relationship with the person, which may help emphasise that a public official or body be appointed as a last resort only
 - acknowledging the value of appointing a personal guardian or financial administrator who will be reasonably readily available and accessible to the proposed represented person, which appears to be an aspect of compatibility that is sometimes overlooked.

RECOMMENDATION

Who should be appointed as personal guardian or financial administrator?

179. New guardianship legislation should include the matters set out in sections 23 and 47 of the *Guardianship and Administration Act 1986* (Vic) as relevant considerations for the tribunal when determining whether a particular person is eligible for appointment as a substitute decision maker. The following matters should be added to the list of relevant considerations:

- (a) the desirability of preserving existing family relationships and other relationships of importance to the person
- (b) the desirability of preferring the appointment of someone who has an existing personal relationship with the person over a professional person or organisation that does not
- (c) the extent to which the proposed personal guardian or financial administrator will be available and able to meet and communicate with the represented person in order to make decisions that best promote their personal and social wellbeing.

POWERS OF SUBSTITUTE DECISION MAKERS

- 12.149 Guardianship legislation should provide substitute decision makers with clear and accessible guidance about their powers.
- 12.150 In Chapter 10, we noted that the Victorian Parliament Law Reform Committee recommended clarifying the powers that may be given to personally appointed substitute decision makers.¹²⁸ The Commission believes that it is important that all substitute decision makers understand the nature of the powers given by their appointments, as well as any limits or conditions on the exercise of those powers. In order to promote integration of guardianship laws, the powers that a principal can give to an enduring personal guardian or financial administrator under a personal appointment should be the same as those available to VCAT when it appoints personal guardians and financial administrators.

¹²⁸ *Inquiry into Powers of Attorney*, above n 82, 157.

- 12.151 Clarity is best achieved by providing that an enduring financial administrator or a tribunal-appointed financial administrator may be given powers for ‘financial matters’ and an enduring personal guardian or a tribunal-appointed guardian may be given powers for ‘personal matters’.
- 12.152 ‘Financial matters’ and ‘personal matters’ should be defined in the new legislation in accordance with the recommendations set out in Chapter 10.

RECOMMENDATIONS

Powers of substitute decision makers

180. New guardianship legislation should permit the tribunal to appoint personal guardians and financial administrators with decision-making powers in relation to ‘personal matters’ and ‘financial matters’ as described in Chapter 10.

Broad powers for financial administrators

181. New guardianship legislation should provide that a financial administrator may be given any of the powers currently set out in Divisions 3 and 3A of Part 5 of the *Guardianship and Administration Act 1986* (Vic) subject to the changes to those provisions proposed by the Commission.

Plenary orders

- 12.153 The Commission does not believe that new guardianship legislation should permit plenary guardianship orders. These orders are rarely made and the legislation describes the plenary guardian’s powers as being akin to that of a parent in relation to a child.
- 12.154 This characterisation is both demeaning and unhelpful. It arguably perpetuates the ‘eternal child’ image of a person whose decision-making capacity is severely impaired. In addition, the description of a plenary guardian as a person who has the same powers as those that they would have if the represented person were their child is unhelpful given the fluid nature of the powers that a parent may exercise in relation to a child who has not yet reached maturity.¹²⁹
- 12.155 In some other jurisdictions,¹³⁰ a plenary guardian is defined as a person who has all the functions ‘that a guardian has at law or in equity’. This legislative description of the powers of a guardian is even less helpful than the existing Victorian approach.

RECOMMENDATION

Plenary orders

182. New guardianship legislation should not provide for the appointment of a plenary guardian.

¹²⁹ Young and Monahan write that ‘[a]s children become more mature and develop the capacity to make their own decisions, the scope of parental authority and control diminishes accordingly’: Geoff Monahan and Lisa Young, *Family Law in Australia* (LexisNexis Butterworths, 7th ed, 2009) 267. According to the authors, the authority for this principle is the English decision of *Gillick v West Norfolk Area Health Authority* [1985] 3 ALL ER 402, which held that persons below 18 years of age may be mature enough to make their own decisions, lessening parental authority to the extent required for their child’s best interests: at 267.

¹³⁰ See, eg, *Guardianship Act 1988* (NSW) s 21(1)(b).

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Tribunal appointments of substitute decision makers

Full or limited powers

12.156 The Commission believes that the powers that may be given to a tribunal-appointed substitute decision maker should be set out in a non-exhaustive list in the legislation. Consistent with our recommendations in Chapter 10, the tribunal should stipulate in the order which specific powers the personal guardian should have or, in rare circumstances, that the personal guardian is able to exercise decision-making power in relation to all of the matters set out in the list. An order of the latter kind would in effect be similar to a current plenary order. A non-exhaustive list would also enable the tribunal to make appropriate orders about those few circumstances that cannot be foreseen.

RECOMMENDATION

Full or limited powers

183. New guardianship legislation should include a non-exhaustive list of decision-making powers and restrictions on those powers that can and cannot be given to a personal guardian or a financial administrator. These powers and restrictions on powers are those set out in recommendations in Chapter 10.

Exclusions

12.157 New guardianship legislation should also specify those matters that a substitute decision maker is not permitted to make decisions about, such as voting or agreeing to a sexual relationship on their behalf. These matters are the same as those listed in the recommendations in Chapter 10. Ultimately, tribunal orders should only give personal guardians and financial administrators those powers necessary to promote the personal and social wellbeing of the represented person.

RECOMMENDATION

Exclusions

184. When appointing a personal guardian or financial administrator, the tribunal should specify in the order which decision-making powers the personal guardian or financial administrator is to have along with any restrictions the tribunal imposes on those powers.

185. When appointing a personal guardian or financial administrator, the tribunal should seek to give the personal guardian or financial administrator only those powers that are necessary to promote the personal and social wellbeing of the represented person.

Limitation—guardianship not to be used to compulsorily treat or detain

12.158 In Chapter 10, we recommended that a ‘personal matter’ should not include ‘a decision to detain or compulsorily treat the represented person for reasons other than the personal and social wellbeing of the person’.¹³¹ This extends to personal appointments and tribunal appointments.

¹³¹ See Chapter 10 recommendation 109(f).

12.159 This recommendation is closely connected to the recommendations in Chapter 23 in relation to extending the compulsory treatment provisions of the *Disability Act 2006* (Vic). The Commission supports the view put by the Public Advocate in response to the information paper that guardianship ‘should never be used as a means of protecting society from dangerous individuals’.¹³²

Powers to cede authority to the represented person

12.160 The Commission has recommended that new guardianship legislation allow financial administrators to cede some of their powers back to the represented person. A provision along these lines is already in place in section 71 of the *NSW Trustee and Guardian Act* (NSW), and the Commission sees merit in including a similar provision in new Victorian guardianship laws.

12.161 The Commission acknowledges that in some situations, arrangements of this nature might need to be communicated to a third party. For example, a bank might need to be informed that a represented person is authorised to operate a particular account. New legislation should provide that the financial administrator has the authority to act in this way and is under a duty to inform relevant third parties when this power is exercised.

RECOMMENDATIONS

Powers to cede authority to the represented person

186. New guardianship legislation should provide that a financial administrator has the power, unless otherwise ordered by the tribunal, to allow the represented person to exercise, either independently or with support, any of the powers vested in the financial administrator when this is consistent with the personal and social wellbeing of the represented person.

187. When allowing the represented person to exercise powers in this manner, the financial administrator must take steps that are reasonably necessary to facilitate the arrangement, including advising relevant third parties of the powers given to the represented person.

Accessing a represented person’s will

12.162 The G&A Act permits VCAT to open and read the will of any represented person.¹³³ An administrator may open and read the will of any represented person that is in their possession.¹³⁴

12.163 These provisions should be included in new guardianship legislation and extended. There will always be circumstances where a financial administrator may need to know the contents of a will in order to ensure that decisions are not made that inadvertently contradict the represented person’s intentions as set out in their will. For example, the represented person may intend a particular piece of property to pass to a friend or relative upon their death and, if the administrator was unaware of this, they may sell that property for the benefit of the represented person while they are still alive.

¹³² Submission IP 8 (Office of the Public Advocate).

¹³³ *Guardianship and Administration Act 1986* (Vic) s 54.

¹³⁴ *Ibid* s 58G.

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- 12.164 Nonetheless, it may also be the case that a represented person, before losing capacity, may have chosen that some aspects of their will are to remain private until their death and would therefore not want the administrator to have access to those details. At present, an administrator has no power to read a will that is not in their possession.
- 12.165 The Commission believes it is necessary to strike an appropriate balance between these two competing interests. This balance is most effectively achieved by requiring a financial administrator to apply to the tribunal for access to the will of a represented person that is not in the financial administrator's possession. In cases of this nature, the tribunal is able to access the will if its whereabouts are known by invoking its general powers to require people to produce documents,¹³⁵ and by relying on its power to open and read the will of any represented person.¹³⁶

RECOMMENDATION

Accessing a represented person's will

188. New guardianship legislation should provide the tribunal and a financial administrator with the powers set out in sections 54 and 58G of the *Guardianship and Administration Act 1986* (Vic) to open and read wills. The legislation should also provide that:
- a financial administrator may apply to the tribunal to open and read a represented person's will that is not deposited with the financial administrator, and
 - the tribunal may order that the will be opened and read if it is satisfied that this is reasonable in the circumstances.

Anti-ademption provisions

- 12.166 The Commission supports the arguments put forward by State Trustees, as noted earlier, about the need to clarify and extend the anti-ademption provisions in the G&A Act. It is clearly very difficult for an administrator who does not have access to the represented person's will to know if any disposal of property will affect a bequest made by the represented person.
- 12.167 The Act seeks to protect people from the loss of property that has been given to them in a represented person's will but is subsequently sold or disposed of by an administrator before the represented person's death.¹³⁷ Similar provisions do not currently apply where an enduring financial attorney disposes of the represented person's property.
- 12.168 The Commission's recommendation, as proposed by State Trustees, attempts to clarify the entitlement of third parties to remedies when they suffer a loss because of a substitute decision maker's decision regardless of whether that property was disposed of by a personally appointed, or a tribunal-appointed, financial administrator.

¹³⁵ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 104.

¹³⁶ *Guardianship and Administration Act 1986* (Vic) s 54.

¹³⁷ *Ibid* s 53.

RECOMMENDATION

Anti-ademption provisions

189. New guardianship legislation should clarify the anti-ademption provisions in section 53 of the *Guardianship and Administration Act 1986* (Vic) in order to:

- (a) Permit a remedy from the estate to third parties for inequitable succession law consequences of the financial administrator's actions and should extend beyond bequests by will to intestacies and joint assets.
- (b) Provide that relief should not be dependent on the knowledge or actions of the financial administrator, although the extent of the knowledge and consent of the represented person should be a relevant factor.

Gifts

- 12.169 The Commission recommends reform of the provisions in the G&A Act that apply when an administrator makes a gift of the represented person's property that may appear to involve a conflict of interest.
- 12.170 Although the G&A Act permits an administrator to make a gift of the represented person's property in some circumstances,¹³⁸ any gift to the administrator or to a charity with which the administrator has a connection must be reported to VCAT if the total value of the gift is \$100 or more.¹³⁹
- 12.171 The Commission accepts State Trustees' suggestion that the disclosure requirement should be extended to gifts that are made to close relatives of the financial administrator (even if they are also close relatives of the represented person) as well as to any organisation, not just to charities, with which the financial guardian is connected.¹⁴⁰ The Commission believes that it is appropriate to monitor this broader range of gifts of the represented person's funds because of the potential for abuse.
- 12.172 The Commission also believes that the means by which these gifts are monitored could be simplified. We recommend disclosure by requiring gifts to be separately itemised in the financial administrator's annual report to the tribunal (we discuss this in Chapter 18).

RECOMMENDATION

Gifts

190. New guardianship legislation should allow a financial administrator to make a gift of a represented person's property in the circumstances set out in section 50A of the *Guardianship and Administration Act 1986* (Vic). If a financial administrator makes a gift of a represented person's property that exceeds an amount specified in the regulations to themselves or any relative or close friend of the financial administrator or to any organisation with which the financial administrator has a connection, that gift must be itemised in the financial administrator's annual report to the tribunal.

¹³⁸ The gift, which must be reasonable in the circumstances, can be made to a close friend or relative or be a donation of the kind that the represented person might have made: *Guardianship and Administration Act 1986* (Vic) s 50A(1).

¹³⁹ *Guardianship and Administration Act 1986* (Vic) s 50A(3).

¹⁴⁰ Submission CP 70 (State Trustees Limited).

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Conflict transactions

12.173 As noted in Chapter 10 in relation to an enduring financial administrator, a tribunal-appointed financial administrator should not be able to enter into a conflict transaction unless it has been specifically authorised ahead of time. The Commission proposes that the provisions for conflict transactions recommended for enduring appointments should also be applied to tribunal appointments.

Power to enforce a guardianship order

12.174 Section 26 of the G&A Act permits VCAT to authorise a guardian to use force, or to permit others to do so, to ensure that the represented person complies with the guardian's decisions. These powers are euphemistically referred to as 'specified measures or actions'.¹⁴¹

12.175 While the Commission believes that this provision should be retained for use in exceptional circumstances, it would be beneficial to stipulate that coercive powers should be used as a last resort, and only to an extent that is proportionate in the circumstances. This recommendation is outlined further in Chapter 21.

ACCESS TO PERSONAL INFORMATION BY SUBSTITUTE DECISION MAKERS

12.176 While 'confidentiality' and 'privacy' are often used interchangeably in ordinary conversation, there are important distinctions between these terms when used legally.

Confidentiality

12.177 'Confidentiality' generally refers to information that is passed from one person to another within a protected relationship and with the expectation that it will not be disclosed to other people without permission. Examples are the information conveyed by a patient to a doctor, or by a client to a legal practitioner. Unless there are exceptional circumstances, the person who receives the information is legally obliged to keep it confidential. Protecting relationships built upon trust and confidence is the primary reason for having laws about confidentiality.

12.178 The person entitled to the benefit of the duty of confidence—such as a patient—can take legal action if confidential information is given to someone else without that person's consent or without lawful authority. A person may have a range of legal remedies available to them if the holder of confidential information passes it on unlawfully. Those remedies include:

- seeking damages for breach of contract
- pursuing a remedy under information privacy legislation for breach of privacy principles and standards
- seeking an injunction and/or damages in court for breach of the equitable duty of confidence
- lodging a complaint with the relevant professional board.

¹⁴¹ *Guardianship and Administration Act 1986* (Vic) s 26(1).

Balancing confidentiality and privacy

- 12.179 The Commission is aware that confidential relationships can present obstacles for guardians and administrators accessing information about the person they are representing. This can impede the process of making fully informed decisions, particularly in relation to medical decisions. It is important for the law to strike a balance between providing guardians and administrators with access to confidential information and respecting the privacy of people with disabilities.
- 12.180 The Commission believes that new legislation should include provisions that, in broad terms, give substitute decision makers a right to access personal information¹⁴² about the represented person on a 'need to know' basis. Access should be limited to information that is relevant to and necessary for carrying out their role. In relation to medical records, this may include, for example, evidence of a current disability, but would not include historical information that is irrelevant to the current disability, such as treatment for drug addiction or records of an abortion.
- 12.181 The Commission is of the view that new guardianship legislation should authorise a third party to provide personal information to a substitute decision maker where the third party reasonably believes that the information is relevant to and necessary for the substitute decision maker to carry out their role. This approach strikes the correct balance between protecting confidential information from unnecessary disclosure, while also ensuring that a substitute decision maker is aware of important information that may affect a decision they are asked to make for a represented person.
- 12.182 The Commission believes that these reforms should extend to all substitute decision makers appointed personally and under guardianship laws—personal guardians, financial administrators, enduring personal guardians, enduring financial administrators and health decision makers.

Access to a financial administrator's file after death of the represented person

- 12.183 In a related issue, the Commission acknowledges that in some cases it may be in the represented person's interests for part of their financial affairs to remain confidential (including from their personal guardian) following their death. A financial administrator's file may also contain confidential information about a third party. Accordingly, the Commission is of the view that if a financial administrator wishes to deny a deceased represented person's personal guardian access to a document or other part of a file relating to the deceased represented person, the financial administrator must apply to the tribunal for an order that the document or other part of the file be withheld.
- 12.184 Where a dispute arises about the provision of information, the Commission believes there should be a straightforward mechanism for either party to apply to the tribunal to determine whether a substitute decision maker should be allowed access to particular information. A person would be exonerated from any potential liability if they act in accordance with a tribunal order to disclose information.

¹⁴² 'Personal information' for the purposes of this report has the same meaning as that provided in section 4 of the *Information Privacy Act 2000* (Vic), ie, with limited exceptions, 'information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion'.

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RECOMMENDATIONS

Access to personal information by substitute decision makers

191. New guardianship legislation should provide that a substitute decision maker, whether appointed personally or by a tribunal, is entitled to access, collect or obtain from a public body, custodian, or organisation personal information about the represented person that is relevant to and necessary for carrying out their functions under the Act.
192. New guardianship legislation should authorise the disclosure of personal information about a represented person by the public body, custodian or organisation holding the information when it is satisfied that the person to whom the information is to be disclosed is a substitute decision maker for the person, and the information is relevant to and necessary for carrying out their functions under the Act.
193. New guardianship legislation should retain sections 58D and 58E of the *Guardianship and Administration Act 1986 (Vic)* subject to one qualification. If a financial administrator wishes to deny a deceased represented person's personal guardian access to a document or other part of a file relating to the deceased represented person, the financial administrator must apply to the tribunal for an order that the document or other part of the file be withheld.
194. New guardianship legislation should provide that in the event of a dispute about the provision of personal information about a represented person to a substitute decision maker, any interested person may apply to the tribunal for a determination about whether information should be provided.

DISTINCTION BETWEEN PERSONAL GUARDIANS AND FINANCIAL ADMINISTRATORS

- 12.185 As noted in Chapter 5, the Commission believes that the existing legislative distinction between substitute decision making for financial decisions and personal (or lifestyle) decisions should continue for both tribunal appointments and personal appointments. This reflects the very different skills needed for these roles.
- 12.186 While the skills are different, the Commission also recognises that in some instances one person will be suitable for appointment to both roles. This is particularly likely to be the case where a close family member or friend of the represented person is appointed as both a personal guardian and a financial administrator.
- 12.187 For this reason, the Commission is not recommending any change in relation to a single appointee—whether public or private—being appointed to both personal guardian and financial administrator roles, even though in practice it is unlikely that these dual appointments will be made in situations other than private appointments. Neither the Public Advocate nor State Trustees should be appointed to fulfil any substitute decision-making role that they are unwilling to undertake.

RELATIONSHIP BETWEEN PERSONAL GUARDIANS AND FINANCIAL ADMINISTRATORS

- 12.188 As with personal appointments, the Commission believes that new guardianship legislation should provide more guidance about the relationship between personal guardians and financial administrators because the functions and powers of these roles often overlap.

- 12.189 The G&A Act requires VCAT to consider the compatibility of guardians and administrators when appointments are being made,¹⁴³ but provides no further guidance about how the two substitute decision makers should interact.
- 12.190 It is clearly highly desirable that substitute decision makers work together wherever the decisions of one are relevant to the decisions of the other. In most cases, any disagreements between a personal guardian and a financial administrator should be able to be resolved informally or through mediation. The mediation structures discussed in Chapter 21, in relation to the resolution of disputes between parties to an application, could be used for these purposes.
- 12.191 Where the two substitute decision makers are unable to resolve a disagreement themselves, either one of them should be permitted to apply to the tribunal for directions to resolve their differences.
- 12.192 Personal decisions are usually of greater significance than financial decisions, particularly for people with impaired decision-making capacity. Financial decisions, while important, tend to be the means by which people enable their personal goals, values and wishes to be realised.
- 12.193 The Commission believes that it is appropriate for the decision of a personal guardian to prevail over an inconsistent decision of a financial administrator in the absence of any direction from the tribunal. The financial administrator should then be required to take any necessary steps to enable the decision of the personal guardian to be implemented. As noted above, this proposal is consistent with the Victorian Parliament Law Reform Committee's recommendation that the decisions of a personally appointed representative with guardianship powers should prevail over the decisions of a representative with financial powers.

RECOMMENDATIONS

The relationship between personal guardians and financial administrators

195. When both a personal guardian and a financial administrator have been appointed for a represented person, they should be obliged to consult with one another to the extent necessary to properly manage any overlap of their roles.
196. In the event of any disagreement between a personal guardian and a financial administrator:
- (a) the parties should first seek to resolve the disagreement informally or through mediation
 - (b) either party may seek direction from the tribunal as to how the disagreement should be resolved
 - (c) unless otherwise decided by the parties themselves, or otherwise directed by the tribunal:
 - (i) the decision of the personal guardian will prevail over the decision of the financial administrator to the extent of any inconsistency, and
 - (ii) the financial administrator must take such steps as are necessary to implement the personal guardian's decision unless, in doing so, the represented person's finances are likely to be seriously depleted, in which case the parties must seek direction from the tribunal about how the disagreement should be resolved, before a decision can be implemented.

¹⁴³ *Guardianship and Administration Act 1986 (Vic)* ss 23(2)(c), 47(2)(b).

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SUCCESSION PLANNING

- 12.194 The Commission acknowledges the concern that many partners, families and carers have about future arrangements for a person with impaired decision-making ability when they are no longer able to carry out their role. While they cannot direct how future appointments should be made, it should be possible for them to record their views and have them considered when future decisions are made about a person they assist.
- 12.195 The Commission notes that this practice already occurs informally, through parents writing to VCAT expressing their future wishes. These documents are kept on file by VCAT and are considered at later hearings. The Commission believes that this process should be formalised.
- 12.196 Succession documents should not be binding because decisions must be made in the light of current circumstances. A succession document is similar to the wishes a parent might express in their will about the future care of their underage children. However, it is appropriate to require the tribunal to consider any wishes set out in a succession document before making an appointment for a person.
- 12.197 VCAT already has the power to appoint an alternative guardian, which can fulfil a similar function to a succession document in that it identifies another person to take over the role when an appointed guardian is unavailable. The power to appoint an alternative guardian should be retained.

RECOMMENDATIONS

Succession planning

197. New guardianship legislation should permit a family member, carer or substitute decision maker for a person with ongoing impaired decision-making capacity to file a succession document with the tribunal that states their wishes about future decision-making arrangements for that person, including for when the family member, carer or substitute decision maker is no longer able to undertake their role.
198. The tribunal should be required to consider the wishes stated in a succession document when making any decisions or orders about the person's future decision-making arrangements.



Chapter 13

Medical treatment

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INTRODUCTION

- 13.1 In this chapter, the Commission makes recommendations for reform of the law concerning authorisation of medical treatment for people with impaired decision-making capacity.
- 13.2 The current law is complex, largely because it is sometimes necessary to consider a number of overlapping statutes as well as the common law in order to determine the legal rules that apply when a person is unable to make their own decisions about medical treatment.
- 13.3 This chapter deals with the substitute decision-making arrangements for medical treatment in the *Guardianship and Administration Act 1986* (Vic) (G&A Act) and the *Medical Treatment Act 1988* (Vic) that apply to all adults who are unable to make their own decisions about medical treatment. In Chapters 23 and 24, we consider the *Disability Act 2006* (Vic) and the *Mental Health Act 1986* (Vic), which also deal with substituted consent for medical treatment for people with impaired capacity due to particular disabilities. The law governing substitute consent for participation in medical research procedures is considered in Chapter 14.
- 13.4 There appears to be a widespread lack of understanding about how the law regulates medical treatment for people who lack capacity to make their own decisions, perhaps because of its complexity. The Commission's recommendations aim to simplify the law and to improve community understanding of its operation.
- 13.5 This chapter contains recommendations that seek to achieve the following outcomes:
- streamlining the law regulating personal appointments of substitute decision makers for medical treatment by replacing the two existing mechanisms with one new process
 - improving the procedure of automatically appointing a person to become the substitute decision maker for medical treatment when there is no personal guardian with the power to make these decisions
 - providing appropriate external authorisation of important medical treatment decisions by making the Public Advocate the substitute decision maker of last resort in some instances.

CURRENT LAW

- 13.6 The common law supports the right of all adults with capacity to make decisions about what happens to their bodies. This means that it is unlawful for any medical practitioner to treat an adult without their consent, 'except in cases of emergency or necessity'.¹ The common law does not otherwise cater for people who are unable to make their own medical treatment decisions, because it does not allow an adult to authorise treatment for another adult in any circumstances.²
- 13.7 In Victoria, the common law rules concerning medical treatment have been supplemented by two pieces of legislation that allow people to make arrangements for medical treatment decisions when they are unable to make their own decisions. This legislation was first passed in the 1980s and subsequently broadened by amendment in the 1990s.

¹ *Rogers v Whitaker* (1992) 175 CLR 479, 489.

² See Bernadette Richards, 'General Principles of Consent to Medical Treatment' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Lawbook Co, 2010) 93–111.

- 13.8 Since 1986, the G&A Act has permitted a tribunal to appoint a guardian to make medical treatment decisions for a person with impaired decision-making capacity. Since 1988, the Medical Treatment Act, which sought to clarify the common law right of people to refuse medical treatment, has allowed a person with capacity to give a written direction about refusal of treatment that, in some circumstances, continues to operate when the person no longer has the capacity to make their own treatment decisions.
- 13.9 The Medical Treatment Act was amended in 1990 to allow a person with capacity to appoint an **agent** to make medical treatment decisions for them—including refusal of treatment—should they lose capacity in the future.³
- 13.10 In 1999, the G&A Act was amended to allow:
- a person with capacity to appoint an enduring guardian to make decisions for them if they lose capacity, including decisions about medical treatment, and
 - a person to be automatically appointed by operation of the legislation, without the need for any tribunal appointment, with authority to consent to medical treatment on behalf of a person who is unable to consent themselves. The substitute decision maker is referred to in the legislation as the ‘person responsible’ and the process is referred to in this chapter as an ‘automatic appointment’ or a ‘statutory appointment’.
- 13.11 Both pieces of legislation responded to the needs of medical practitioners and the community for clearer allocation of legal responsibility for medical treatment decisions. The Medical Treatment Act sought to provide greater clarity and security about potentially life-ending withdrawal of treatment, while the ‘automatic appointment’ amendments to the G&A Act sought to establish an efficient means of obtaining consent to treat patients who lacked capacity to make their own decisions.⁴
- 13.12 The way in which these two Acts operate together is not clear because Medical Treatment Act agents and enduring guardians appointed under the G&A Act have very similar roles. While the Medical Treatment Act was initially concerned with end of life refusal of treatment, the 1990 amendment appears to permit a person with capacity to appoint an agent to make decisions about *any* medical treatment. An enduring guardian can also be given authority to make any medical treatment decisions for a person who is unable to do so, other than decisions about ‘special procedures’, which must be made by the Victorian Civil and Administrative Tribunal (VCAT).⁵

THE GUARDIANSHIP AND ADMINISTRATION ACT 1986 (VIC)

Substitute decision makers

- 13.13 The G&A Act authorises six different substitute decision makers to make some decisions, in some circumstances, for an adult who is ‘incapable of giving consent’⁶ to ‘medical or dental treatment’.⁷ They are:
- a guardian appointed by VCAT with power to make medical treatment decisions
 - an enduring guardian appointed by the person concerned with power to make medical treatment decisions

³ These are the provisions for appointment of an enduring power of attorney (medical treatment): see *Medical Treatment Act 1988 (Vic)* s 5A.

⁴ There had been a large number of applications to VCAT for relatively minor procedures. See Victoria, *Parliamentary Debates*, Legislative Assembly, 22 April 1999, 594–5 (Marie Tehan).

⁵ See *Guardianship and Administration Act 1986 (Vic)* pt 4A div 4.

⁶ This term is defined in s 36 of the *Guardianship and Administration Act 1986 (Vic)*.

⁷ This term is defined in s 3 of the *Guardianship and Administration Act 1986 (Vic)*. For ease of discussion, the term ‘medical treatment’ is used throughout this chapter to include what is described in part 4A of the Act as ‘medical or dental treatment’.



- a person who is automatically appointed by operation of the legislation as a person responsible with power to consent to some forms of medical treatment
- VCAT, which can make decisions about any medical treatment,⁸ including a special procedure
- a 'registered practitioner',⁹ who can make decisions about any medical treatment, including a special procedure, when the practitioner has reasonable grounds for believing that the treatment is 'necessary, as a matter of urgency'¹⁰
- a 'registered practitioner', who can make decisions about any medical treatment other than a special procedure, when the practitioner has been unable to obtain consent from a person responsible for the proposed medical treatment which the practitioner believes to be in the best interests of the person concerned and appropriate notice has been given to the Public Advocate.¹¹

Powers of guardians

13.14 The extent of a guardian's authority to make decisions concerning medical treatment depends on the powers given to the guardian by VCAT, or the powers given to an enduring guardian by a donor. A guardian can be given the power to make any medical treatment decisions that the represented person could make other than consenting to a special procedure. A guardian appointed to make health care decisions usually has the power to consent to any medical treatment offered by a registered practitioner, as well as the power to refuse or decline any treatment.

VCAT's powers

- 13.15 VCAT has the power to make decisions about all forms of medical treatment, including special procedures, for an adult who is unable to make their own decisions. Special procedures are defined as permanent sterilisations, abortions, and removal of non-regenerative tissue for donation, as well as any other procedures named in regulations.¹² Only VCAT can provide substitute consent for a special procedure.¹³
- 13.16 VCAT has the power to consent to any medical treatment (or special procedure) offered by a registered practitioner, as well as the power to refuse or decline any treatment (or special procedure).¹⁴

Powers of the person responsible

- 13.17 Section 37 of the G&A Act contains a hierarchy of people who are permitted by section 39 of the Act to *consent* to 'medical (or dental) treatment' for an adult who is incapable of doing so when there is no guardian with the power to make these decisions. These automatic appointment provisions overlap with those parts of the Act that permit a guardian to be given the power to make medical treatment decisions, because guardians are included in the list of people who are eligible to be a person responsible.
- 13.18 The first person on the list who is available, willing and able to act is the person responsible, who has the authority to consent to or withhold consent to the proposed medical treatment. The section 37 list is:

⁸ VCAT can also appoint another person to make these decisions: *Guardianship and Administration Act 1986* (Vic) s 42N(6).

⁹ This term is defined in s 3 of the *Guardianship and Administration Act 1986* (Vic) and includes registered medical and dental practitioners.

¹⁰ This concept is explained further in s 42A(1) of the *Guardianship and Administration Act 1986* (Vic).

¹¹ *Guardianship and Administration Act 1986* (Vic) ss 42K and 42L.

¹² *Ibid* s 3. There are currently no additional special procedures set out in regulations.

¹³ *Guardianship and Administration Act 1986* (Vic) pt 4A div 4.

¹⁴ *Ibid* ss 39, 42N.

- an agent with an enduring power of attorney (medical treatment) appointed by the patient under the Medical Treatment Act¹⁵
- a person specifically appointed by VCAT to make decisions about the proposed treatment
- a person appointed by VCAT under a guardianship order that includes authority to make decisions about the proposed treatment
- a guardian with enduring power of guardianship appointed by the patient and whose appointment includes authority to make decisions about the proposed treatment
- a person appointed in writing by the patient with authority to make decisions about the proposed treatment
- the patient's spouse or domestic partner
- the patient's primary carer
- the patient's 'nearest relative'.¹⁶

13.19 If there is no person responsible available, or the medical practitioner cannot find out who the person responsible is, then the practitioner can make the decision to carry out the treatment without consent, providing they follow certain procedures, which are explained below.¹⁷

The types of treatment covered

13.20 'Medical treatment' is defined broadly by the G&A Act to include any medical treatment 'normally carried out by, or under, the supervision of a registered practitioner'.¹⁸ 'Dental treatment' is similarly defined.¹⁹ The definition also expressly excludes a number of matters including:

- a 'special procedure'
- a 'medical research procedure'
- non-intrusive examinations made for diagnostic purposes
- first-aid treatment
- administration of pharmaceutical drugs according to prescription or, if it is a drug for which a prescription is not required, according to the manufacturer's instructions
- anything else set out in regulations.²⁰

Consenting to a medical procedure

13.21 The person responsible must act in a person's **best interests** when deciding whether to consent to medical treatment. The G&A Act requires the person responsible to consider a range of matters when making this 'best interests' determination. Those matters are:

- the wishes of the patient, as far as they can be ascertained

¹⁵ The authority of an agent appointed under the *Medical Treatment Act 1988 (Vic)* is discussed below.

¹⁶ Nearest relative is defined in s 3 of the *Guardianship and Administration Act 1986 (Vic)* as the spouse or domestic partner of the person, or if the person does not have a spouse or domestic partner, the first listed in the following hierarchy who is over the age of 18 years (with the eldest member of each category given priority): son or daughter; father or mother; brother or sister; grandfather or grandmother; grandson or granddaughter; uncle or aunt; nephew or niece.

¹⁷ *Guardianship and Administration Act 1986 (Vic)* s 42K.

¹⁸ *Ibid* s 3.

¹⁹ *Ibid* s 3.

²⁰ There are currently no additional exclusions in regulations.

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- the wishes of any nearest relative or any other family members of the patient
- the consequences to the patient if the treatment is not carried out
- any alternative treatment available
- the nature and degree of any significant risks associated with the treatment or any alternative treatment
- whether the treatment is to be carried out only for the purposes of promoting and maintaining the health and wellbeing of the patient
- any other matters prescribed by the regulations.²¹

13.22 Additional matters can be relevant if the patient is likely to be able to make their own decision within a reasonable time. If the patient objects to a nearest relative being involved in the decision, the person responsible is not required to take that relative's wishes into account.²² In addition, the person responsible cannot give consent at all unless:

- the medical practitioner states in writing that they believe a further delay in carrying out the treatment would result in a significant deterioration of the patient's condition, and
- there is no reason to believe that treatment would be against the person's wishes.²³

13.23 If the person responsible consents to medical treatment, that consent has the same legal effect as if the patient had consented to the treatment with the capacity to do so.²⁴

Withholding consent and refusing treatment

13.24 The powers of a person responsible differ from those of a medical agent under the Medical Treatment Act or a guardian with broad medical treatment powers, because a medical agent and a guardian may make a final and binding decision to refuse treatment for the represented person. A person responsible can only consent or withhold consent to the proposed treatment.

13.25 Part 4A of the G&A Act does not deal expressly with substitute refusal of treatment for a person with impaired decision-making capacity. While the Act gives the person responsible the power to consent to medical or dental treatment, it also recognises that consent may be withheld, because it permits a medical practitioner to proceed with treatment in some circumstances where the person responsible does not consent.²⁵ This means that if person responsible withholds consent, it will not always amount to a refusal of treatment. This has led to considerable confusion about the difference between withholding consent under the G&A Act and refusing treatment under the Medical Treatment Act.

Carrying out medical treatment without consent

Emergencies

13.26 The G&A Act authorises a registered practitioner to perform medical treatment without consent in an emergency. An emergency exists when the procedure is necessary:

²¹ *Guardianship and Administration Act 1986 (Vic)* s 38(1). There are currently no additional matters prescribed by regulation.

²² *Guardianship and Administration Act 1986 (Vic)* s 38(2).

²³ *Ibid* s 42HA(2).

²⁴ *Ibid* s 40.

²⁵ *Ibid* s 42L.

- to save the patient's life
- to prevent serious damage to the patient's health, or
- to prevent the patient from suffering or continuing to suffer significant pain or distress.²⁶

13.27 While there is also a common law power to perform medical treatment without consent in an emergency,²⁷ this statutory power is probably more extensive than the authority given to medical practitioners by the common law.²⁸

When the person responsible is unavailable or withholds consent

13.28 If a medical practitioner is unable to identify or contact the person responsible, they may still carry out a medical treatment procedure if they believe that the treatment is in the best interests of the patient and they give notice to the Public Advocate.²⁹

13.29 If the person responsible is contacted but withholds consent to the medical treatment, the medical practitioner can still proceed with the treatment, if they believe it is in the patient's best interests to do so and they advise both the person responsible and the Public Advocate of their intention to proceed with the treatment.³⁰ The medical practitioner cannot proceed with the treatment until the person responsible has been given at least seven days to apply to VCAT to challenge that decision.³¹ VCAT has broad powers to make orders it believes are in the best interests of the patient.³²

THE MEDICAL TREATMENT ACT 1988 (VIC)

13.30 The Medical Treatment Act originally sought to clarify the common law right of people to refuse medical treatment. The 1990 amendment³³ that permits a person to appoint an agent as a substitute decision maker appears to allow the person to authorise the agent to make any decisions that the person could make about any medical treatment when the person is incapable of making their own decisions.³⁴

Who can consent to or refuse treatment

13.31 Three groups of people can make decisions about medical treatment under the Medical Treatment Act. They are:

- **patients** themselves, if they have the capacity to so³⁵
- **agents** appointed by an enduring power of attorney (medical treatment)³⁶
- **guardians appointed by VCAT**, where VCAT has included the power to make decisions about medical treatment in the guardianship order.³⁷

13.32 A person with capacity to make their own treatment decisions may appoint an agent 'to make decisions about medical treatment'³⁸ for them if they become 'incompetent'.³⁹ The appointment is made by using an enduring power of attorney

²⁶ Ibid s 42A(1).

²⁷ *Rogers v Whitaker* (1992) 175 CLR 479, 489.

²⁸ See Richards, 'General Principles of Consent to Medical Treatment', above n 2, 108–10.

²⁹ *Guardianship and Administration Act 1986* (Vic) s 42K.

³⁰ Ibid s 42L.

³¹ Ibid s 42L(2)(a).

³² Ibid s 42N(6).

³³ *Medical Treatment (Enduring Powers of Attorney) Act 1990* (Vic).

³⁴ See section 5A and Schedule 2 to the *Medical Treatment Act 1988* (Vic). While 'medical treatment' when used in section 5A and Schedule 2 must mean 'medical treatment' as defined in section 3 of that Act, that statutory definition appears to be much broader than the definition of 'medical treatment' in section 3 of the *Guardianship and Administration Act 1986* (Vic).

³⁵ *Medical Treatment Act 1988* (Vic) s 5.

³⁶ Ibid ss 5A(1)(a)(aa).

³⁷ Ibid s 5A(1)(b). The Medical Treatment Act does not refer to personally appointed enduring guardians.

³⁸ *Medical Treatment Act 1988* (Vic) s 5A(2)(a), sch 2[2].

³⁹ Ibid s 5A(2)(b).

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(medical treatment). The reference to 'decisions' in the legislation⁴⁰ suggests that the agent has the power to consent to and refuse medical treatment when the appointment is operative.

The types of treatment covered

- 13.33 The Medical Treatment Act contains a very broad definition of 'medical treatment', describing it as the carrying out of an operation, the administration of a drug or other like substance, or any other medical procedure. It expressly excludes palliative care.⁴¹
- 13.34 The distinction between medical treatment and palliative care has been a matter of some controversy, despite the fact that the Medical Treatment Act contains definitions of both terms.⁴² In 2003, Justice Morris of the Victorian Supreme Court found that artificial nutrition and hydration via percutaneous endoscopic gastronomy (PEG) was medical treatment rather than palliative care.⁴³ This finding permitted a guardian with powers to make decisions about a person's medical treatment to refuse PEG for a represented person by relying upon the refusal of treatment provisions of the Medical Treatment Act.
- 13.35 The Commission sees no need to revisit the meaning of these terms in the Medical Treatment Act. The matter is best left to the courts for decision on a case-by-case basis. The Commission also notes that the terms of reference provide that 'issues associated with end of life decisions, beyond those currently dealt with by the *Medical Treatment Act 1988*, are not within the scope of the review'.

The procedure for refusing medical treatment

- 13.36 An agent or guardian must be informed about a patient's current condition before they can refuse medical treatment on the patient's behalf. There must be sufficient information as would allow the patient to make their own decision about whether to refuse the treatment.⁴⁴ The agent or guardian can refuse treatment if it would cause unreasonable distress to the patient or if there are reasonable grounds for believing that the patient would consider the treatment unwarranted if they were able to make the decision themselves.⁴⁵
- 13.37 When an agent or guardian decides to refuse treatment on behalf of a patient, it is necessary to complete a '**refusal of treatment certificate**'.⁴⁶ This certificate requires the agent or guardian to declare that:
- they are authorised to make medical treatment decisions for the patient
 - the patient is at least 18 years old
 - they have been informed about the patient's condition
 - they understand this information
 - they believe that the patient would not want the treatment to be administered.⁴⁷
- 13.38 Two witnesses must certify that they are satisfied that the agent or guardian has been informed about, and understands, the patient's condition to the extent that would be sufficient if the patient were able to make their own decision. One of these two people must be a registered medical practitioner.⁴⁸

40 Ibid s 5A(2)(a).

41 Ibid s 3.

42 Ibid defines palliative care as including 'the provision of medical procedures for the relief of pain, suffering and discomfort; or the reasonable provision of food and water'.

43 *Re BWV; Ex Parte Gardner* (2003) 7 VR 487, 504–5.

44 *Medical Treatment Act 1988* (Vic) s 5B(1).

45 Ibid s 5B(2).

46 Ibid s 5B(3).

47 Ibid sch 3.

48 Ibid.

Consenting to medical treatment

13.39 The Medical Treatment Act does not set out any procedure for an agent to follow when consenting to medical treatment.

Carrying out medical treatment when there is a refusal of treatment certificate

13.40 If an agent or guardian has completed a refusal of treatment certificate, the Medical Treatment Act only allows medical treatment to be undertaken if the power of the agent or guardian is suspended or revoked by VCAT.⁴⁹ Any person who has a special interest in the affairs of the patient can apply to VCAT for this to happen.⁵⁰ VCAT may suspend or revoke the power, or revoke the certificate itself, if it is satisfied that it would not be in the patient's best interests for the refusal of treatment to continue, or for the agent to continue to hold the power.⁵¹

OTHER JURISDICTIONS

13.41 All other Australian jurisdictions, except the Northern Territory, have legislation similar to the G&A Act that provides for automatic appointees to make medical treatment decisions for adults with impaired decision-making capacity. It is instructive to consider some of the important points of difference.

DISTINCTION BETWEEN MINOR AND MAJOR TREATMENT FOR THE PURPOSES OF CONSENT

13.42 In New South Wales, as in Victoria, a doctor may carry out a medical treatment procedure without the consent of the person responsible if they are unable to identify or contact the person responsible. In New South Wales, this can happen only if the procedure fits the Act's definition of minor treatment.⁵² Major treatment would require a guardian to be appointed, or an application to the tribunal for its consent. Minor treatment is any treatment, other than special treatment or clinical trials, not defined by regulation as being major treatment.⁵³

13.43 The New South Wales regulations describe major treatment as:

- injection of long-acting hormones for contraception or regulating menstruation
- administering a drug of addiction
- administering a general anaesthetic or, in some cases, a sedative
- any treatment to eliminate menstruation
- certain treatments that affect the central nervous system
- treatments that have a high level of risk in relation to death, brain damage, paralysis, scarring, distress, prolonged recovery, etc.
- any test for HIV.⁵⁴

13.44 In Queensland, minor and uncontroversial treatment may be carried out without consent, as long as the health practitioner believes it will promote the patient's health and wellbeing and that there are no objections to it. The Act does not actually define 'minor and uncontroversial' treatment, leaving this matter to be determined on a case-by-case basis.⁵⁵

49 Ibid s 5D. Otherwise the medical practitioner may commit the offence of medical trespass: at s 6.

50 The Public Advocate and the agent or an alternate agent may also apply: *Medical Treatment Act 1988* (Vic) 5C(2).

51 *Medical Treatment Act 1988* (Vic) ss 5C(3).

52 *Guardianship Act 1987* (NSW) s 37.

53 Ibid s 33.

54 *Guardianship Regulation 2005* (NSW) reg 10.

55 *Guardianship and Administration Act 2000* (Qld) s 64.

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PRINCIPLES TO GUIDE DECISION MAKERS

13.45 The Australian Capital Territory legislation includes principles that guide the decisions made by any substitute decision maker—any decision about medical treatment must be made according to those principles.⁵⁶ The Queensland Act complements its broad decision-making principles with specific health care principles.⁵⁷

PROVISION OF INFORMATION

13.46 The Australian Capital Territory legislation also includes a provision requiring health professionals to give certain information to a ‘health attorney’, who is the Australian Capital Territory equivalent of a person responsible.⁵⁸ The Act also requires a health professional to inform the Public Advocate if a health attorney is consenting to a particular medical treatment procedure for a period longer than six months.⁵⁹

AUTOMATIC APPOINTMENTS OF SUBSTITUTE DECISION MAKERS

13.47 New South Wales was the first Australian jurisdiction to respond to the problems associated with substituted consent for medical treatment by establishing a scheme for automatic statutory appointments of substitute decision makers.⁶⁰ Other jurisdictions quickly followed, and now Victoria, the Australian Capital Territory,⁶¹ South Australia,⁶² Queensland⁶³ and Tasmania⁶⁴ all deal with automatic appointment of substitute decision makers for medical treatment in legislation broadly similar to that operating in New South Wales.

13.48 In Queensland, a person known as the ‘statutory health attorney’ is automatically appointed to make decisions about health care matters if no one has been appointed under the *Guardianship and Administration Act 2000* (Qld) to make health care decisions. Health care matters must first be dealt with according to any health directive made by the person concerned, then by any guardian appointed by the tribunal, and then by any enduring appointment made by the person. If none of these appointments has been made, the ‘statutory health attorney’ appointed under the *Powers of Attorney Act 1998* (Qld) becomes the decision maker.

13.49 The legislation sets out a hierarchy of people who can be the ‘statutory health attorney’, being first the spouse of the person, then their unpaid carer, then their close friend or relative and then, finally, if none of those people are available, the Queensland Adult Guardian.⁶⁵

13.50 In all of these jurisdictions, other than Queensland, automatic appointees can only make decisions about medical treatment. In Queensland, admission to some nursing facilities is included in the list of health care decisions to which a statutory health attorney can consent.⁶⁶

Alberta, Canada

13.51 While all of the Australian jurisdictions have some kind of ‘standing list’ of automatic appointees, the Canadian province of Alberta takes a different approach, permitting a medical practitioner to choose who the appropriate decision maker should be.

56 *Guardianship and Management of Property Act 1991* (ACT) s 32E.

57 *Guardianship and Administration Act 2000* (Qld) sch 1.

58 *Guardianship and Management of Property Act 1991* (ACT) s 32G.

59 *Ibid* s 32J.

60 See *Guardianship Act 1987* (NSW) s 33A.

61 See *Guardianship and Management of Property Act 1991* (ACT) pt 2A.

62 See *Guardianship and Administration Act 1993* (SA) s 59.

63 See *Guardianship and Administration Act 2000* (Qld) s 66 and *Powers of Attorney Act 1998* (Qld) s 63.

64 See *Guardianship and Administration Act 1995* (Tas) s 39.

65 *Powers of Attorney Act 1998* (Qld) s 63.

66 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5.

In Alberta, a ‘specific decision maker’ is authorised to make various health care decisions. This person is a relative chosen by the health care provider applying criteria set out in the legislation.⁶⁷

Tribunal reviews

- 13.52 Each Australian jurisdiction with an automatic appointments system provides for some limited tribunal review of the way in which the powers are exercised in a particular case. In Queensland, the actual appointment can be reviewed,⁶⁸ while in New South Wales, as in Victoria,⁶⁹ a tribunal can be asked to consent to treatment that the person responsible has refused to authorise.⁷⁰

COMMUNITY RESPONSES

- 13.53 In the consultation paper, the Commission identified a number of reform proposals that sought to simplify the law governing substitute decision making for medical treatment for people with impaired capacity.

HARMONISATION OF THE G&A ACT AND THE MEDICAL TREATMENT ACT

- 13.54 An important option was the proposal to harmonise the G&A Act and the Medical Treatment Act to overcome the confusion caused by having two Acts that allow a person to make two different appointments of a substitute decision maker with medical treatment powers. The Commission suggested that Medical Treatment Act agents and enduring guardians with medical treatment powers should merge within a new, single personal appointment of a person to make substitute medical treatment decisions.
- 13.55 We discuss community responses to that idea in Chapter 10 and the Commission’s recommendation to combine those appointments. We consider that recommendation in more detail later in this chapter. In Chapter 17, the Commission recommends new principles to guide substitute decision makers. Later in this chapter, we also consider additional principles that should guide medical treatment decisions.

AUTOMATIC APPOINTMENTS—THE PERSON RESPONSIBLE

- 13.56 The Commission also proposed reform of the automatic appointments scheme in the G&A Act. In the consultation paper, the Commission noted the apparent widespread lack of awareness of the automatic appointment process and the role of the person responsible.
- 13.57 The Commission proposed retaining the ‘person responsible’ hierarchy but suggested changes to clarify the role and responsibilities of the position.

The person responsible hierarchy

- 13.58 Community responses and submissions were generally supportive of the current ‘person responsible’ hierarchy and the current Act’s provisions,⁷¹ although some people voiced concerns about lack of awareness of the system by members of the community and by medical practitioners.⁷² Other responses pointed to the limited oversight of the framework and a lack of understanding by the person responsible about their role.⁷³

67 *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 89(1).

68 *Powers of Attorney Act 1998* (Qld) s 113.

69 *Guardianship and Administration Act 1986* (Vic) s 42N(6).

70 *Guardianship and Administration Act 1987* (NSW) s 44.

71 Submissions CP 19 (Office of the Public Advocate), CP 27 (Catholic Archdiocese of Melbourne), CP 44 (Leadership Plus), CP 59 (Carers Victoria), CP 71 (Senior Rights Victoria).

72 Submission CP 68 (Australian Nursing Federation), CP 73 (Victoria Legal Aid).

73 Submission CP 19 (Office of the Public Advocate), CP 65 (Council on the Ageing Victoria).



- 13.59 The Victorian Equal Opportunity and Human Rights Commission advocated changes to the current hierarchy, arguing that all personal appointments should precede VCAT appointments.⁷⁴
- 13.60 There were concerns expressed about the hierarchy's lack of cultural variability and the fact that it automatically favours the oldest person in any category when determining the identity of the nearest relative. The Catholic Archdiocese of Melbourne noted that the person responsible might not always be the most appropriate individual in the circumstances to make a decision.⁷⁵ The submission conceded, however, that a legislative scheme for automatic decision makers cannot capture the range of personal and cultural factors that make one person, rather than another, a more suitable substitute decision maker.⁷⁶

Scrutiny of automatic appointees

- 13.61 In its consultation paper, the Commission asked whether new guardianship legislation should provide for enhanced scrutiny of decisions of automatic appointees by use of practices such as random auditing by the Public Advocate of decisions by 'persons responsible'.
- 13.62 There were mixed responses to the proposal. Various submissions thought that the current provision, which permits an application to VCAT concerning a person's best interests in the context of proposed treatment, was adequate.⁷⁷
- 13.63 The Public Advocate pointed out that the ability to apply to VCAT to remove the 'person responsible' is rarely exercised despite serious doubts about the way that someone is making decisions.⁷⁸

DEFINITION OF MEDICAL TREATMENT

- 13.64 In the consultation paper, the Commission proposed expanding the definition of 'medical treatment' in the G&A Act because of concerns that it excluded procedures for which prior consent would be required when dealing with a person with capacity. The Commission noted that broadening the definition would mean that people connected to the person with impaired capacity rather than health professionals would be responsible for more substitute health care decisions than is currently the case.
- 13.65 There was broad support for widening the definition to encompass a broader range of treatments that fall within ordinary perceptions of medical treatment. One submission commented that a broader definition would be consistent 'with the increasing trend for health professionals other than doctors to provide health care'.⁷⁹ The range of available health care services is much broader than that currently covered by the definition of 'medical treatment' in the G&A Act, and includes alternative medicines and paramedical services.
- 13.66 The Public Advocate suggested broadening the definition to include the administration of pharmaceutical drugs as well as paramedical and complementary medical procedures, while also making it consistent with the definition of 'medical treatment' in both the Medical Treatment Act and the Mental Health Act.⁸⁰ The most significant of these differences, as noted above, is the Medical Treatment Act's exclusion of

⁷⁴ Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

⁷⁵ Submission CP 27 (Catholic Archdiocese of Melbourne).

⁷⁶ Ibid.

⁷⁷ Submission CP 22 (Alzheimer's Australia Victoria), CP 27 (Catholic Archdiocese of Melbourne), CP 59 (Carers Victoria), CP 73 (Victoria Legal Aid).

⁷⁸ Submission CP 19 (Office of the Public Advocate).

⁷⁹ Submission CP 63 (Shin-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)).

⁸⁰ Submission CP 19 (Office of the Public Advocate).

palliative care from its definition of medical treatment.⁸¹ The Public Advocate also suggested that legislation should list examples of treatments that fall within the new definition.⁸²

- 13.67 The inclusion of the administration of ‘medication’ within the definition, as is the case in New South Wales, was strongly supported by most submissions that commented on this issue, including the Public Advocate, Epworth Health Care and the Catholic Archdiocese.⁸³
- 13.68 The Public Advocate pointed out that current practice makes it easy to provide standard medications where practitioners cannot obtain consent from the person responsible.⁸⁴ However, the Public Advocate also pointed out that administering certain drugs is not always a simple and uncontroversial procedure. It can amount to treatment that has more significant consequences than some treatments currently regulated by the Act, such as when there are adverse effects from the administration of a drug.⁸⁵
- 13.69 Several submissions expressed concern about the use of behaviour modifying drugs. The AMA noted that the Act’s current exclusion of pharmaceutical drugs from its definition of medical treatment has allowed the excessive use of behaviour modifying drugs in aged care facilities, because consent for their administration is not required.⁸⁶ A submission by Dr Michael Murray argued that ‘this is an area subject to significant abuse with regular failure to consult’.⁸⁷
- 13.70 Respecting Patients’ Choices did not support expanding the definition of medical treatment to include the provision of ‘medication’. They believe that expanding the definition to encompass pharmaceuticals would make the treatment of patients unable to consent to oral medication ‘very difficult’.⁸⁸
- 13.71 Broadening the definition of medical treatment to include complementary and paramedical procedures was widely supported.⁸⁹

MINOR MEDICAL PROCEDURES

- 13.72 In the consultation paper the Commission also asked whether a medical practitioner should be required to obtain formal consent from the patient or the person responsible for minor and uncontroversial medical treatment.
- 13.73 The reform option presented in the consultation paper would allow medical practitioners to perform minor procedures without consent, subject to satisfying certain procedural conditions that might include: notifying VCAT; seeking a second medical opinion; or recording in the patient’s file the decision to perform the procedure without consent and the reasons for doing this.
- 13.74 Two approaches for distinguishing between ‘minor’ and ‘major’ treatment were discussed in the consultation paper:
- the New South Wales approach, which defines major treatment and provides that minor treatment is that which is not major treatment

81 *Medical Treatment Act 1988* (Vic) s 3.

82 Submission CP 19 (Office of the Public Advocate).

83 Ibid, CP 20 (Epworth HealthCare), CP 27 (Catholic Archdiocese of Melbourne) and CP 69 (Australian Medical Association (Victoria)).

84 Submission CP 19 (Office of the Public Advocate).

85 Ibid.

86 Consultation with the Australian Medical Association Victoria Limited (18 May 2011).

87 Submission CP 47 (Dr Michael Murray).

88 Submission CP 49 (Respecting Patient Choices Program—Austin Health).

89 For e.g., submission CP 19 (Office of the Public Advocate), CP 20 (Epworth HealthCare), CP 24 (Autism Victoria), CP 33 (Eastern Health), CP 59 (Carers Victoria), CP 68 (Australian Nursing Federation) and CP 75 (Federation of Community Legal Centres).

13

Chapter 13

Medical treatment



- the Queensland approach, which refers to, but does not define, ‘minor and uncontroversial’ treatment and provides examples of procedures that may fall into this category. Two examples are given: the administration of an antibiotic requiring a prescription and the administration of a tetanus injection.⁹⁰ A health care practitioner must also be satisfied that the treatment will promote the health and wellbeing of the patient and that there are no objections to it.⁹¹
- 13.75 While some submissions advocated adopting the New South Wales or Queensland approaches,⁹² others highlighted definitional problems and the potential for abuse in removing the safeguard of consent for minor procedures.⁹³ Seniors Rights Victoria supported the Queensland approach.⁹⁴
- 13.76 The submission by members of the Health Law Research Program at the QUT Faculty of Law suggested that ‘minor and uncontroversial’ should be ‘narrowly defined’.⁹⁵ They doubted whether procedural safeguards suggested in the consultation paper would be effective because there is no oversight of these decisions.⁹⁶
- 13.77 The Public Advocate supported permitting ‘minor and uncontroversial’ treatment to proceed without consent.⁹⁷ The Public Advocate favoured the New South Wales definitional approach, which defines ‘major treatment’.⁹⁸ As a safeguard, the Public Advocate recommended that practitioners obtain a second opinion, noted on the patient’s medical record and verified by that practitioner’s signature.⁹⁹
- 13.78 Epworth HealthCare agreed that ‘minor’ procedures should not require consent if the procedural conditions outlined in the consultation paper are satisfied.¹⁰⁰
- 13.79 Other health bodies were generally supportive but uncertain about how to differentiate between ‘minor’ and other forms of treatment. The Royal District Nursing Service favoured it in principle, but said that they needed to consider how the two concepts could be distinguished in practice.¹⁰¹
- 13.80 Victoria Legal Aid and the Victorian Equal Opportunity and Human Rights Commission (the commission) did not support this proposal. Victoria Legal Aid argued that a lesser standard should not apply to individuals with diminished capacity.¹⁰² The commission highlighted the practical problem of drawing a distinction between ‘minor’ and other forms of treatment. However, the commission’s main objection was that the proposal had the potential to lead to human rights abuses.¹⁰³ The commission argued that ‘the current situation allowing substitute consent to medical treatment is already fraught with human rights implications that require strict safeguards to prevent abuse’.¹⁰⁴ Accordingly, the commission contended that where a person receiving treatment is unable to consent, lifting the requirement for consent by a substitute decision maker unacceptably infringes a core human right enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).¹⁰⁵

90 *Guardianship and Administration Act 2000* (Qld) s 64(1).

91 *Ibid.*

92 For eg, Submissions CP 19 (Office of the Public Advocate), and CP 63 (Shin-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)).

93 Submission CP 35 (Ursula Smith), CP 56 (Disability Discrimination Legal Service), CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

94 Submission CP 71 (Seniors Rights Victoria).

95 Submission CP 63 (Shin-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)).

96 *Ibid.*

97 Submission CP 19 (Office of the Public Advocate).

98 *Ibid.*

99 *Ibid.*

100 Submission CP 20 (Epworth HealthCare).

101 Consultation with Royal District Nursing Service (9 March 2011).

102 Submission CP 73 (Victoria Legal Aid).

103 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

104 *Ibid.*

105 *Ibid.*

- 13.81 Some submissions highlighted the fact that individuals understand and experience medical treatment differently. Alzheimer’s Australia (Victoria) said that treatments are never insignificant for individuals who are weak and lack capacity.¹⁰⁶ Autism Victoria said that a person living with the condition may become distressed because they do not comprehend ‘the difference or consequence of a procedure whether minor or not’.¹⁰⁷

SPECIFIC PRINCIPLES FOR MEDICAL DECISION MAKERS

- 13.82 In the consultation paper, the Commission proposed that automatic appointees should adopt a substituted judgment approach to medical decision making by seeking to make decisions that the person would make themselves, if they had capacity to do so. The Commission noted that this approach differs from the existing ‘best interests’ standard because it focuses on the likely wishes of the represented person. We discuss this approach to decision making more generally in Chapter 17. In that chapter, the Commission recommends that decision makers should make decisions that promote the personal and social wellbeing of the person they are representing. This approach involves a consideration of substituted judgment principles.
- 13.83 Most responses to the consultation paper supported a substituted judgment approach to decision making although the submission from Alzheimer’s Australia (Victoria) pointed out the difficulty in determining what should happen when the substitute decision maker faces a medical treatment decision that the represented person had not considered when they had capacity.¹⁰⁸
- 13.84 The Public Advocate suggested that the patient’s personal and social wellbeing should be the key guide. It was noted that the principle of substituted judgment is important but should not be the only factor that the person responsible relies upon to make a decision.¹⁰⁹ The Public Advocate supported a general set of principles to assist decision makers in all types of decisions, and the inclusion of additional principles to guide decision makers in relation to medical treatment.¹¹⁰
- 13.85 The Ad Hoc Interfaith Committee and the Catholic Archdiocese of Melbourne argued that best interests should be retained as the guiding principle for health decisions.¹¹¹ They argued that this approach best serves people with disabilities, and that there are significant risks associated with the proposal to make substituted judgment the paramount consideration.¹¹²

SPECIAL MEDICAL PROCEDURES FOR MINORS

- 13.86 The Public Advocate believes that guardianship provisions concerning medical treatment¹¹³ should apply to all people with disabilities, not just those over the age of 18.¹¹⁴ Currently, the Family Court makes medical treatment decisions for children that are beyond parental capacity.¹¹⁵ The Public Advocate noted these decisions are often ‘ethically complex’. It questioned the appropriateness of these decisions being

106 Submission CP 22 (Alzheimer’s Australia Vic).

107 Submission CP 24 (Autism Victoria).

108 Submission CP 22 (Alzheimer’s Australia Vic).

109 Submission CP 19 (Office of the Public Advocate).

110 Ibid.

111 Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 52 (Ad Hoc Interfaith Committee).

112 Ibid.

113 *Guardianship and Administration Act 1986* (Vic) pt 4A.

114 Submission CP 19 (Office of the Public Advocate).

115 *Department of Health & Community Services v JMB and SMB (Marion’s Case)* (1992) 175 CLR 218 ruled that consent to certain medical procedures falls outside parental authority. *Marion’s Case* involved the proposed sterilisation, for reasons not based on medical necessity, of a young woman with an intellectual disability. As Fehlberg and Behrens note, the judgment had ‘three key features’: the sterilisation procedure was significant and irreversible; the likelihood that parents misjudge their child’s present and future ability to consent and ‘best interests’; and the ‘consequences of a wrong decision are particularly grave’: Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 261, quoting (*Marion’s Case*) (1992) 175 CLR 218, 250.



determined in the Family Court because of the adversarial nature of that Court and the prohibitive costs of Family Court applications.¹¹⁶

- 13.87 The Public Advocate argued that, in some circumstances, VCAT would be a more appropriate body to make these decisions for children with a disability than the Family Court.¹¹⁷ It was argued that VCAT is better suited to make such decisions because it is ‘an accessible and inquisitorial forum’ with experience in hearing cases concerning medical treatment of adults.¹¹⁸ The Public Advocate suggested that VCAT should be able to make medical decisions concerning children.¹¹⁹ This would result in VCAT having shared jurisdiction with the Family Court to consent to special procedures for children with disabilities.
- 13.88 The Commission does not believe that it is constitutionally possible to implement the Public Advocate’s suggestion, because the Victorian Parliament referred its relevant legislative powers to the Commonwealth in 1986.¹²⁰ Even if it were possible for the Victorian Parliament to legislate about this matter, it would be unnecessarily confusing for a Commonwealth court and a Victorian tribunal to have concurrent jurisdiction in relation to complex medical treatment issues that often require quick and final decisions.

THE COMMISSION’S VIEWS AND CONCLUSIONS

A NEW PERSONAL APPOINTMENT FOR MEDICAL DECISION MAKING

- 13.89 The Commission believes that it is important to streamline the law regulating personal appointments of substitute decision makers for medical treatment by replacing the two existing mechanisms with a new, simple process. It is unhelpful to have two mechanisms—an agent appointed under the Medical Treatment Act and an enduring guardian with medical treatment powers appointed under the G&A Act—for personally appointing a person to make medical treatment decisions for the principal when they are unable to make their own decisions.
- 13.90 The Commission recommends that new guardianship legislation should contain only one mechanism for personally appointing a substitute decision maker for medical treatment. This proposal would effectively merge the two current personal appointments of substitute decision makers for medical treatment.
- 13.91 The proposed new enduring personal guardian, discussed in Chapter 10, would become the sole new mechanism for personally appointing a medical substitute decision maker. The person who makes the appointment would determine the extent of the powers given to their enduring personal guardian, which could include the end of life decision-making powers that may be given to an agent appointed under the Medical Treatment Act. This step would be a matter of choice for the person who makes the appointment.
- 13.92 No useful purpose is served by retaining two statutory mechanisms for personally appointing a substitute decision maker to make decisions about medical treatment. Given the need for certainty about the extent of a substitute decision maker’s powers when making end of life decisions, new guardianship legislation should contain provisions that mirror the existing sections of the Medical Treatment Act that permit agents and guardians to make refusal of treatment certificates.¹²¹

¹¹⁶ Submission CP 19 (Office of the Public Advocate).

¹¹⁷ Submissions IP 8 (Office of the Public Advocate) and CP 19 (Office of the Public Advocate).

¹¹⁸ Submission CP 19 (Office of the Public Advocate).

¹¹⁹ *Ibid.* See also Office of the Public Advocate (Victoria), *What Role Should VCAT have for Persons Under the Age of 18 Years?* (June 2010), 4 <<http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2010/VCAT%20age%20criteria.doc>>.

¹²⁰ *Commonwealth Powers (Family Law – Children) Act 1986* (Vic).

¹²¹ *Medical Treatment Act 1988* (Vic) ss 5A–5F.

- 13.93 While this recommendation would cause those sections in the Medical Treatment Act that concern substitute decision makers to be removed and folded into new guardianship legislation, the remaining sections should be retained because they establish a useful process by which a person can give directions about unwanted medical treatment.
- 13.94 To avoid doubt, it would also be helpful for new legislation to provide that VCAT can appoint a personal guardian with the power to make decisions about any health care matters that the represented person could make a decision about, other than special procedures.
- 13.95 New guardianship legislation should also make it possible for a person who completes a refusal of treatment certificate—whether as a principal or as an enduring personal guardian with the power to do so—to file that certificate with the Registrar of Births, Deaths and Marriages for inclusion in the online register that is described in Chapter 16.

RECOMMENDATIONS

A new personal appointment for medical decision making

199. New guardianship legislation should permit a person to appoint an enduring personal guardian to make decisions about health care matters for them when they do not have the capacity to make their own health care decisions, including the power to complete a refusal of treatment certificate in the manner in which this step can be taken by an agent appointed under the *Medical Treatment Act 1988* (Vic).
200. New guardianship legislation should integrate the provisions in the *Medical Treatment Act 1988* (Vic) concerning the appointment of an agent to make medical treatment decisions for a person who lacks capacity with the provisions in the new legislation concerning health decision-making powers that can be given to an enduring personal guardian.
201. If the provisions in the *Medical Treatment Act 1988* (Vic) concerning the appointment and powers of an agent are fully integrated with provisions in new guardianship legislation concerning the appointment and powers of an enduring personal guardian, the provisions of the Medical Treatment Act concerning the appointment of an agent should be repealed in so far as they apply to appointments made from the date of the commencement of new guardianship legislation.
202. It should be possible for the tribunal to appoint a personal guardian with the power to make decisions about health care matters for a person who does not have the capacity to make their own health care decisions.
203. It should be possible for a person who makes a refusal of treatment certificate for themselves in accordance with the provisions of the *Medical Treatment Act 1988* (Vic), or an enduring personal guardian with the power to make a refusal of treatment certificate for the principal, to file that certificate with the Registrar of Births, Deaths and Marriages for inclusion in the online register.



AUTOMATIC APPOINTMENTS

13.96 While the Commission recommends retention of the statutory scheme of automatically appointing a person to make medical treatment decisions for a person who is unable to make their own decisions, it proposes a number of improvements.

Health decision makers

13.97 The name of the person who is automatically appointed to make treatment decisions by virtue of their relationship to the person who lacks capacity to make their own decisions should be changed because the current term—‘person responsible’—is not widely known or understood. The Commission recommends that this person should be referred to as the ‘health decision maker’ because this term clearly describes the nature of the role.

Guardians distinguished from health decision makers

- 13.98 The automatic appointment scheme for medical treatment decisions should be clearly distinguished from personal guardians with the power to make medical treatment decisions.
- 13.99 The G&A Act does not effectively differentiate a guardian with medical treatment powers from a person who is automatically appointed as a person responsible, because it includes guardians within the hierarchy of people who can be the ‘person responsible’. This unnecessary step appears to limit the powers of a guardian who acts as a person responsible, because a person responsible is only permitted to consent to treatment or withhold consent. In contrast, a guardian with medical treatment powers can consent to treatment or refuse treatment for the represented person when acting as a guardian. It is unlikely that this was the intended outcome when guardians and Medical Treatment Act agents were included in the list of people who could be a person responsible.
- 13.100 The Commission believes that if someone has appointed a personal guardian with the power to make medical treatment decisions, or if VCAT has made such an appointment, the personal guardian should be the first person who is asked to make decisions for a person who is unable to make their own decisions. This person should act as a personal guardian when they make these decisions and not as a statutory ‘health decision maker’.
- 13.101 The automatic appointment scheme should only operate when there is no personal guardian with the appropriate powers or when that person is not available to make the necessary treatment decisions. The automatic appointment scheme should not include a personal guardian among the hierarchy of substitute decision makers, because a personal guardian with the appropriate powers is already authorised to make medical treatment decisions. The automatic appointment scheme is a default mechanism for appointing a substitute decision maker when there is no one with the authority to make the decision in question.

RECOMMENDATION

Automatic appointment of a health decision maker

204. New guardianship legislation should provide for the automatic (statutory) appointment of a substitute decision maker—to be known as a health decision maker—to make medical treatment decisions for a person who lacks the capacity to make their own decisions and who does not have an enduring personal guardian or a personal guardian with the power to make those decisions for them.

The powers of guardians and health decision makers

- 13.102 The difference between the medical treatment powers of a personal guardian and those of a health decision maker should be clearly explained in new legislation. Under current law, the extent of a guardian's powers differs from those of a person responsible when making medical treatment decisions for a person who is unable to make their own decisions. While the drafting of the G&A Act generates some confusion,¹²² a guardian with health care powers has the power to make any medical treatment decision that the represented person can make, other than consenting to a special procedure. As an adult has a common law right to refuse any medical treatment,¹²³ a guardian with appropriate powers must also have the authority to refuse treatment on behalf of the represented person.
- 13.103 The Commission recommends that new guardianship legislation should clearly indicate that a personal guardian with the power to make health care or medical treatment decisions has the authority to consent to any treatment or to refuse that treatment. Any person who sought to challenge a refusal of treatment would do so by asking VCAT to consider whether the personal guardian should retain authority to make some or all medical treatment decisions for the represented person.
- 13.104 Under the G&A Act, a 'person responsible' has the power to consent to any medical treatment for the represented person, other than a special procedure.¹²⁴ The person responsible also has the power to withhold consent to any medical treatment. Withholding consent does not constitute refusal of treatment, because the registered practitioner is permitted to proceed with the treatment if the person responsible and the Public Advocate have been given an opportunity to apply to VCAT for a determination about what should happen in the circumstances and they decline to take this step within a designated period.¹²⁵
- 13.105 There are good policy reasons for distinguishing between the powers of an enduring guardian and a health decision maker to act in a way that causes a represented person not to receive treatment recommended by a registered practitioner. Personal guardians are people who have been chosen by the person concerned or VCAT to make important decisions for that person. It is appropriate that they have the power to make any decisions that the represented person could make in the circumstances. Health decision makers are automatic or default appointees—they are chosen because of their relationship to the person concerned rather than following an individual determination of their suitability to make medical treatment decisions. It is appropriate that these people have more limited powers than personal guardians.
- 13.106 The Commission recommends that a health decision maker should have similar powers to those of a person responsible—the power to consent to or withhold consent to any medical treatment other than a special procedure. New guardianship legislation should also contain a process similar to that in the G&A Act that permits a registered practitioner to proceed when consent has been withheld after the health decision maker and the Public Advocate have been given a reasonable opportunity to seek a ruling from VCAT about the proposed treatment.

122 The form set out in sch 4 of the G&A Act for use when appointing an enduring guardian refers to a power 'to consent to any health care that is in my best interests' and subsequently refers in a note to the power of an enduring guardian 'to consent or withhold consent to medical or dental treatment'. This wording is unfortunate because a decision about medical treatment could be a positive decision to refuse that treatment rather than an equivocal decision to withhold consent.

123 Loane Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (LexisNexis Butterworths, 3rd ed, 2008) 329.

124 *Guardianship and Administration Act 1986* (Vic) s 39(1)(b).

125 *Ibid* s 42L.



RECOMMENDATIONS

The powers of guardians and health decision makers

- 205. New guardianship legislation should clearly indicate that a personal guardian with the power to make health care or medical treatment decisions has the power to consent to or refuse any 'medical treatment', other than a 'special procedure', for the represented person when that person lacks the capacity to make their own decision about the matter.
- 206. A health decision maker should be permitted to consent or withhold consent to any 'medical treatment', other than a 'special procedure', for the represented person when that person lacks the capacity to make their own decision about the matter.
- 207. New guardianship legislation should contain a process similar to that set out in sections 42L, 42M and 42N of the *Guardianship and Administration Act 1986* (Vic), which permits a registered practitioner to proceed with treatment when consent has been withheld by the health decision maker after the health decision maker and the Public Advocate have been given a reasonable opportunity to seek a ruling from the tribunal about the proposed treatment.

Hierarchy of health decision makers

- 13.107 The Commission recommends retention of the person responsible hierarchy in the G&A Act subject to two changes. First, for the reasons just given, the hierarchy should not include an enduring personal guardian or a guardian appointed by VCAT with medical treatment powers because the automatic process should only come into effect when there is no personal guardian with authority to make medical treatment decisions.
- 13.108 Secondly, in Chapter 9, the Commission proposed the introduction of a new joint decision-making arrangement known as a 'co-decision making order'. In some circumstances, a person with impaired decision-making ability who has a co-decision maker in relation to medical treatment may lose the ability to participate in those decisions. In this situation, the co-decision maker should become the health decision maker.
- 13.109 The Commission acknowledges that the process of choosing a medical substitute decision maker for a person by use of a statutory automatic appointment system is not without its flaws. A person who is automatically appointed to make decisions for another is not required to meet the suitability requirements in sections 23 and 47 of the G&A Act that VCAT must consider before it makes an appointment. Additionally, this person might not be the one who would have been chosen to act in this role by the person who is unable to make their own medical treatment decisions.
- 13.110 Different cultures have different concepts of the role of family, and sometimes their broader community, in decision making. Some cultures are more inclined to recognise multiple decision makers and extended family, while some have a role for community elders. In the consultation paper, the Commission acknowledged the challenge of designing a system that can adapt to different cultural circumstances and yet remain workable for third parties, such as medical practitioners, who often need to identify a substitute decision maker quickly.

13.111 The automatic appointment scheme gives statutory recognition to the longstanding practice of asking a person's next of kin to make medical treatment decisions when they are unable to do so. While the entire process, and particularly the definition of 'nearest relative',¹²⁶ is open to criticism, the scheme is a workable, yet imperfect, means of seeking authorisation to treat a person who is incapable of making their own decision about the matter when it is not practical to conduct a hearing to decide who the most appropriate person is to make the decisions in question.

RECOMMENDATION

Hierarchy of health decision makers

208. The hierarchy of statutorily appointed health decision makers in new guardianship legislation should be:

- (a) the patient's co-decision maker with authority in relation to medical treatment decisions
- (b) the patient's spouse or domestic partner
- (c) the patient's primary carer
- (d) the patient's nearest relative.

The Public Advocate as decision maker of last resort

- 13.112 The Commission recommends that the Public Advocate should become the decision maker of last resort when there is no personal guardian with medical treatment powers or a health decision maker who is available to make a decision about 'significant treatment' for a person who is unable to make their own decision. This proposal mirrors the position in Queensland, where the Adult Guardian is the health decision maker of last resort.¹²⁷
- 13.113 The current system of permitting a registered practitioner to proceed in the absence of consent, if the practitioner has made reasonable efforts to locate a substitute decision maker and if the practitioner notifies the Public Advocate of an intention to proceed without consent,¹²⁸ does not appear to operate successfully. It seems that the Public Advocate receives relatively few notices, perhaps because the process is time consuming and not widely known.
- 13.114 It is important that significant medical procedures are authorised by someone who is responsible for the wellbeing of the person concerned and who is not directly involved, either professionally or financially, in the administration of those procedures. It is also important that this process of external authorisation is restricted to significant medical procedures and that health professionals are able to administer routine treatment to a person who is unable to make their own decisions, without the need for external authorisation or unhelpful reporting requirements.
- 13.115 The Public Advocate's role as the decision maker of last resort should be limited to those matters that constitute 'significant procedures', because of the need to ensure that the Public Advocate's resources and the time of health professionals is expended wisely. The distinction between 'significant procedures' and 'routine procedures' is discussed below.

¹²⁶ *Guardianship and Administration Act 1986* (Vic) s 3.

¹²⁷ *Powers of Attorney Act 1998* (Qld) s 63.

¹²⁸ *Guardianship and Administration Act 1986* (Vic) s 42K.



RECOMMENDATION

The Public Advocate as decision maker of last resort

209. The Public Advocate should be permitted to consent to or refuse any 'medical treatment', which is 'significant treatment', for a person who does not have the capacity to consent to that treatment and who does not have a personal guardian with the relevant powers, or a health decision maker, to act as the person's substitute decision maker.

Definition of medical treatment

- 13.116 The Commission recommends changes to the statutory description of the range of medical treatment that requires the consent of a substitute decision maker if a person is unable to consent to their own medical treatment. The Commission believes that the statutory definition of medical treatment should be expanded to include some medical procedures that are currently excluded. It should also be divided into two categories—'significant procedures' and 'routine procedures'—for the purposes of determining the processes to follow when there is no personal guardian or health decision maker to make decisions for a person who is unable to consent to their own medical treatment.
- 13.117 The Commission believes that the statutory definition of medical treatment should encompass the administration of prescription pharmaceutical drugs. All pharmaceutical drugs—prescription and non-prescription drugs—are expressly excluded from the current definition of medical treatment in the G&A Act.¹²⁹ This means that, in practice, prescription drugs are often given to a person who is unable to consent to their own medical treatment without any authorisation by a guardian or a person responsible.
- 13.118 The current definition is also limited to 'medical treatment' or 'dental treatment'. While these terms are not defined exhaustively, they are limited to treatment carried out 'by or under the supervision of a registered practitioner'. This probably means that intrusive treatments carried out by allied health professionals, which might technically constitute an assault if performed without consent, do not fall within the authorisation powers of a person responsible.
- 13.119 The Commission believes that the statutory definition of medical treatment should also be expanded to include procedures performed by allied health professionals which are intrusive and which would constitute an assault in the absence of consent.
- 13.120 There was widespread support for including the administration of pharmaceutical drugs within the statutory definition of medical treatment. The administration of some prescription drugs may be as significant and intrusive for a person as other medical treatment procedures that fall within the statutory definition. Some people expressed concern about the liberal use of psychotropic medication in some aged care facilities without any authorisation by a guardian or person responsible. It is appropriate that substitute decision makers make these important health care decisions.
- 13.121 The administration of non-prescription medication seems less problematic. It appears sufficient to rely on normal care principles for ensuring that those medications are not misused or overused by people who are unable to make their own decisions. The Commission believes that the new definition of medical treatment should specifically exclude medication that can be obtained without a prescription and is normally self-administered, provided it is administered in accordance with the manufacturer's instructions. This approach is taken in Queensland guardianship legislation.

¹²⁹ Ibid s 3.

RECOMMENDATION

Definition of medical treatment

210. New guardianship legislation should contain a definition of 'medical treatment' that is in similar terms to the definition of 'medical or dental treatment' in section 3 of the *Guardianship and Administration Act 1986* (Vic) except as follows:

- (a) The administration of pharmaceutical drugs for which a prescription is required should fall within the definition.
- (b) Paramedical and allied health procedures which involve a touching of the person's body and which are intrusive should fall within the definition.

Significant and routine medical procedures

- 13.122 As noted earlier, the current system of permitting a registered practitioner to administer medical treatment in the absence of consent, if the practitioner has made reasonable efforts to locate a substitute decision maker and if the practitioner notifies the Public Advocate of an intention to proceed without consent,¹³⁰ is unwieldy and should not be retained in new guardianship legislation.
- 13.123 The Commission proposes that the Public Advocate should become the decision maker of last resort when the treatment in question is 'significant'. When the treatment in question is 'routine', the health professional concerned should be permitted to proceed in the absence of any authorisation, if appropriate notes are made of unsuccessful attempts to locate a personal guardian or health decision maker for substitute consent.
- 13.124 It is not easy to devise principled and practical definitions of 'significant' and 'routine' medical treatment. The Commission believes that a two-step process is required. New guardianship legislation should define the concepts in broad terms, with their practical meaning amplified by guidelines prepared by the Public Advocate in conjunction with relevant professional bodies and interest groups.
- 13.125 An important principle to bear in mind when seeking to define 'significant treatment' is that people who are unable to consent to their own treatment should be dealt with in the same way, whenever possible, as people who are able to consent to their own treatment. If a health professional would ordinarily seek specific consent to performing a particular procedure from a person with capacity to consent to their own treatment, this procedure should presumptively be 'significant treatment' that requires external authorisation when performed upon a person who is unable to consent.
- 13.126 Another important principle to bear in mind is subjective assessment of the significance of some procedures. While some medical and dental procedures might be routine from a professional perspective, the degree of intrusion or momentary pain that people might experience could cause them to regard the procedure as significant.
- 13.127 The Commission suggests that the following matters should fall within the statutory definition of 'significant treatment':
- 'significant degree of bodily intrusion', which may include internal and intimate examinations
 - 'significant risk' to the patient, including treatments that may result in some serious bodily damage

¹³⁰ Ibid s 42K.



- ‘significantly negative side effects’, including the administration of pharmaceutical drugs with serious adverse effects
 - ‘significant distress’, including the distress a person may feel when they are about to receive an injection or a particular treatment that is known to cause them fear and anxiety.
- 13.128 The statutory definition of ‘significant treatment’ should be complemented by guidelines prepared by the Public Advocate in consultation with professional associations and groups that represent the interests of consumers of health services. The guidelines should indicate, with reasonable precision, the procedures that fall within the concept of ‘significant treatment’ or for which the Public Advocate is the decision maker of last resort.
- 13.129 The Commission proposes that a registered practitioner should be authorised to perform a ‘routine procedure’ on a person who is unable to consent and who does not have a personal guardian or health decision maker to provide substitute consent, if reasonable attempts have been made to locate such a person and notes are kept of the steps taken. This recommendation would overcome the current requirement that a registered practitioner notify the Public Advocate in writing of their intent to perform treatment upon a person who is unable to consent and who does not have a locatable substitute decision maker.
- 13.130 The Commission recommends that registered practitioners should be required to take reasonable steps to locate a personal guardian or health decision maker before they are authorised to perform a routine procedure on a person who is unable to consent to that procedure.
- 13.131 This requirement would not affect the ability of a registered practitioner to perform any necessary treatment in an emergency, because the Commission proposes that the existing emergency treatment powers in the G&A Act¹³¹ should be reproduced in new guardianship legislation.

RECOMMENDATIONS

Significant and routine medical procedures

211. New guardianship legislation should define ‘significant treatment’ as a medical or dental procedure, other than an emergency procedure or a special procedure that:
- (a) involves a significant degree of bodily invasion, or
 - (b) involves a significant risk to the patient, or
 - (c) is likely to have significantly negative or unpleasant side effects for the patient, or
 - (d) is likely to result in significant distress for the patient, and
 - (e) would ordinarily cause a medical practitioner to seek specific consent from a person with capacity before proceeding.

Guidelines to be developed by the Public Advocate

212. The Public Advocate should develop and publish guidelines in consultation with relevant professional bodies and other interested organisations to assist registered practitioners when determining whether a particular procedure is ‘significant treatment’.

¹³¹ Ibid s 42A.

Definition of routine treatment

213. New guardianship legislation should define 'routine treatment' as a medical or dental procedure that is not an 'emergency procedure', a 'significant procedure' or a 'special procedure'.

Consent to a significant medical treatment

214. New guardianship legislation should provide that if a person is unable to consent to 'significant treatment', the registered practitioner may undertake that procedure only with the consent of:

- (a) a personal guardian with the power to make decisions about the matter, or if there is no such person or that person cannot be reasonably located
- (b) a health decision maker, or if there is no such person or that person cannot be reasonably located
- (c) the Public Advocate.

Consent to a routine medical treatment

215. New guardianship legislation should provide that if a person is unable to consent to a 'routine procedure', the registered practitioner may undertake that procedure:

- (a) with the consent of a personal guardian with the power to make decisions about the matter, or if there is no such person or that person cannot be reasonably located
- (b) with the consent of a health decision maker, or if there is no such person or that person cannot be reasonably located
- (c) in the absence of consent if the registered practitioner has taken reasonable steps to locate a personal guardian or a health decision maker and the registered practitioner believes the treatment will promote the personal and social wellbeing of the person concerned.

216. New guardianship legislation should require a registered practitioner who performs a 'routine procedure' upon a person in the absence of consent to make notes in that person's file of attempts made to locate any personal guardian or health decision maker.

ADDITIONAL CONSIDERATIONS TO GUIDE MEDICAL DECISION MAKING

13.132 In Chapter 6, the Commission recommends that all people who have discretionary powers under new guardianship legislation should be guided by statutory principles when exercising those powers.

13.133 The Commission believes that there is value in listing additional considerations to guide personal guardians and health decision makers when making medical treatment decisions for another person. Many of these considerations are drawn from the existing provisions of the G&A Act.



RECOMMENDATION

Additional considerations for personal guardians and health decision makers

217. New guardianship legislation should contain a list of matters for personal guardians and health decision makers to consider when making medical treatment decisions for a represented person. Those considerations are:

- (a) any instructional directive prepared by the represented person
- (b) whether the represented person is likely to be able to make a decision about the treatment themselves within a reasonable time, and the effect on the person's condition of waiting for the person to make the decision themselves
- (c) the extent to which the proposed treatment is likely to be of benefit to the person
- (d) the extent to which the proposed treatment is likely to cause distress to the person
- (e) alternative treatments available, and the extent to which these are likely to benefit the patient or to cause distress to the person
- (f) other likely risks associated with the proposed treatment, or any alternative treatments available, for the person.

EMERGENCY PROCEDURES

13.134 The G&A Act authorises a registered practitioner to undertake any form of medical treatment without consent where it is 'necessary, as a matter of urgency' to 'save the patient's life', 'prevent serious damage to the patient's health', or 'prevent the patient from suffering or continuing to suffer significant pain or distress'.¹³² This authority appears to be broader than the common law power to provide treatment without consent 'in cases of emergency or necessity'.¹³³ It is unclear whether the common law power extends to treatment given without consent to 'prevent serious damage to the patient's health' or 'prevent significant pain or distress'.¹³⁴ A registered practitioner who relies upon this authority in good faith is not liable for any criminal, civil or professional consequences that might otherwise result from treating a patient without consent.¹³⁵

13.135 The Commission did not receive any suggestions to change the emergency treatment powers in the G&A Act and it is unaware of any circumstances in which the extent of this power has been contentious. The Commission believes that section 42A of the G&A Act contains a fair and reasonable description of those circumstances in which a registered practitioner should have the authority to treat any person without consent. This section should be retained in new legislation.

¹³² Ibid s 42A(1).

¹³³ *Rogers v Whitaker* (1992) 175 CLR 479, 489.

¹³⁴ See Skene, *Law and Medical Practice*, above n 123, 113–14 for a discussion of the relevant case law.

¹³⁵ *Guardianship and Administration Act 1986* (Vic) s 42A(2).

RECOMMENDATION

Emergency procedures

218. New guardianship legislation should continue to authorise a 'registered practitioner' to perform 'medical treatment' upon a person who does not have the capacity to consent to that treatment in emergencies. Section 42A of the *Guardianship and Administration Act 1986* (Vic) should be reproduced in new legislation.

SPECIAL PROCEDURES

13.136 Only VCAT can authorise a 'special procedure' for a person who is unable to make their own decisions about medical treatment.¹³⁶ A person cannot authorise an enduring guardian or an agent appointed under the Medical Treatment Act to consent to a special procedure for them. VCAT cannot appoint a guardian to make a decision about a special procedure and it is beyond the power of a person responsible to consent to a special procedure.

13.137 Special procedures are medical procedures with permanent consequences. At present three procedures are included within the statutory definition of a special procedure. They are:

- permanent sterilisations
- abortions
- removal of tissue for the purpose of donation to another person.¹³⁷

13.138 It is sound policy to require an independent, expert tribunal to decide whether a person who is unable to make their own medical treatment decisions should have a medical procedure that has significant, irreversible consequences. The Commission believes that the 'special procedure' process should be retained in new guardianship legislation. The Commission sees no need to recommend that any procedures be added to or removed from the existing list of special procedures.

RECOMMENDATION

Special procedures

219. New guardianship legislation should continue to require VCAT authorisation before a 'special procedure' can be performed upon a person who lacks the capacity to consent to that procedure.

¹³⁶ Ibid s 39(1)(a).

¹³⁷ Ibid s 3. There are currently no additional special procedures set out in regulations.



Chapter 14

Medical research

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INTRODUCTION

- 14.1 In this chapter, the Commission makes recommendations for reform of the law concerning authorisation of participation in medical research by people who are unable to make their own decisions about the matter.
- 14.2 The *Guardianship and Administration Act 1986* (Vic) (G&A Act) was amended in 2006 to establish a four-step process for authorising participation in a ‘medical research procedure’ by a person who is unable to make a decision about their own participation.¹ In all cases, a relevant human research ethics committee must approve the research project. If the patient is unlikely to be capable of giving consent to the procedure within a reasonable time, a ‘person responsible’ may give substitute consent for participation in the research procedure.² If a person responsible is not available, the registered practitioner may be able to proceed without any external authorisation.
- 14.3 Prior to the 2006 amendments, it was necessary to obtain approval from the Victorian Civil and Administrative Tribunal (VCAT) for participation in a medical research procedure by a person who was unable to consent. While the 2006 changes to the G&A Act have streamlined the process of obtaining substitute consent for participation in medical research, improvements can be made without compromising the interests of vulnerable people.
- 14.4 Two important issues require reform. The first is that in some instances the G&A Act processes for authorising medical treatment and medical research are both applied to the same procedure when standard treatment is being researched. This need for separate authorisation seems unnecessary, especially when the research procedure must also have ethical approval.
- 14.5 The second issue is that in some instances the substitute decision maker of last resort may be the medical researcher. A disinterested person should authorise participation in any research when it might not be of any benefit to the participant and could be intrusive or exploitative.
- 14.6 This chapter contains recommendations about the following:
- distinguishing between participation in medical research procedures that require separate legal authorisation and those that do not require separate legal authorisation because they form part of medical treatment that has been authorised
 - distinguishing between routine and significant medical research procedures for the purpose of authorising participation when there is no personal guardian or health decision maker to make the decision
 - matters for substitute decision makers to consider when deciding whether to authorise participation in a medical research procedure.

CURRENT LAW

- 14.7 The G&A Act provides for substitute consent to medical research procedures in Division 6 of Part 4A.

¹ *Guardianship and Administration (Further Amendment) Act 2006* (Vic). This Act inserted Division 6 of Part 4A into the *Guardianship and Administration Act 1986* (Vic).

² In Chapter 5, the Commission recommends changing the term ‘person responsible’ to ‘health decision maker’.

14.8 A 'medical research procedure' is defined in the current Act as:

A procedure carried out for the purposes of medical research, including, as part of a clinical trial, the administration of medication or the use of equipment or a device...³

14.9 The Act specifically excludes some procedures from its definition of a 'medical research procedure', such as a non-intrusive examination (including a visual examination of the mouth, throat, nasal cavity, eyes or ears or the measuring of a person's height, weight or vision), observing a person's activities, undertaking a survey, or collecting or using information including personal or health information.⁴

14.10 The G&A Act establishes a four-step process for authorising a person's participation in a medical research procedure where they are unable to consent to that procedure. Those steps are:

- Step 1: determine whether the research project is approved by the 'relevant human research ethics committee'.⁵ Approval of the project is required before the medical research procedure may be carried out and the procedure must be carried out in accordance with any conditions of the approval.
- Step 2: determine whether the patient is likely to be able to consent to the research procedure within a reasonable time. If this is likely, then the research procedure should not go ahead until the patient is able to consent to it.⁶ If the patient is not likely to be able to consent within a reasonable time, Step 3 applies.
- Step 3: obtain the consent of the 'person responsible'.⁷ The person responsible can consent to the procedure if they believe that it would not be contrary to the patient's best interests.⁸ If it is not possible to comply with this step because the person responsible is not available, Step 4 applies.
- Step 4: 'procedural authorisation' applies when the person responsible cannot be identified or contacted. It allows a registered practitioner to carry out the research procedure if the practitioner certifies that a number of things have been done and that the practitioner holds a number of beliefs about the research project and the person concerned. The practitioner must hold particular beliefs about:
 - the best interests of the patient
 - whether the ethics committee was aware that the research might involve people who are unable to consent
 - whether the procedure adds to risks the patient faces because of their medical condition
 - whether there is a reasonable scientific likelihood that the patient will benefit from the research procedure.⁹

14.11 The effect of Step 4 is that the person implementing the research procedure becomes the substitute decision maker for a person who is unable to make a decision about their own participation if there is no person responsible available to authorise participation.

3 *Guardianship and Administration Act 1986* (Vic) s 3(1). The definition also includes any procedures prescribed by regulations to be medical research procedures. There are no additional procedures in regulations.

4 *Guardianship and Administration Act 1986* (Vic) s 3(1).

5 *Ibid* s 42Q. The term 'relevant human research ethics committee' is defined in somewhat circular fashion in section 3 of the Act to mean 'the human research ethics committee responsible for approving the relevant research project'.

6 *Guardianship and Administration Act 1986* (Vic) s 42R.

7 The appointment and role of the person responsible are discussed in Chapter 13.

8 *Guardianship and Administration Act 1986* (Vic) s 42S.

9 *Ibid* s 42T.

14

Chapter 14

Medical research



- 14.12 Different considerations guide the process of substitute decision making for participation in medical research from those that apply when making decisions about medical treatment. The person responsible, or the registered practitioner, must be satisfied that participation in a medical research procedure ‘would not be contrary’ to the best interests of the patient. The person responsible must act in the patient’s ‘best interests’ when deciding whether to consent to any proposed medical treatment.¹⁰ The reason for the difference appears to be that participation in a research procedure could be an activity of no particular benefit to the person concerned in some instances, such as receiving a placebo in a drug trial, or when the research involves a procedure for which the benefits are still not clear.
- 14.13 The G&A Act provides additional guidance about the matters that must be taken into account when deciding whether a proposed research procedure is not contrary to the patient’s best interests. These are:
- the wishes of the patient, so far as they can be ascertained
 - the wishes of any nearest relative or any other family members of the patient
 - the nature and degree of any benefits, discomforts and risks for the patient in having or not having the procedures
 - any other consequences to the patient if the procedure is or is not carried out, and
 - any other prescribed matters.¹¹
- 14.14 The first step in the process—ethics committee approval—is usually determined in accordance with *the National Statement on Ethical Conduct in Human Research* (the National Statement) which was jointly developed by the National Health and Medical Research Council, the Australian Research Council and the Australian Vice-Chancellors’ Committee in 2007. The National Statement governs all human research funded by or conducted under the auspices of these bodies.

COMMUNITY RESPONSES

- 14.15 In response to the information paper, comments were made about the cumbersome and confusing processes set out in the G&A Act for medical research.¹² It was also suggested that the requirements for contacting the person responsible could be time consuming and could, as a result, compromise medical research.¹³
- 14.16 In the consultation paper, the Commission identified two options to address the issue of substitute consent for participation in medical research. One of those options was to retain the current provisions in the G&A Act, but simplify them in new guardianship laws. The other was to allow the person responsible (or the new health decision maker) to consent to medical research in the same way they could consent to medical treatment.
- 14.17 The Commission consulted representatives from various hospital ethics committees in order to consider means of improving the current provisions in the G&A Act.¹⁴ The responses from those people have greatly assisted the Commission to refine its recommendations.

¹⁰ Ibid s 42H(2).

¹¹ Ibid s 42H(2).

¹² Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine).

¹³ Submission IP 57 (Alfred Hospital Ethics Committee and the General Ethical Issues Sub Committee).

¹⁴ Members comprised: Professor John McNeil, Chair, Alfred Hospital Ethics Committee & General Ethical Issues Sub-Committee; Mr Peter Gallagher, HREC member, Alfred Medical Research & Education Precinct; Professor Peter Cameron, Director of Research, Alfred Hospital; Associate Professor David Taylor, HREC Chair, Austin Health; Professor Rinaldo Bellomo, Senior Researcher, Austin Health; Dr Angela Watt, Director Research Governance & Ethics, Office for Research, Royal Melbourne Hospital; The Hon. Allan McDonald, QC, HREC member, Melbourne Health/Royal Melbourne Hospital; Mr Phil Grano, Principal Legal Officer, Office of the Public Advocate.

MEDICAL TREATMENT AND MEDICAL RESEARCH

- 14.18 The importance of maintaining different considerations to guide substitute decision making about medical treatment and participation in medical research was emphasised by medical researchers because participation in some research may be of no immediate benefit to a person who takes part in it.¹⁵ It is necessary, therefore, to allow a substitute decision maker to authorise participation when satisfied that it would not be contrary to the person's best interests to participate rather than in the person's best interests to do so.
- 14.19 The Public Advocate argued that the process for obtaining substitute consent should be essentially the same for a medical research procedure and a medical treatment procedure.¹⁶ Others argued that there should be even more stringent criteria for obtaining consent to medical research than for medical treatment, given the human rights issues at stake.¹⁷
- 14.20 The Victorian Equal Opportunity and Human Rights Commission argued that only VCAT should be empowered to consent to medical research procedures being undertaken on a person who is unable to consent, despite the administrative hurdles this would create for researchers:

Because of the potential grave human rights implications, the [Victorian Equal Opportunity and Human Rights] Commission believes that only VCAT should be authorised to consent to medical research procedures for persons with impaired decision-making capacity. This will add an unwanted bureaucratic hurdle for researchers, but a necessary one that forces them to consider in depth whether there really is a need to carry out this research on vulnerable people who are unable to consent.¹⁸

PRINCIPLES TO GUIDE DECISION MAKERS

- 14.21 The value of the principle of substituted judgment was also raised in relation to participation in medical research—that is, considering whether the person themselves would have chosen to participate in the research.¹⁹

DIFFERENT PROCEDURES

- 14.22 Ethics committee members observed that some research procedures are part of normal treatment, such research comparing the relative benefits of two routinely used procedures. This research is qualitatively different from trialling an unknown procedure, such as administering a new drug.²⁰
- 14.23 Some medical researchers also saw value in distinguishing between major and minor procedures, allowing minor research procedures to be undertaken without substitute consent.²¹ It was also noted that, because asking families to consent to minor medical research procedures at a time of stress and crisis can be distressing, it would be better to be able to obtain consent to participation in research a few days later.²²

15 Consultation with Alfred Hospital Ethics Committee & General Ethical Issues Sub-committee (3 March 2011); Submission CP 76 (Professor Rinaldo Bellomo).

16 Submission CP 19 (Office of the Public Advocate).

17 Submissions CP 23 (Dr Kristen Pearson) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

18 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

19 Submissions CP 23 (Dr Kristen Pearson) and CP 24 (Autism Victoria).

20 Roundtable with Ethics Committee representatives from the Alfred Hospital, Austin Health, Royal Melbourne Hospital and Office of the Public Advocate (17 May 2011).

21 Ibid.

22 Ibid.



ETHICS APPROVAL

14.24 Some people emphasised the important role played by human research ethics committees in approving and monitoring research.²³ The Catholic Archdiocese of Melbourne suggested that the process of substitute consent for participation could be strengthened by requiring human research ethics committee approval to be in accordance with the National Statement.²⁴

14.25 The Catholic Archdiocese said:

The *National Statement* limits research on a person who is unable to consent to low or negligible research procedures and requires that such research be for the benefit of the participant or at least a group to which the participant belongs. It would be helpful if these requirements were included in the G&A Act.²⁵

UN CONVENTION AND VICTORIAN CHARTER

14.26 Both the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention)²⁶ and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter)²⁷ deal with the issue of participation in medical research without consent.

14.27 The Convention provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.²⁸

14.28 Similarly, the *Charter* provides that:

A person must not be subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.²⁹

14.29 The Charter also acknowledges that human rights may be limited in some circumstances. Charter rights 'may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'.³⁰

14.30 There are a number of Victorian laws which authorise medical treatment without the full, free and informed consent of the person.³¹ It is arguable, however, that they impose reasonable and justifiable limits upon Charter rights.³²

OTHER JURISDICTIONS

14.31 Queensland and New South Wales are the only other Australian jurisdictions that have separate legislative provisions concerning substitute consent for participation in medical research. Tribunal approval is required in both states for participation in a medical research procedure by a person who is unable to consent.³³

²³ Ibid.

²⁴ Submission CP 27 (Catholic Archdiocese of Melbourne).

²⁵ Ibid.

²⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) ('*Convention on the Rights of Persons with Disabilities*').

²⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

²⁸ *Convention on the Rights of Persons with Disabilities* art 15(1).

²⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10(c).

³⁰ Ibid s 7(2).

³¹ See, eg, *Guardianship and Administration Act 1986* (Vic) pt 4A; *Mental Health Act 1988* (Vic); *Disability Act 2006* (Vic) pt 8; *Severe Substance Dependence Treatment Act 2010* (Vic).

³² For example, involuntary treatment under the *Mental Health Act 1986* (Vic), has been found to be Charter compliant: see *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [775]–[785].

³³ *Guardianship and Administration Act 2000* (Qld) s 72; *Guardianship Act 1987* (NSW) ss 45AA–45AB.

- 14.32 In New South Wales, the Guardianship Tribunal may approve the involvement in a clinical trial of patients who are unable to consent.³⁴ The Tribunal then determines if it needs to provide individual consent for participation by each patient in the trial, or if the person responsible for each patient can provide consent.³⁵
- 14.33 Queensland distinguishes between two categories of medical research: ‘approved clinical research’³⁶ and ‘special medical research or experimental health care’.³⁷ The Queensland Civil and Administrative Tribunal (QCAT) may approve clinical research generally. If this occurs, QCAT is no longer required to provide individual consent for participation in this ‘approved clinical research’.³⁸ Queensland’s definition of ‘approved clinical research’ specifically excludes ‘a comparative assessment of health care already proven to be beneficial’.³⁹
- 14.34 By contrast, participation in ‘special medical research or experimental health care’ requires QCAT consent in each case.⁴⁰
- 14.35 Both the New South Wales and Queensland legislation contain matters for the tribunals to consider when deciding whether to approve the proposed research procedure.⁴¹

THE COMMISSION’S VIEWS AND CONCLUSIONS

- 14.36 The 2006 amendments to the G&A Act, which streamlined the process for obtaining substitute consent for participation in a medical research procedure, were important developments in seeking to provide a balance between advancing medical knowledge and protecting vulnerable people from exploitation or unnecessary intrusion. The experience of dealing with these provisions over the past six years demonstrates that the process can be refined and improved.
- 14.37 As noted above, the consultation paper put forward two reform options in relation to medical research. The first was to retain the existing medical research consent procedures, but simplify them. The second was to apply the same procedures to obtaining consent for medical research as those that apply for obtaining consent for medical treatment. The Commission’s final reform recommendations amalgamate aspects of these options with the aim of simplifying the current procedures and making them more consistent with those used when seeking substitute consent for medical treatment.
- 14.38 The Commission believes that the current four-step process for authorising participation by a person in a medical research procedure, when that person is unable to consent to the procedure, is unnecessarily cumbersome and inappropriately delegates decision-making authority to researchers in some instances.
- 14.39 The existing process can be streamlined by distinguishing those medical research procedures that require legal authorisation from those that require authorisation in order to comply with the relevant human research ethical requirements. When a person with appropriate powers has authorised medical treatment for a person who is unable to consent to their own treatment⁴² and research is being conducted about

34 *Guardianship Act 1987* (NSW) s 45AA.

35 *Ibid* s 45AB.

36 *Guardianship and Administration Act 2000* (Qld) sch 2 pt 2 cl 13.

37 *Ibid* sch 2 pt 2 cl 12.

38 This is because, once approved, ‘approved clinical research’ is treated like other health matters, which do not require QCAT consent: *Guardianship and Administration Act 2000* (Qld) s 72.

39 *Guardianship and Administration Act 2000* (Qld) sch 2 pt 2 cl 13(1A).

40 *Ibid* s 72.

41 See *Guardianship Act 1987* (NSW) s 45AA; *Guardianship and Administration Act 2000* (Qld) s 72, sch 2 pt 2 cls 13(3)–(5).

42 Under current law, this would include a guardian or an enduring guardian with appropriate powers as well as a registered practitioner relying upon the emergency treatment powers in section 42A of the *Guardianship and Administration Act 1986* (Vic).



the efficacy of that treatment, it is legally unnecessary to also seek substitute consent to participation in research that is an adjunct to the treatment. This is because consent has already been given to conduct that would otherwise constitute an assault. In these circumstances, participation in any medical research should be governed by relevant ethical obligations imposed by the National Statement or any subsequent document that regulates research concerning humans.

- 14.40 The existing process can be improved by making the Public Advocate, rather than medical researchers, the substitute decision maker of last resort when the proposed medical research procedure is significant. The Commission proposes that, as with substitute consent to medical treatment, new guardianship legislation should distinguish between significant and routine procedures for the purposes of authorising participation by a person who is unable to make their own decision about the matter. Similar steps have been taken in Queensland to differentiate routine research from ‘special medical research or experimental health care’.⁴³

ETHICS COMMITTEE APPROVAL

- 14.41 The Commission believes that ethics committee approval should continue to be a mandatory prerequisite to using the statutory process for authorising participation in a medical research procedure by a person who is unable to consent to their own participation.
- 14.42 The National Statement is justifiably concerned with a much broader range of considerations than those of the law governing substitute consent to conduct that would otherwise constitute the crime and the tort of assault.
- 14.43 When the law has ensured that a substitute decision maker has authorised conduct that would otherwise be unlawful, the more detailed ethical prescriptions of the National Statement should govern the manner in which medical researchers interact with people who are unable to consent to their own participation in a medical research procedure.
- 14.44 This approach provides two layers of protection for vulnerable people and ensures that a broad array of sanctions is available when researchers fail to comply with their legal or ethical obligations. In many instances, professional sanctions will be more effective than those available to the criminal and civil courts when a researcher engages in research practices which are harmful to or disrespectful of a person who is unable to make their own decision about participation in a medical research procedure.
- 14.45 Whether Victorian law continues to refer to ethics committee approval in general terms, or whether it requires approval in accordance with the National Statement, is a matter for the Victorian Government when introducing new legislation, having regard to the status of the National Statement and the extent to which it binds all relevant ethics committees in Victoria.

LEGAL AUTHORISATION

Researching medical treatment

- 14.46 As explained earlier, the current process of requiring substitute consent to both medical treatment and medical research procedures when the efficacy of a particular mode of treatment is being researched is legally unnecessary, because in most instances only one procedure or interference with the body of another person is involved. While it would be unethical to allow research to be performed on a person without appropriate authorisation, no useful end is served by requiring dual legal authorisation for the one procedure.

⁴³ *Guardianship and Administration Act 2000* (Qld) s 72.

- 14.47 The medical treatment provisions of the legislation should govern legal consent in these circumstances, while the National Statement or some other similar set of ethical considerations should govern ethical consent to participation in the research procedure.
- 14.48 The Commission acknowledges that, in some circumstances, the boundary between treatment and research will not be clear. For example, in some instances it might be appropriate to take a small quantity of blood from a person for testing associated with medical treatment. The clinical staff involved in this process might also consider it desirable to take a small additional quantity of blood for use in some allied research procedure.
- 14.49 In this example, the substitute consent for the extraction of blood for treatment purposes would not extend to the extraction for research purposes because the act that has been authorised is only the taking of an amount of blood that is required for medical treatment purposes. Researchers would also need to follow the legal authorisation processes in order to take the additional quantity of blood. If, however, research was conducted on blood that had been taken solely for treatment purposes, the ethical requirements of the National Statement would apply.
- 14.50 The Public Advocate should be encouraged to publish guidelines prepared in consultation with relevant professional and consumer groups.

RECOMMENDATIONS

Medical research that is an adjunct to medical treatment

220. New guardianship legislation should clearly distinguish between a 'medical research procedure' that is an adjunct to 'medical treatment' and a 'medical research procedure' that is undertaken for the purposes of medical research and not primarily for the purpose of providing a medical intervention to treat a person's current condition.

221. When a 'medical research procedure' is carried out as an adjunct to 'medical treatment', the procedures dealing with substitute consent to 'medical treatment' should govern legal authorisation for the treatment and the requirements of the relevant ethics committee should govern ethical authorisation for the 'medical research procedure'.

New definitions

222. New guardianship legislation should indicate that:

- (a) Research that is carried out as an adjunct to 'medical treatment' is not a 'medical research procedure' for the purposes of requiring authorisation when a person is unable to consent to that research.
- (b) A procedure is not a 'medical research procedure' unless it is approved by an ethics committee.

SUBSTITUTE CONSENT

- 14.51 The existing provisions of the G&A Act dealing with substitute consent for participation in a medical research procedure do not distinguish between the role of a guardian and that of a person responsible. The two roles are blended in Step 3 of the process, as a guardian with health care powers simply becomes someone who can be the person responsible for authorising participation.



- 14.52 As the Commission pointed out in Chapter 13, it is not appropriate to regard a guardian with health care powers and a person responsible in the same way. Guardians have been specifically chosen by the person concerned or VCAT to make medical decisions for a person. A person responsible is automatically appointed because of their relationship to the person concerned, rather than following an individual determination of their suitability to make medical treatment decisions.
- 14.53 New guardianship legislation should continue to require substitute consent for participation in any medical research procedure by a person who is unable to make their own decisions about the matter. It should be possible for a person with capacity to appoint an enduring personal guardian to make decisions about this matter, or for VCAT to appoint an enduring guardian with these powers. In the event that there is no personal guardian with these powers, the automatically appointed health decision maker⁴⁴ should be able to make these decisions.

Significant procedures

- 14.54 The existing process can be improved by making the Public Advocate rather than medical researchers the substitute decision maker of last resort when the proposed medical research procedure is significant. The Public Advocate should be permitted to make decisions about participation in a significant medical research procedure for a person who is unable to make their own decisions and who does not have a personal guardian or health decision maker to make the decision for them. At present, researchers themselves make these decisions using the 'Step 4 – Procedural authorisation' process in the G&A Act.⁴⁵
- 14.55 Decisions about participation by vulnerable people in research procedures should be made by a public official, who is at arms-length from the research, when the procedures involved are significant because they are potentially harmful, intrusive or exploitative. In some instances, it could be very difficult for committed researchers to be sufficiently dispassionate and attuned to the interests of people who are unable to make their own decisions about participation in a research trial that might produce considerable benefits for the researchers.
- 14.56 Although the 2006 reforms simplified the unnecessarily cumbersome process of seeking VCAT approval for all participation in research procedures by people who are unable to consent, a public body should be involved in those cases where there is no substitute decision maker and the research procedure is significant because of its possible impact on people who are unable to protect their own interests.
- 14.57 While medical research should be encouraged, vulnerable people should be protected. As the United Kingdom Parliament said in its equivalent legislation: 'the interests of the person must be assumed to outweigh those of science and society'⁴⁶ in these circumstances.
- 14.58 The Commission recommends that new guardianship legislation should distinguish between 'significant' and 'routine' medical research procedures in the same way and for the same reasons as in substitute consent for medical treatment, discussed in Chapter 13. While the Public Advocate should be the substitute decision maker of last resort when dealing with participation in a significant medical research procedure, the registered practitioners involved in a medical research procedure should continue to be able to rely upon the procedural authorisation process when the procedure is routine.

44 See Chapter 13 for a discussion of this proposed title and role.

45 *Guardianship and Administration Act 1986* (Vic) s 42T.

46 *Mental Capacity Act 2005* (UK) s 33(3).

- 14.59 The Public Advocate should develop and publish guidelines, in consultation with relevant professional bodies and other interested organisations, to assist registered practitioners when determining whether a particular medical research procedure is 'significant' or 'routine'.

RECOMMENDATIONS

Substituted consent for participation in a medical research procedure

223. It should be possible for a person to appoint an enduring personal guardian to make decisions about their participation in a 'medical research procedure' when they do not have the capacity to make their own decisions about participation.
224. It should be possible for the tribunal to appoint a personal guardian with the power to make decisions about participation in a 'medical research procedure' for a person who does not have the capacity to make their own decisions about participation.
225. New guardianship legislation should permit a health decision maker to make decisions about participation in a 'medical research procedure' for a person who lacks the capacity to make their own decisions and who does not have an enduring personal guardian or a personal guardian with the power to make those decisions for them.
226. A personal guardian or an enduring personal guardian with 'medical research procedure' powers or a health decision maker should be permitted to authorise participation in a 'medical research procedure' for the principal when the principal lacks the capacity to make their own decision about the matter.
227. The Public Advocate should be permitted to authorise participation in a 'medical research procedure' which is a 'significant procedure' for a person who does not have the capacity to authorise their own participation and who does not have a personal guardian, an enduring personal guardian or a health decision maker to make that decision for them.
228. The 'procedural authorisation' process in the *Guardianship and Administration Act 1986* (Vic) should be reproduced in new guardianship legislation for the purpose of authorising participation in a 'medical research procedure' which is a 'routine procedure' for a person who does not have the capacity to authorise their own participation and who does not have a personal guardian, an enduring personal guardian or a health decision maker to make that decision for them.
229. The Public Advocate should develop and publish guidelines in consultation with relevant professional bodies and other interested organisations to assist registered practitioners when determining whether a particular medical research procedure is 'significant' or 'routine'.



RECOVERY WITHIN A REASONABLE PERIOD

- 14.60 The Commission recommends retaining the existing requirement that a medical research procedure should not be carried out on a person who cannot consent, if it would be reasonable to wait for the person concerned to make this decision. This is Step 2 in the current four-step G&A Act process discussed earlier in this chapter.⁴⁷
- 14.61 This step does not deny a person access to the best available treatment. If new treatment that is still in research trials to determine its efficacy were the best available option for a person who was unable to consent to that procedure, the substitute decision maker for medical treatment would have the power to decide whether to authorise that treatment.
- 14.62 If researchers seek participation in a medical research procedure by a person who is likely to regain capacity within a reasonable period to make their own decision, it is appropriate to delay any participation until that time.

RECOMMENDATION

Recovery within a reasonable period

230. Step 2 of the current four-step process for authorising the performance of a medical research procedure upon a person who is unable to make their own decisions about the matter should be reproduced in new guardianship legislation.

CONSIDERATIONS THAT GOVERN DECISIONS ABOUT PARTICIPATION

- 14.63 As noted earlier, different considerations currently govern the process of substitute decision making for participation in medical research compared to those that apply when making decisions about medical treatment. A substitute decision maker for medical treatment must be satisfied that the proposed treatment is in the person's 'best interests',⁴⁸ whereas a substitute decision maker for participation in a medical research procedure must be satisfied that the proposed research procedure 'would not be contrary' to the person's best interests.⁴⁹
- 14.64 The Commission believes that this different guiding consideration should remain, subject to some modifications and additions. In Chapter 17, the Commission proposes that the concept of 'best interests' be replaced by 'promoting the personal and social wellbeing' of the person concerned. Consequently, substitute decision makers for participation in a medical research procedure should authorise participation only when they believe that it would not be contrary to the patient's personal and social wellbeing to participate.
- 14.65 Two additional considerations should guide the substitute decision maker. Throughout the report, the Commission has emphasised the growing significance of the principle of substituted judgment—that is, seeking to make the decision that the represented person would have made in the circumstances. Many members of the community hold strong views about their willingness, or unwillingness, to participate in medical research. The likely response of the represented person, if known, is clearly a matter that should guide any decision by a substitute decision maker.

⁴⁷ *Guardianship and Administration Act 1986* (Vic) s 42R.

⁴⁸ *Ibid* s 42H(2).

⁴⁹ *Ibid* ss 42S(3), 42T(2)(c), 42U.

14.66 The National Statement refers to the likely benefit to the patient, or to a class of people to which the patient belongs, as a relevant ethical consideration. This matter should also be a relevant legal consideration when a substitute decision maker is deciding whether to authorise participation in a medical research procedure by a person who is unable to make their own decision about the matter.

RECOMMENDATION

Criteria for consenting to a medical research procedure

231. A substitute decision maker should only be permitted to authorise participation in a medical research procedure if they believe that it would not be contrary to the patient's personal and social wellbeing to participate in that procedure. When determining whether the procedure would not be contrary to the patient's personal and social wellbeing, the following are relevant considerations:

- (a) the decision that the person might have made in the circumstances
- (b) the extent to which the procedure is likely to benefit the patient, or a class of people to which the patient belongs
- (c) the matters set out in section 42U(1) of the *Guardianship and Administration Act 1986* (Vic).



Chapter 15

Restrictions upon liberty in residential care

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Restrictions upon liberty in residential care



INTRODUCTION

- 15.1 In this chapter, the Commission considers means of providing appropriate safeguards for people with impaired decision-making ability who are living in certain residential facilities in circumstances that involve substantial restrictions upon their freedom of movement.
- 15.2 At present, many people who lack capacity to make decisions about their accommodation arrangements live in facilities, such as nursing homes, with the informal consent of a close family member, or other unpaid carer. Some people who live in residential facilities are detained in their ward or room in order to prevent them from leaving and exposing themselves to serious risk, such as that posed by traffic on busy roads. Others are detained in their beds or chairs in order to prevent them from falling and causing serious injury to themselves.
- 15.3 There is no common law or statutory power permitting the family member or friend to provide substituted consent to these practices. There is no statutory power, nor any clear common law power,¹ that permits the staff at the residential facility to undertake these practices. The family members or unpaid carers who are often asked to approve these arrangements act as 'de facto' guardians. However, unlike enduring guardians or guardians appointed by the Victorian Civil and Administrative Tribunal (VCAT), there is no formal recognition of their role or scrutiny of informal arrangements involving restraint of liberty.
- 15.4 The number of people in supported residential care is likely to grow quite substantially over the next two decades as the community ages and life expectancy increases. It will be an ongoing challenge to devise fair, efficient and practical safeguards for the many people who are likely to need someone to decide where they will live and, in some instances, whether they should be detained or restrained for their own welfare. Appointing guardians for all the people who lack capacity to consent to these practices would probably place an unsustainable demand on VCAT and the Public Advocate.
- 15.5 In 1982, the Cocks Committee² reported that the family of a person who is unable to make particular decisions can often provide informal consent to various actions without the need for a guardianship order. While the Commission supports the continued use of informal practices in some circumstances, it is necessary to review their continued use when dealing with some practices that involve significant restrictions upon fundamental liberties.
- 15.6 As discussed in Chapter 4, disability policy and attitudes to legal risk have changed quite substantially in the 30 years since the Cocks Committee reported. It is no longer appropriate to rely on informal consent by family members when dealing with residential decisions that involve total restraint of a person's liberty. Because liberty is a value of paramount importance in our community, it is strongly arguable that actions involving total loss of liberty should be authorised by a process that involves appropriate checks and balances.
- 15.7 Many statutes and common law rights protect liberty. They include:
- the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Charter)³
 - the writ of *habeas corpus*
 - the tort of false imprisonment

¹ In some cases, a court may find that the legality of such arrangements rests on the common law doctrine of necessity. This was the approach of the House of Lords in *R v Bournewood Community and Mental Health NHS Trust; Ex parte L* [1999] ('*Bournewood*') 1 AC 458. We discuss the implications of the *Bournewood* case below.

² Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982).

³ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 21.

- the legislative safeguards under the *Disability Act 2006* (Vic) for people with an intellectual disability who are subject to compulsory treatment involving detention⁴
 - the legislative safeguards on the use of restrictive interventions, especially restraint and seclusion, for people with a disability as defined under the *Disability Act*⁵
 - the legislative safeguards for people subject to involuntary detention under the *Mental Health Act 1986* (Vic)⁶
 - the legislative safeguards on the use of restraint and seclusion for people receiving treatment for a mental disorder under the *Mental Health Act*.⁷
- 15.8 The Commission’s recommendations in this chapter seek to strike a balance between ensuring there are appropriate safeguards in situations where a person is deprived of their liberty, and avoiding unnecessary administrative burdens for residential care facilities, especially when there is little tangible benefit gained by replacing workable and fair informal arrangements with expensive bureaucratic ones. For this reason, the recommendations in this chapter deal only with safeguards for practices that will result in a total restraint of a person’s liberty. In other instances, people involved in residential care decisions for a person who lacks capacity to consent to their own living arrangements will need to decide on a case-by-case basis whether it is appropriate to rely upon informal consent to those arrangements or whether a personal guardian should be appointed.
- 15.9 The lack of adequate safeguards for people who are unable to consent to admission to an institution but do not resist that step became an important issue in the United Kingdom following *R v Bournewood Community and Mental Health NHS Trust; Ex parte L (Bournewood)* in 2005.⁸ In 2009, the United Kingdom Government introduced the Deprivation of Liberty Safeguards⁹ in response to the European Court of Human Rights’ decision in *Bournewood*, which found that a man’s informal admission to and subsequent detention in a hospital was a deprivation of his liberty and a violation of article 5(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention).¹⁰
- 15.10 The *Bournewood* case and the Deprivation of Liberty Safeguards are discussed in more detail below.
- 15.11 It is possible that a similar case could arise in Victoria because the Charter contains a similar provision to article 5(1) of the European Convention.¹¹ In contrast with the United Kingdom however, where people can bring claims against public authorities under the *Human Rights Act 1998* (UK) for breaches of the rights in the European Convention,¹² there is no independent cause of action under the Charter. Any claim under the Victorian Charter concerning circumstances that were similar to those in the *Bournewood* case would need to be linked to a pre-existing cause of action.¹³

4 *Disability Act 2006* (Vic) pt 8.

5 *Ibid.*

6 *Mental Health Act 1986* (Vic). See especially pts 3–4.

7 *Mental Health Act 1986* (Vic) ss 81–2.

8 *R v Bournewood Community and Mental Health NHS Trust; Ex parte L* [1999] 1 AC 458; *HL v United Kingdom* (2005) 40 EHRR 32. We refer to the European Court of Human Rights case as ‘*Bournewood*’.

9 *Mental Capacity Act 2005* (UK) c 9, ss 4A, 4B, schs A1, 1A. The new legislative scheme was inserted into the *Mental Capacity Act 2005* (UK) c 9 by the *Mental Health Act 2007* (UK) c 12, s 50, schs 7–9.

10 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) (‘*European Convention*’).

11 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21. A similar case has recently arisen in New South Wales, *Darcy v New South Wales* [2010] NSWDC 210.

12 *Human Rights Act 1998* (UK) ss 6–7.

13 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(1).

Restrictions upon liberty in residential care



CURRENT LAW, STANDARDS AND PRACTICES

- 15.12 Liberty is one of the most important values protected by the common law.¹⁴ Any interference with a person's liberty is unlawful unless it is authorised by law.¹⁵ The common law has developed causes of action—an application for a writ of *habeas corpus* and the action for false imprisonment—that allow people to test the lawfulness of any deprivation of liberty and that provide remedies when a person is found to have been unlawfully deprived of their liberty.
- 15.13 Deprivations of liberty are authorised by statute in various circumstances, such as when a person is apprehended or arrested by the police,¹⁶ or sentenced by a court to a term of imprisonment following conviction for an offence.¹⁷ Some deprivations of liberty are also authorised by legislation in health and disability settings, such as decisions by an authorised psychiatrist to detain a person with a mental illness in an approved mental health service,¹⁸ or decisions by the Secretary to the Department of Human Services to authorise restrictive interventions for a person with an intellectual disability.¹⁹
- 15.14 A guardian appointed by VCAT or an enduring guardian with appropriate powers is also able to authorise deprivations of liberty in some circumstances. For example, a guardian with appropriate powers could authorise accommodation arrangements for the represented person which involve that person living in a locked ward or facility, or which permit that person to be strapped in a chair or bed when necessary to safeguard the person's welfare.

HABEAS CORPUS

- 15.15 Both *habeas corpus* and the action for false imprisonment are open to all people who face unauthorised restrictions on their liberty in any settings, except where the deprivation of liberty is authorised by law.
- 15.16 *Habeas corpus* is one of the common law's oldest causes of action²⁰ and allows a person to challenge the legality of their deprivation of liberty. It was recently successfully invoked in Victoria in *Antunovic v Dawson & Anor (Antunovic)*.²¹
- 15.17 Justice Bell said in that case:

The purpose of the writ is to give a remedy against unlawful restraints on personal liberty, which is not to be narrowly defined. The restraint may be imposed directly or indirectly. It may be partial or total. The question is whether the person imposing the restraint has the lawful custody, power or control of the person being restrained. The liberty protected by common law *habeas corpus* is broader than the liberty protected by the human right to personal liberty and security in s 21(1) of the Charter. For the purposes of *habeas corpus*, it is a restraint on personal liberty to imprison or detain somebody and also to impose restrictions on their liberty or freedom of movement which are not shared by the public generally. That freedom is a human right specified in s 12 of the Charter.²²

14 There is a useful discussion of the relevant common law rules in Jeremy Gans, Terese Henning, Jill Hunter and Kate Warner, *Criminal Process and Human Rights* (2011) Chapter 4.

15 See, eg, *Williams v R* (1986) 161 CLR 278 [8].

16 Section 459 of the *Crimes Act 1958* (Vic) permits members of the police force to apprehend and arrest people in certain circumstances. Other sections of the *Crimes Act* that allow a person to apprehend another include s 458, which allows a person to apprehend a person found to be committing an offence for the purposes of bringing him or her before a court; and s 463B, which allows a person to use reasonable force to prevent an action that may amount to suicide.

17 Section 6A of the *Corrections Act 1986* (Vic) authorises the Secretary of the Department of Justice to detain in custody a person who has been sentenced to a term of imprisonment.

18 *Mental Health Act 1986* (Vic) s 12AC.

19 *Disability Act 2006* (Vic) s 135.

20 See the comprehensive discussion of the writ's development in Australia in Ian Freckleton, 'Habeas Corpus and Involuntary Detention of Patients with Psychiatric Disorders' (2011) 18 *Psychiatry, Psychology and Law* 473, 474, and also Jeremy Gans, Terese Henning, Jill Hunter and Kate Warner, *Criminal Process and Human Rights* (Federation Press, 2011) 159.

21 *Antunovic v Dawson & Anor* [2010] VSC 377.

22 *Ibid* [113]. Citations omitted from the original.

15.18 Although the plaintiff was not subjected to any physical restraint in *Antunovic*, the Court accepted her evidence that she felt that she was unable to leave the premises in which she was residing without the permission of her psychiatrist. Justice Bell described it as ‘partial not total restraint’ and stated that ‘[b]ecause of the power which the doctor and the unit have over her, Mrs Antunovic feels unable simply to leave the unit and go home’.²³ The Court found that Mrs Antunovic had been unlawfully restrained and ordered her release.

15.19 The Victorian case of *Skyllas v Retirement Care Australia*²⁴ also involved a writ of *habeas corpus* sought against an aged care facility on behalf of an elderly woman, Mrs Skyllas, who wished to live in her own home with her son. Justice Byrne ruled that:

As a matter of law the nursing home cannot detain a patient against her wishes and the first defendant did not contend otherwise. This situation assumes that the patient is able to express her wishes and that she has control of her affairs and decision-making processes. Accordingly, on 26 July 2006, I ordered that a writ of *habeas corpus* issue returnable on 2 August 2006.

When the matter returned before me on that day it appeared that VCAT had on 1 August 2006, appointed the Public Advocate to be plenary guardian of Mrs Skyllas. A representative of the Public Advocate attended Court in response to the writ and I accepted this as sufficient response to the writ, given the health of Mrs Skyllas.²⁵

FALSE IMPRISONMENT

15.20 False imprisonment is a tort, or civil wrong, that is committed whenever a person directly, and either intentionally, negligently or recklessly, causes the total restraint of the liberty of another person without lawful justification. While false imprisonment is a form of trespass, it is not necessary for there to be actual force or direct physical contact. The tort is committed when a person’s liberty is restrained by means which causes them to submit to their deprivation of liberty.²⁶

STATUTORY AUTHORITY TO DEPRIVE LIBERTY

15.21 A range of statutes authorise people to deprive others of their liberty in some circumstances. Some of these authorisations concern detention of people with a disability in limited circumstances. These statutory authorisations are usually accompanied by checks and balances that seek to ensure that the powers of detention are exercised fairly and responsibly.

Mental Health Act

15.22 The Mental Health Act provides for involuntary treatment and detention of some people with a mental illness²⁷ in certain circumstances.²⁸ The Commission examines this scheme more closely in Chapter 24.

15.23 The Mental Health Act provides a number of safeguards for involuntary detention and treatment that include:

- the authorised psychiatrist must examine the person within 24 hours after the order is made to determine if the criteria for involuntary treatment are met and either confirm the order or discharge the person²⁹

²³ *Antunovic v Dawson & Anor* [2010] VSC 377, [174].

²⁴ *Skyllas v Retirement Care Australia* (Preston) Pty Ltd [2006] VSC 409.

²⁵ *Ibid* [9]–[10]. A guardian was subsequently appointed to make these decisions.

²⁶ John G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 33–7.

²⁷ *Mental Health Act 1986* (Vic) s 8(1)(A) defines a person as mentally ill ‘if he or she has a mental illness, being a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory’. Section 8(2) specifies a number of circumstances that by themselves or in combination will not amount to a mental illness.

²⁸ *Mental Health Act 1986* (Vic) pt 3.

²⁹ *Ibid* s 12AC.

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- appeals against involuntary treatment orders and continued detention under the Act
- compulsory reviews by the Mental Health Review Board.³⁰

15.24 The compulsory detention provisions in the Mental Health Act apply only to people being treated in 'approved mental health services', which are, in most instances, psychiatric wards in general hospitals.

Disability Act

15.25 The Disability Act establishes a framework for providing support and services to people with disabilities throughout Victoria. Most of the Disability Act's provisions apply to people with a broad range of disabilities but do not extend to people who have a mental illness or disabilities solely related to ageing.³¹ It contains provisions regarding compulsory detention and treatment that apply only to people with an intellectual disability.³²

15.26 The Senior Practitioner is generally responsible for ensuring that the rights of a person who is subject to restrictive interventions and compulsory treatment under the Disability Act are protected and that appropriate standards are followed.³³

15.27 Safeguards for the use of restrictive interventions for restraint and seclusion include:

- a requirement that disability service providers have approval from the Secretary to use restrictive interventions³⁴
- the appointment of an Authorised Program Officer to a disability service provider to ensure that any restrictive intervention is done in a manner that conforms to the requirements of the Act³⁵
- a monitoring role for the Senior Practitioner.³⁶

15.28 Restraint and seclusion is limited to situations involving risk of harm to the person or other people.³⁷ It must be the least restrictive treatment of the person as possible in the circumstances.³⁸ It must be part of a behaviour management plan³⁹ and only be applied for the period of time that has been authorised by the Authorised Program Officer.⁴⁰ Additional criteria apply to the use of seclusion.⁴¹

15.29 The Authorised Program Officer must ensure that an independent person is available to explain to a person with a disability the treatment that forms part of the behaviour management plan and that the person with a disability knows they can seek a review in VCAT of the decision to include that treatment in the behaviour management plan.⁴²

REGULATION OF RESIDENTIAL SERVICES

15.30 Both Commonwealth and Victorian legislation regulate the provision of residential services for people who experience impaired decision-making ability due to a disability.

30 Ibid ss 29–30.

31 *Disability Act 2006* (Vic) s 3 (definition of 'disability').

32 *Disability Act 2006* (Vic) s 152(1)(a).

33 Ibid s 23(2)(a).

34 Ibid s 135.

35 Ibid s 139.

36 Ibid s 150.

37 Ibid s 140(a).

38 Ibid s 140(b).

39 Ibid ss 140(c)(i), 141.

40 Ibid s 140(c)(iii).

41 Ibid s 140(d).

42 Ibid ss 143(1), 146.

Commonwealth legislation regulates the provision of aged care services while Victorian legislation regulates the provision of supported residential services that are often used by people with an intellectual disability or mental illness.⁴³

- 15.31 While the legislation contains detailed provisions concerning standards of care, it does not authorise a person to detain or restrain a resident who might be at risk of harm if their liberty was not restrained in some way.

Aged Care Act 1997 (Cth)

- 15.32 The *Aged Care Act 1997* (Cth) applies to all services approved for Commonwealth Residential Care Subsidy. The Aged Care Act enables the development of Accreditation Standards⁴⁴ with which a service must comply in order to be eligible for the Residential Care Subsidy.⁴⁵

- 15.33 Accreditation Standards prescribe 44 'expected outcomes', generally in quite broad terms, across four areas:⁴⁶

- **Standard 1:** Management systems, staffing and organisational development
- **Standard 2:** Health and personal care
- **Standard 3:** Resident lifestyle
- **Standard 4:** Physical environment and safe systems.

- 15.34 Standards are applied through self-assessments by the service and by visits, both announced and unannounced, by teams of assessors.

Supported Residential Services (Private Proprietors) Act 2010 (Vic)

- 15.35 The *Supported Residential Services (Private Proprietors) Act 2010* (Vic) (the SRS Act) applies, subject to some exceptions, to premises where accommodation and personal support are privately provided or offered for a fee or reward.⁴⁷

- 15.36 The SRS Act, upon proclamation in 2012, will replace the current regulatory regime for supported residential services provided under the *Health Services Act 1988* (Vic) and the Health Services (Supported Residential Services) Regulations 2001.

- 15.37 The SRS Act makes it an offence to operate a supported residential service that is not registered under the Act.⁴⁸ It details the rights of residents of supported residential services⁴⁹ and puts limits on the restriction of those rights, requiring that:

- the restriction is necessary
- where there is more than one option available in implementing the restriction, the least restrictive option is chosen.⁵⁰

43 Clearly, not all people who live in aged care facilities or supported residential services experienced impaired decision-making ability.

44 *Aged Care Act 1997* (Cth) s 54.2.

45 *Ibid* s 42.1.

46 For full details on the Commonwealth Aged Care Accreditation system, see the website of the Aged Care Standards and Accreditation Agency Ltd <<http://www.accreditation.org.au>>.

47 Some premises are excluded. They are where the services provided receive the Commonwealth Residential Care Subsidy; where it is used for residential services under the *Disability Act 2006* (Vic); where it is used for an appropriate mental health service under the *Disability Act 2006* (Vic); where it is used for an approved mental health service under the *Mental Health Act 1986* (Vic); where it is used for services (secure welfare of out of home care) under the *Children Youth and Families Act 2005* (Vic); where accommodation and personal support is provided to all residents under a funding and service agreement with State or Commonwealth or a public body where that agreement specifies requirements or standards for the provision of care that are recorded in the Register under the *Retirement Villages Act 1986* (Vic); *Supported Residential Services (Private Proprietors) Act 2010* (Vic) s 5.

48 *Supported Residential Services (Private Proprietors) Act 2010* (Vic) s 9.

49 *Ibid* s 7.

50 *Ibid* s 8.

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- 15.38 The Act also includes provisions about the general operation of supported residential services, detailing:
- residential and service agreements⁵¹
 - support plans⁵²
 - health and support standards⁵³
 - medication⁵⁴
 - staffing⁵⁵
 - complaints⁵⁶
 - reporting and records⁵⁷
 - management of residents' money⁵⁸
 - security of tenure.⁵⁹
- 15.39 The Act empowers the Secretary of the Department of Health to monitor services, including powers to enter premises and to direct services to provide documents and answer questions.⁶⁰

AGED CARE ASSESSMENT SERVICE

- 15.40 An Aged Care Assessment Service (ACAS) assessment is mandatory for an older person who seeks access to Commonwealth-subsidised aged care services, including residential respite, community aged care packages, extended aged care in home packages or flexible care.⁶¹
- 15.41 An ACAS assessment occurs as part of the admission process to many aged care facilities in Victoria. However, an ACAS assessment does not specifically address formal substitute decision-making arrangements when a person with impaired decision-making ability is admitted to an aged care residential facility.

The ACAS process

- 15.42 ACAS assessments generally take place before admission to an aged care facility. In some cases, people who are already in residential care are referred to ACAS for further assessment. This may occur for various reasons, including because the client wants to return home, the facility or family consider there is a need for a move to high-level care, or sometimes because the facility finds it difficult to meet the person's needs.⁶²
- 15.43 ACAS assessors are independent teams who assess the care needs of older people and identify what kind of care will best meet their needs.⁶³ Assessment teams are multi-disciplinary and can include medical practitioners, social workers, nurses, occupational therapists and physiotherapists.⁶⁴

51 Ibid ss 47–55.

52 Ibid ss 56–8.

53 Ibid ss 59–62.

54 Ibid s 63.

55 Ibid ss 64–74.

56 Ibid s 75.

57 Ibid ss 76–8.

58 Ibid ss 79–106.

59 Ibid ss 107–129.

60 Ibid ss 130–155.

61 Department of Health (Victoria), *Aged Care in Victoria: The Aged Care Assessment Service (ACAS)* (19 September 2011) <<http://www.health.vic.gov.au/agedcare/services/assess.htm>> ('*Aged Care in Victoria*').

62 Consultation with Aged Care Assessment Service in Victoria (28 February 2011).

63 *Aged Care in Victoria*, above n 61.

64 Ibid.

- 15.44 There are a number of steps in the ACAS process. They are:
- referral to intake for assessment screening and triaging
 - information gathering (involving risk screening and prioritising for response urgency)
 - a comprehensive assessment examining physical capability, cognitive and behavioural issues, social environmental factors and physical environmental factors, which is done through the face-to-face component of the assessment
 - consultation with the client, and with any family, advocates and relevant professionals, such as the client's general practitioner.⁶⁵ The assessment is holistic and incorporates need, risk and capacity.⁶⁶
- 15.45 A multidisciplinary discussion will then lead to the development of a 'care plan' and the outcome may result in eligibility for Commonwealth-funded programs.⁶⁷
- 15.46 Decisions about admission to care are made primarily on the basis of risk. People with frequent admissions to hospital are often considered at greater risk and are often recommended for residential aged care.⁶⁸
- 15.47 Capacity issues do not always arise in an ACAS assessment. If they do arise, various professionals such as a general practitioner, a geriatrician, or a neuropsychologist might assess a person's capacity to make their own decisions.⁶⁹
- 15.48 At times, guardianship or administration applications are made in the course of the assessment process. In appropriate cases, ACAS will apply to VCAT for an order. In other cases, ACAS assists family members to make an application.⁷⁰

The ACAS process does not extend to all care facility beds

- 15.49 People who are living in supported residential services or private retirement villages do not go through the ACAS process for admission to those facilities. However, care and support issues might arise while they are living there and this can trigger an ACAS assessment.⁷¹
- 15.50 There are some aged care facilities that have 'unlicensed' aged care beds. These beds do not require an ACAS assessment because they are ineligible for a Commonwealth Government subsidy.⁷²

THE BOURNEWOOD CASE IN THE UNITED KINGDOM

- 15.51 The challenges that arise when there is no legal authorisation for actions taken in relation to people with impaired decision-making ability that amount to a deprivation of their liberty were highlighted in the *Bournewood* case in 2005 and the United Kingdom Government's response to the decision of the European Court of Human Rights.⁷³
- 15.52 As noted earlier, a similar case could arise in Victoria because of the similarities between the common law rules in both jurisdictions and because there are comparable provisions in the Charter to those in the European Convention.

65 Consultation with Aged Care Assessment Service in Victoria (28 February 2011).

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 *R v Bournewood Community and Mental Health NHS Trust; Ex parte L* [1999] 1 AC 458; *HL v United Kingdom* (2005) 40 EHRR 32.

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BACKGROUND TO THE *BOURNEWOOD* CASE

- 15.53 HL was a 48-year-old man who was informally admitted to and detained at Bournewood Hospital. He was described by the European Court of Human Rights as a person who ‘has suffered from autism since birth’, as ‘frequently agitated’ with ‘a history of self-harming behaviour’ and as ‘a person who lacks the capacity to consent or object to medical treatment’.⁷⁴
- 15.54 No one sought to rely upon any statutory authority for HL’s living arrangements at Bournewood Hospital because the practice at the time was not to invoke any statutory powers when a person in his position was not resisting those arrangements. HL’s former carers, who disagreed with the arrangements made for him at Bournewood Hospital, arranged for proceedings to be taken on his behalf, claiming a writ of *habeas corpus* and damages for false imprisonment.
- 15.55 These proceedings were unsuccessful in the United Kingdom. A series of cases culminated in a decision by the House of Lords that any actions taken by hospital staff to detain HL that ‘might otherwise have constituted an invasion of his civil rights, were justified on the basis of the common law doctrine of necessity’.⁷⁵ At the time of this decision, the only source of statutory authority to detain a person in a hospital in the United Kingdom was the *Mental Health Act 1983* (UK)—there was no legislation similar to the *Guardianship and Administration Act 1986* (Vic) (G&A Act).
- 15.56 An application was lodged with the European Court of Human Rights challenging the decision of the House of Lords.

EUROPEAN COURT OF HUMAN RIGHTS DECISION: *HL V UNITED KINGDOM*⁷⁶

- 15.57 The European Court of Human Rights found that the admission of HL to Bournewood Hospital and his subsequent detention was a deprivation of his liberty and a violation of article 5(1) of the European Convention.⁷⁷ The relevant parts of article 5(1) provide that:
- Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.
- 15.58 The European Convention applies a number of qualifications to the right to liberty. One of the exceptions is ‘the lawful detention ... of persons of unsound mind’.⁷⁸ However, to be lawful, the detention must be ‘in accordance with a procedure prescribed by law’.⁷⁹
- 15.59 In determining if HL had been unlawfully deprived of his liberty, the European Court of Human Rights considered the following three issues:
- Was HL detained?
 - Was HL of unsound mind?
 - Was the detention unlawful?
- 15.60 The European Court found that HL was detained because the health care professionals treating and managing him ‘exercised complete and effective control over his care and movements’.⁸⁰ He ‘was under continuous supervision and control and was not free to leave’.⁸¹

⁷⁴ *HL v United Kingdom* (2005) 40 EHRR 32 [1].

⁷⁵ *R v Bournewood Community and Mental Health NHS Trust; Ex parte L* [1998] All ER 289, 299.

⁷⁶ *HL v United Kingdom* 40 EHRR 32.

⁷⁷ European Convention.

⁷⁸ *Ibid* art 5(1)(e).

⁷⁹ *Ibid* art 5(1).

⁸⁰ *HL v United Kingdom* (2005) 40 EHRR 32, 792.

⁸¹ *Ibid* 793.

- 15.61 The Court also accepted that HL was of unsound mind.⁸² The remaining question was whether the detention was lawful.
- 15.62 The decision emphasises that the essential objective of article 5(1) of the European Convention is ‘to prevent individuals being deprived of their liberty in an arbitrary fashion’.⁸³ The Court stressed that this objective, combined with the general requirement that the detention be ‘in accordance with a procedure prescribed by law’, required ‘the existence in domestic law of adequate legal protections and “fair and proper procedures”’.⁸⁴
- 15.63 The Court determined that the detention was unlawful because there were insufficient procedural safeguards to guard against arbitrary detention. It emphasised the lack of fixed rules for the admission and detention of compliant people and the strong contrast with the extensive network of safeguards for involuntary patients under the *Mental Health Act 1983* (UK).⁸⁵
- 15.64 The European Court of Human Rights also determined that there had been a breach of HL’s article 5(4) right to a speedy review of the lawfulness of his detention. Article 5(4) provides that:
- Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.⁸⁶

RESPONSE TO THE ‘BOURNEWOOD GAP’ IN THE UNITED KINGDOM

- 15.65 The decision to admit HL to Bournemouth Hospital complied with the Code of Practice under the *Mental Health Act 1983* (UK), which mandated informal admission when a person is mentally incapable of consent but does not object to entering hospital and receiving care or treatment.⁸⁷ The *Bournemouth* decision meant, however, that there was a large group of people who were being deprived of their liberty contrary to article 5(1) of the European Convention.
- 15.66 The United Kingdom Government sought to identify which groups of people were affected and in which settings they might be found. In addition to people like HL, who had been admitted to hospital informally, an additional group of people was identified as possibly falling within the ‘Bournemouth gap’. This group included many people with dementia who resided in non-hospital settings such as care homes.⁸⁸
- 15.67 The United Kingdom considered three possible responses to the *Bournemouth* decision:
- introduce a new ‘protective care’ system to govern admission and detention procedures as well as reviews of detention and appeals⁸⁹
 - extend the use of detention under the *Mental Health Act 1983* (UK) to the Bournemouth group of patients⁹⁰
 - use existing arrangements for guardianship under the *Mental Health Act 1983* (UK).⁹¹

82 Ibid 796.

83 Ibid 799.

84 Ibid.

85 Ibid 800–1.

86 Article 5 of the European Convention on Human Rights is expressed in very similar terms to the right to liberty and security of the person provided by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(1)–(3), discussed in more detail later in this chapter.

87 See Department of Health (United Kingdom), *Bournemouth Consultation: The Approach to be Taken in Response to the Judgment of the European Court of Human Rights in the ‘Bournemouth’ Case* (2005) 3 [2.2] (‘Bournemouth Consultation’).

88 Ibid 4, 22–3.

89 Ibid 8.

90 Ibid 13.

91 Ibid 14.

Restrictions upon liberty in residential care



- 15.68 Following consultations,⁹² the United Kingdom Government decided to introduce a ‘protective care’ system in the *Mental Capacity Act 2005* (UK), which is broadly equivalent to the G&A Act. The Deprivation of Liberty Safeguards came into force on 1 April 2009.⁹³ They seek to ‘provide a proper legal process and suitable protection in those circumstances where deprivation appears to be unavoidable, in a person’s own best interests’.⁹⁴ They do not cover deprivations of liberty in supported accommodation, a private residence, or for people under the age of 18.⁹⁵ They do not apply to people detained under the *Mental Health Act 1983* (UK).⁹⁶
- 15.69 The Deprivation of Liberty Safeguards seek to ensure that people who are or who may be deprived of their liberty in a hospital or care home are identified and that the decision to deprive them of liberty is externally reviewed and authorised, even if the person is not actively seeking liberty. Once a person in this situation is identified, an assessment process is carried out by between two and six assessors who each report separately to the supervisory body that commissions the assessments. If all the requirements are met, an authorisation must be issued. The safeguards are unusual because authority for a person’s deprivation of liberty is provided by a combination of these various clinicians rather than by a court, tribunal or statutory official.⁹⁷
- 15.70 The majority of applications in England for authorisations under Deprivation of Liberty Safeguards have been made for people who lack capacity because of dementia. In 2009–10, there were 7157 applications and in 2010–11 there were 8982 applications. Approximately half of the applications were for people who lacked capacity because of dementia.⁹⁸
- 15.71 The Commission has been mindful of the complexity and costs associated with the United Kingdom Government’s response to *Bournewood*—the Deprivation of Liberty Safeguards—when devising recommendations concerning a process of legal authorisation that provides appropriate safeguards when people with impaired decision-making ability who live in residential care facilities are deprived of their liberty.

POTENTIAL APPLICATION OF THE *BOURNEWOOD* CASE IN VICTORIA

- 15.72 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) protects a person’s right to liberty and security. It provides that:
- every person has the right to liberty and security
 - a person must not be subjected to arbitrary arrest or detention
 - a person must not be deprived of their liberty except on grounds, and in accordance with procedures, established by law.⁹⁹

92 Consultations took place between March and June 2005. The Government received 108 responses from a wide range of groups and individuals. See *ibid* 3, 17–20.

93 *Mental Capacity Act 2005* (UK) c 9, ss 4A, 4B, schs A1, 1A. The new legislative scheme was inserted into the *Mental Capacity Act 2005* (UK) c 9 by the *Mental Health Act 2007* (UK) c 12, s 50, schs 7, 8, 9.

94 Ministry of Justice (United Kingdom), *Deprivation of Liberty Safeguards: Code of Practice to Supplement the Main Mental Capacity Act 2005 Code of Practice* (2008) 9–10 (*‘Deprivation of Liberty Safeguards: Code of Practice’*).

95 This situation would generally fall under the *Children Act 1989* (UK) c 41, s 25. In some situations it would be appropriate to use the *Mental Health Act 1983* (UK) c 20: see *ibid* 12.

96 *Mental Health Act 1983* (UK) c 20. The determination of whether someone is ineligible for the safeguards is made under the *Mental Capacity Act 2005* (UK) c 9, sch 1A. For a recent discussion of the problematic relationship between the *Mental Health Act 1983* (UK) c 20 and the ineligibility provisions for the Deprivation of Liberty Safeguards contained in the *Mental Capacity Act 2005* (UK) c 9, sch 1A see Neil Allen, ‘The Bournewood Gap (As Amended?)’ (2010) 18 *Medical Law Review* 78.

97 The Commission will publish a background paper on its website about Deprivation of Liberty Safeguards in the UK and safeguards in other jurisdictions.

98 National Health Service Information Centre, Community and Mental Health, *Mental Capacity Act 2005 Deprivation of Liberty Safeguard Assessments (England): First Report on Annual Data 2009/10* (2010) 3 (*‘Mental Capacity Act 2005 Deprivation of Liberty Safeguard Assessments’*).

99 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 21(1)–(3).

- 15.73 It also provides that any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of their detention. The court must make a decision without delay and order the release of the person if it finds that the detention is unlawful.¹⁰⁰ This Charter entitlement mirrors the common law right to challenge the lawfulness of detention by seeking a writ of *habeas corpus*.
- 15.74 These provisions in the Charter have very similar wording to the right to liberty in article 5 of the European Convention that was central to the European Court’s decision in *Bournemouth*.
- 15.75 Given the similarities between article 5 of the European Convention and section 21 of the Charter, it is possible that Charter proceedings against a ‘public authority’ in relation to a person without capacity who is effectively detained in a hospital or nursing home without formal authorisation could produce a similar result to the *Bournemouth* case.¹⁰¹
- 15.76 It is important to note that the Charter, unlike the European Convention, specifies that a person cannot bring an action against a public body based solely on a Charter right but must rely on an existing cause of action.¹⁰² In such proceedings—such as an application for a writ of *habeas corpus* or an action based on false imprisonment—it is possible to seek a remedy for a breach of a Charter right.
- 15.77 It is also important to note that the Charter, unlike the European Convention,¹⁰³ does not oblige governmental action to secure compliance with the rights set out in the Charter.

OTHER JURISDICTIONS

- 15.78 Various steps have been taken in a number of comparable jurisdictions to provide safeguards for various practices when people who lack capacity are admitted to or deprived of their liberty while living in residential care facilities by establishing processes that enable various people to authorise these actions.
- 15.79 The Commission will publish a background paper on its website about relevant safeguards operating in England and Wales, Queensland, and the Canadian provinces of Ontario, British Columbia and the Yukon.

COMMUNITY RESPONSES

- 15.80 Many people and organisations suggested that there should be specific laws regulating the admission and potential detention of a person in a residential facility when the person lacks capacity to consent to these steps.¹⁰⁴
- 15.81 Aged Care Crisis submitted that:
 older people who are perceived to have cognitive impairment are the only group of people who can be placed in locked facilities, against their will, **without any reasonably accessible procedures** for appeal. Clearly, people must be kept safe but we are aware of several instances where the basic human right, not to be kept locked away or otherwise restrained without due process, has been disregarded. We can think of no other group of people where this situation would be regarded as acceptable.¹⁰⁵

¹⁰⁰ Ibid s 21(7).

¹⁰¹ The definition of ‘public authority’ in s 4 of the *Charter of Human Rights and Responsibilities 2006* (Vic) is broad. Section 4(1)(c) includes entities that are exercising functions of a public nature on behalf of the state or a public authority.

¹⁰² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39.

¹⁰³ European Convention art 1.

¹⁰⁴ For eg, Submissions CP 19 (Office of the Public Advocate), CP 21 (Action for More Independence & Dignity in Accommodation), CP 29 (STAR Victoria), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 56 (Disability Discrimination Legal Service), CP 57 (Aged Care Assessment Service in Victoria), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 69 (Australian Medical Association (Victoria)), CP 71 (Seniors Rights Victoria) and CP 75 (Federation of Community Legal Centres (Victoria)).

¹⁰⁵ Submission CP 38 (Aged Care Crisis). Emphasis in the original.

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Chapter 15

Restrictions upon liberty in residential care



15.82 Another submission raised specific concerns about deprivations of liberty involving people in hospitals with post-traumatic amnesia. It was noted that ‘the lack of prescribed safeguards surrounding the authorisation and long-term use of ... restrictive practices in general hospital wards is in strong contrast to the extensive network of safeguards for involuntary patients under Victoria’s mental health legislation’.¹⁰⁶ It was argued that deprivations of liberty, seclusion and restrictive practices limit a person’s Charter rights and extensive procedural safeguards are required for these situations. Those safeguards should include:

- that limits on rights should only be permissible following independent and impartial decision making, which take into account the nature of the right and whether the limitation is reasonable and proportionate in the individual circumstances
- access to an independent and impartial court or tribunal appeal or review mechanism
- specific exclusion of treatment that involves deprivations of liberty, seclusion or the long-term use of restraints from the definition of ‘medical treatment’.¹⁰⁷

THE REFORM OPTIONS PROPOSED IN THE CONSULTATION PAPER

15.83 The Commission identified five possible reform options in the consultation paper for dealing with deprivations of liberty in residential care facilities. They were:

- no change—retain the current system of relying primarily upon informal arrangements
- use existing guardianship mechanisms to appoint substitute decision makers
- introduce a new scheme of safeguards similar to the Deprivation of Liberty Safeguards scheme in the United Kingdom
- extend protection through existing legislation, such as the Disability Act
- expand the decision-making powers of automatic appointees (the person responsible under section 37 of the G&A Act) with additional safeguards to allow them to consent to admission into some residential care facilities.

15.84 Support for the options suggested in the consultation paper fell primarily into two categories: those who supported the introduction of a new scheme of safeguards similar to the Deprivation of Liberty Safeguards scheme,¹⁰⁸ and those who supported the expansion of automatic appointment provisions with additional safeguards.¹⁰⁹

15.85 There was little support for the options of using existing guardianship mechanisms or of extending the reach of existing legislation such as the Disability Act.¹¹⁰

15.86 The option of continuing to rely upon informal arrangements received limited support. Some submissions considered that the current informal processes are sufficient.¹¹¹ It was noted that there are a number of processes that may be applicable to admission to residential aged care, in particular, assessment by ACAS.¹¹² Dr Kristen Pearson submitted that:

¹⁰⁶ Submission CP 86 (Anne Kennedy).

¹⁰⁷ *Ibid.*

¹⁰⁸ For eg, Submissions CP 8 (Leonie Chirgwin), CP 19 (Office of the Public Advocate), CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 84 (Law Institute of Victoria—Supplementary Submission).

¹⁰⁹ For eg, Submissions CP 21 (Action for More Independence & Dignity in Accommodation), CP 73 (Victoria Legal Aid), CP 27 (Catholic Archdiocese of Melbourne), CP 29 (STAR Victoria), CP 33 (Eastern Health), CP 43 (Alfred Health), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 56 (Disability Discrimination Legal Service), CP 57 (Aged Care Assessment Service in Victoria) and CP 71 (Seniors Rights Victoria).

¹¹⁰ For eg, Submission CP 35 (Ursula Smith), who supported this option.

¹¹¹ For eg, Submission CP 23 (Dr Kristen Pearson) (note the comments in this submission specifically excluded the situation of younger people).

¹¹² Submission CP 23 (Dr Kristen Pearson).

[c]urrent processes involve assessment by ACAS, and frequently involve input from health professionals (including medical, social work, nursing, case managers etc) as well as oversight from family members/carers/friends and from the admitting facility.¹¹³

- 15.87 One response noted that the assessment processes undertaken by ACAS are driven by the need to determine the level of Commonwealth funding for the person in question.¹¹⁴
- 15.88 Eastern Health's submission suggested that there is no need for specific laws if the person lacks capacity but everyone agrees to place the person in residential care.¹¹⁵ It considered that laws would be 'too heavy handed', especially if there is no conflict about the decision.¹¹⁶

Expansion of automatic appointment provisions with safeguards

- 15.89 Many submissions supported the option of allowing family members and carers to authorise some deprivations of liberty in their capacity as the automatically appointed person responsible for providing substitute consent to medical treatment. Reasons given for supporting an extension to the powers available under the automatic appointment scheme included:
- to provide stricter controls and greater scrutiny¹¹⁷
 - to provide certainty about who can make the decision and avoid delays¹¹⁸
 - to help protect against de facto decision making by service providers.
- 15.90 The Public Advocate, who did not support this option overall, noted that it would have the advantage of avoiding an excessively high administrative burden.¹¹⁹
- 15.91 The submission of Victoria Legal Aid stated that:
- VLA often receives phone calls from persons living in aged care facilities who feel they are 'trapped' in these facilities by family members who do not wish them to return home. Although this problem in itself cannot be solved through the expansion of s 37 of the [G&A] Act, this would at least create stricter controls and a more transparent process.
- 15.92 Aged Care Assessment Service in Victoria submitted that:
- This process informally occurs now where the next of kin/family are asked to accept responsibility for a decision, or carer/family declare they are unwilling to retain a role in caring for the person at home, thus decision is made for residential care. Currently there is no scrutiny of this process.
- The additional dilemma exists where people have no recognised relationships as defined in 'person responsible' e.g. marginalised people. The ACAS-OPA protocols and the Department of Health and Ageing support alternative arrangements that should be considered when changing this law.¹²⁰
- 15.93 The Catholic Archdiocese of Melbourne supported giving the person responsible power to make accommodation decisions where those decisions are relevant to the health care available to the person in combination with additional safeguards.¹²¹

113 Ibid.

114 Consultation with Royal District Nursing Service (9 March 2011).

115 Submission CP 33 (Eastern Health).

116 Ibid.

117 For eg, Submissions CP 57 (Aged Care Assessment Service in Victoria) and CP 73 (Victoria Legal Aid).

118 For eg, Submission CP 43 (Alfred Health).

119 Submission CP 19 (Office of the Public Advocate).

120 Submission CP 57 (Aged Care Assessment Service in Victoria).

121 Submission CP 27 (Catholic Archdiocese of Melbourne).

Restrictions upon liberty in residential care



Additional safeguards for automatic appointees

15.94 In the consultation paper, the Commission suggested that additional safeguards could be needed if the automatic appointment scheme were expanded to permit the person responsible to make decisions about residential care.¹²² A range of possible safeguards was identified. They were:

- The person responsible should not be able to exercise their powers without medical certification that the represented person lacks capacity and is at risk of harm.
- Before making a decision, the person responsible should be required to consider and formally acknowledge the benefits of the placement for the person, whether a less restrictive alternative exists and the duration of the practice.
- The person responsible should be required to reconsider regularly if this form of accommodation is still necessary.
- The represented person or any interested party should be able to challenge the consent given by the person responsible and have the decision reviewed by VCAT.
- The person responsible's consent should be deemed insufficient if the represented person is actively refusing, or resisting, admission to the facility, or was resisting staying there or actively requesting to leave the facility, thereby requiring a decision by VCAT to appoint a guardian to authorise the represented person's continuing residence in the facility.
- The Public Advocate should be notified that the person responsible has made a decision about accommodation. The Public Advocate could be permitted to undertake random audits of the way that these decision makers have exercised their powers and responsibilities and conduct an annual review of the ongoing need for these arrangements.
- The automatic appointment process would not apply if an admission or detention procedure under another piece of legislation was applicable, such as under the Disability Act or the Mental Health Act.
- There should be restrictions on the types of residential facility for which an automatic appointee's consent would be sufficient.

15.95 A number of organisations considered that all the possible safeguards were appropriate and necessary.¹²³ Seniors Rights Victoria submitted that the introduction of these safeguards, combined with an education program for medical professionals would be important because:

current practice in relation to medical decision-makers often involves an element of ageism, in that elderly spouses are regularly discounted by staff at medical facilities or carers when a person responsible is needed. This, combined with the potential for a conflict between the represented person and family members in relation to decisions to admit the older person into care, increases the risk of abuse and the need for the types of safeguards discussed in the Consultation Paper.¹²⁴

¹²² These safeguards are detailed on pages 283 and 284 of the consultation paper.

¹²³ For eg, Submissions CP 21 (Action for More Independence & Dignity in Accommodation), CP 57 (Aged Care Assessment Service in Victoria), CP 71 (Seniors Rights Victoria) and CP 75 (Federation of Community Legal Centres (Victoria)).

¹²⁴ Submission CP 71 (Seniors Rights Victoria).

15.96 Action for More Independence & Dignity in Accommodation also considered that all the safeguards are necessary and supported allowing the person responsible to make decisions about residential care only with these safeguards in place. It strongly supported the safeguard that any person should be able to challenge the consent given by the person responsible. It submitted that this safeguard should be strengthened beyond the situation where a represented person is actively resisting, refusing admission or asking to leave as:

this relies on a person being capable of resisting staying in a facility or actively requesting to leave. Many people are not capable of such active resistance either due to the level of their disability or fear of the consequences of resisting. We would add to this safeguard that VCAT can find the person responsible consent to be insufficient if the person admitted is displaying any behaviour which would indicate they are unhappy about going to or staying in the facility.¹²⁵

15.97 In contrast, other community responses argued that requiring VCAT to appoint a guardian in these circumstances might be an overly burdensome and impractical safeguard.¹²⁶ Autism Victoria submitted:

What person if anxious would not actively resist moving their place of residence? This would be unreasonable for carers to keep caring for a person with limited decision making capacity in their own home beyond what they can cope with. Carers' wishes have to be equally considered.¹²⁷

15.98 Some submissions suggested that an appropriate additional safeguard would be an ACAS assessment for a recommendation about the type of care that would be suitable to help ensure that there is not a more appropriate placement available.¹²⁸

15.99 Victoria Legal Aid suggested that, in formulating a safeguard that related to the type of residential facility, it was important that:

consideration should be given to allowing automatic consent for admission to certain types of residential facilities only in certain situations (such as moving a person aged over 80 into an aged care facility). Where it is proposed to place a represented person in a residential facility in circumstances where they do not fall within the primary eligibility criteria for that facility (eg a person aged under 65 in a residential aged care facility), VLA suggests that automatic consent should not be sufficient and that VCAT should be required to determine whether there is any more appropriate placement reasonably available. The VCAT determination should be required prior to any such move taking place.¹²⁹

15.100 The Public Advocate did not support the option that an automatic appointee be empowered to make these decisions. However, should this option be adopted, her submission supported the introduction of the safeguards proposed by the Commission.¹³⁰ The Public Advocate did not support safeguards that involved the Public Advocate being notified of the use of these powers by automatic appointees, suggesting that the administrative burden of this task outweighed its usefulness. The Public Advocate observed that 'it is the times the Public Advocate is not notified that would be the situations of greatest concern'.¹³¹ The Law Institute of Victoria also noted that the Public Advocate may not have the resources or capacity to perform this role or the jurisdiction to act under the *Aged Care Act 1997* (Cth). It was suggested that the Office of the Senior Practitioner might be better placed to perform this role.¹³²

125 Submission CP 21 (Action for More Independence & Dignity in Accommodation).

126 Submissions CP 24 (Autism Victoria) and CP 35 (Ursula Smith).

127 Submission CP 24 (Autism Victoria).

128 For eg, Submissions CP 57 (Aged Care Assessment Service in Victoria) and CP 73 (Victoria Legal Aid).

129 Submission CP 73 (Victoria Legal Aid).

130 Submission CP 19 (Office of the Public Advocate).

131 Ibid.

132 Submission CP 84 (Law Institute of Victoria—Supplementary Submission).

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15.101 The Public Advocate proposed two additional safeguards:

- The Public Advocate should be advised when a person is consistently objecting to an accommodation decision.
- The Public Advocate should receive and investigate complaints about the exercise of power by persons responsible. In appropriate cases, the Public Advocate would be able to apply to VCAT for an order removing the person responsible from having decision-making authority.¹³³

15.102 The Public Advocate also suggested

legislative articulation of the principles that should guide facilities which utilize those restrictions that may be considered to be deprivations of liberty.

Such legislative articulation would put the onus on facilities to name restrictive practices as such, and to justify their use by pointing to the absence of less restrictive options.¹³⁴

15.103 The Law Institute of Victoria did not support the option of extending the use of automatic appointment provisions with additional safeguards. However, the submission did consider what safeguards would be required if this did occur. The submission proposed that medical certification should take the form of a statutory declaration and there should be guidance to practitioners as to matters to consider. It also suggested that certification should be built into ACAS processes and should not be an additional state-based requirement.¹³⁵

15.104 The Law Institute of Victoria noted that oversight by an impartial authority or judicial body would require significant resources. It suggested ‘a staged approach ... whereby initial resources are committed to undertaking a scoping of the need for independent oversight’.¹³⁶ Although the submission raised concerns about the Public Advocate’s capacity to undertake a monitoring role, it suggested that as an interim measure the Public Advocate ‘could undertake a monitoring role with powers to investigate any abuses for the purpose of seeking guardianship or administration’.¹³⁷ It considered that the Public Advocate would require a substantial increase in resources to perform this role.

Residential facilities to be included

15.105 Some submissions considered the facilities that should be covered by an automatic appointment scheme.¹³⁸

15.106 The Public Advocate suggested:

The residential facilities to which an expanded person responsible scheme might apply would include all government funded and supported accommodation settings as well as all government regulated settings. It would not apply to those facilities that are subject to higher-level safeguards, such as those accommodation settings where people are detained under disability or mental health legislation.¹³⁹

15.107 Action for More Independence & Dignity in Accommodation submitted that it should only apply to ‘the types of residential facility ... where the person will receive a level of health and personal care’.¹⁴⁰

¹³³ Submission CP 19 (Office of the Public Advocate).

¹³⁴ Ibid.

¹³⁵ Submission CP 84 (Law Institute of Victoria—Supplementary Submission).

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ For eg, Submissions CP 19 (Office of the Public Advocate), CP 24 (Autism Victoria), CP 33 (Eastern Health), CP 35 (Ursula Smith), CP 47 (Dr Michael Murray) and CP 59 (Carers Victoria).

¹³⁹ Submission CP 19 (Office of the Public Advocate).

¹⁴⁰ Submission CP 21 (Action for More Independence & Dignity in Accommodation).

15.108 Aged Care Assessment Services Victoria considered that '[a]ny residential facility that can meet the level of care required by the person should fall within this scheme'.¹⁴¹ However, it considered that:

[a]n exception to the facilities that fall within this scheme should be psychogeriatric units as they are specialised and most restrictive in their care. Under the Mental Health Act a Consultant Psychiatrist can also recommend accommodation as part of a Treatment Order.¹⁴²

Problems with use of automatic appointment provisions

15.109 A number of organisations did not support extending the automatic appointment scheme, even with safeguards, to permit the person responsible to make accommodation decisions that involve a deprivation of liberty.¹⁴³

15.110 The major reasons for this opposition were:

- Medical treatment decisions currently made under the person responsible scheme are governed by medical professional norms, whereas accommodation decisions may not be.¹⁴⁴
- Medical treatment decisions currently made under the person responsible scheme are generally discrete short-term decisions, whereas accommodation decisions may involve ongoing responsibility for decisions.¹⁴⁵
- Medical treatment decisions currently made under the person responsible scheme are generally focused on a single issue, whereas decisions about a person's accommodation may involve multiple factors leading to insufficient focus on considerations about limitations on freedom.¹⁴⁶
- The person responsible may not be the most appropriate person to make this decision and automatic appointments may inappropriately prioritise some family relationships over others.¹⁴⁷
- There is potential for a conflict of interest between the person responsible and the person to whom the decision relates.¹⁴⁸
- It is inappropriate to give decisions that are currently made informally, and have the potential to compromise the rights of a person with a disability, elevated legal status.¹⁴⁹

15.111 The Law Institute of Victoria expressed concern that the proposed safeguard of requiring a person responsible to sign a declaration confirming that they have considered all relevant matters might become a formality without practical effect.¹⁵⁰

15.112 A number of submissions considered that the existing person responsible hierarchy would be appropriate if the scheme was extended with safeguards to allow decisions about accommodation involving deprivations of liberty.¹⁵¹

141 Submission CP 57 (Aged Care Assessment Service in Victoria).

142 Ibid.

143 For eg, Submissions CP 19 (Office of the Public Advocate), CP 65 (Council on the Ageing Victoria), CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 84 (Law Institute of Victoria—Supplementary Submission).

144 For eg, Submissions CP 19 (Office of the Public Advocate) and CP 84 (Law Institute of Victoria—Supplementary Submission).

145 For eg, Submissions CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 86 (Anne Kennedy).

146 For eg, Submissions CP 19 (Office of the Public Advocate), CP 65 (Council on the Ageing Victoria), CP 84 (Law Institute of Victoria—Supplementary Submission).

147 For eg, Submissions CP 65 (Council on the Ageing Victoria) and CP 84 (Law Institute of Victoria—Supplementary Submission).

148 For eg, Submissions CP 19 (Office of the Public Advocate) and CP 84 (Law Institute of Victoria—Supplementary Submission).

149 For eg, Submissions CP 19 (Office of the Public Advocate), CP 65 (Council on the Ageing Victoria) and CP 84 (Law Institute of Victoria—Supplementary Submission).

150 Submission CP 84 (Law Institute of Victoria—Supplementary Submission).

151 For eg, Submissions CP 21 (Action for More Independence & Dignity in Accommodation), CP 24 (Autism Victoria), CP 33 (Eastern Health) and CP 35 (Ursula Smith).

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15.113 Submissions from the Public Advocate and the Law Institute of Victoria suggested that the hierarchy would need to ensure that enduring guardians or guardians with accommodation powers took priority over other individuals.¹⁵²

Deprivation of liberty safeguards

15.114 A number of community responses supported the introduction of a modified version of the deprivation of liberty safeguards model used in England and Wales.¹⁵³

15.115 The Victorian Equal Opportunity and Human Rights Commission said that the strictest possible safeguards were required rather than a simple solution to ensure that decisions are reasonable, proportionate and justified as required by the Charter. The commission observed that while deprivation of liberty safeguards may be extremely resource intensive, this type of approach is the only way to protect the rights of the people concerned.¹⁵⁴

15.116 The Public Advocate considered the deprivation of liberty safeguards introduced in England and Wales to be ‘unduly administratively burdensome’ but supported a simplified version of the scheme.¹⁵⁵

THE COMMISSION’S VIEWS AND CONCLUSIONS

15.117 Many Victorians now live in supported residential care and, as discussed in Chapter 4, the number of people living in these facilities will increase substantially over the next few decades. Some of these people are unable to make their own accommodation decisions because they have impaired decision-making ability due to a disability. It appears that family members and carers often make decisions about living arrangements for these people informally. In some instances, VCAT appoints a guardian to make place of residence decisions for a person who is reluctant to move from home or hospital into supported residential care.

15.118 The Commission is not proposing any changes to these practices even though the existing informal arrangements clearly lack any legal foundation. The circumstances in Victoria are not the same as those in England and Wales where statutory processes—the Deprivation of Liberty Safeguards—now apply to people who lack the capacity to consent to living in publicly funded supported residential care facilities. These statutory processes were the United Kingdom Government’s response to the European Court of Human Rights decision in *Bournewood* and to the requirement in the European Convention on Human Rights that the United Kingdom Government take action to secure the rights breached in *Bournewood*.

15.119 The Victorian legal environment is different. There has been no local equivalent to the *Bournewood* decision and the Victorian Charter does not oblige the Government to take action to secure any rights when a court finds that they have been breached. Failure to act in these circumstances would have political rather than legal consequences.

15.120 The Commission does not believe that there is widespread support for new formal processes to govern place of residence decisions for every person who lacks the capacity to consent to living in supported residential care. The existing combination of informal arrangements and formal decisions by VCAT-appointed guardians in some difficult cases appears to operate reasonably well for the moment. However, the Commission urges the Attorney-General to keep the practice of relying upon informal agreement under attention as the number of people with impaired decision-making

¹⁵² Submissions CP 19 (Office of the Public Advocate) and CP 84 (Law Institute of Victoria—Supplementary Submission).

¹⁵³ For eg, Submissions CP 19 (Office of the Public Advocate) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

¹⁵⁴ Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

¹⁵⁵ Submission CP 19 (Office of the Public Advocate).

ability who move to supported residential care increases. The Public Advocate is well placed to advise the Attorney-General of the need for any change to the current arrangements.

- 15.121 Some of the people who live in supported residential care and who lack the capacity to consent to their own living arrangements experience substantial restraints upon their movements that are not authorised or regulated in any way. The Public Advocate has pointed to 'the need for Victoria (and indeed Australia) to better regulate the means by which people with disabilities are subjected to some degree of "deprivation of liberty" or are subjected to unregulated or under-regulated restrictive interventions'.¹⁵⁶
- 15.122 The Commission believes that it is necessary to devise appropriate means of regulating deprivations of people's liberty while they are living in supported residential care. While there is no evidence of substantial numbers of people making applications for a writ of *habeas corpus* or taking action for false imprisonment, many existing practices are not 'legislatively authorised and subject to review'.¹⁵⁷ Nonetheless, it is important to protect the interests of vulnerable people and to ensure that they are deprived of their liberty only in circumstances where it has been authorised for their own welfare. There should also be appropriate checks and balances in place to ensure appropriate use of these powers. These things are not happening now.
- 15.123 The Commission has not identified any means of regulating these practices in other jurisdictions that it recommends for adoption in Victoria. The English and Welsh Deprivation of Liberty Safeguards are not supportable. Extending the authority of a person responsible for providing consent to medical treatment to making deprivation of liberty decisions for a person in supported residential care is not an attractive option because of the potential for too many conflicts of interests and because it values liberty too lightly. While the appointment of a guardian has theoretical appeal, it is not a practical solution to an issue of increasing magnitude. The reasons for rejecting these options are examined in more detail below.

PROBLEMS WITH THE UNITED KINGDOM APPROACH

- 15.124 The Commission believes that introducing a Victorian version of the Deprivation of Liberty Safeguards scheme would be extremely expensive and administratively burdensome.
- 15.125 While rigorous, the English and Welsh process is particularly complex, time-consuming and resource intensive. The Commission understands that some assessments take much longer than originally anticipated, leading to increased costs.¹⁵⁸ Annual assessments take at least 10 hours and sometimes up to 18 hours.¹⁵⁹ These detailed assessments, which require at least two assessors, also have the potential to cause a great deal of stress to the person concerned.¹⁶⁰
- 15.126 There are also inconsistencies in the application of Deprivation of Liberty Safeguards across England and Wales. Some areas have a high number of applications, whereas others have very few,¹⁶¹ perhaps because of differing views about the meaning of 'deprivation of liberty'.¹⁶²

¹⁵⁶ Submission CP 19 (Office of the Public Advocate).

¹⁵⁷ *Ibid.*

¹⁵⁸ Consultation with Office of the Public Guardian (United Kingdom), Social Care Institute for Excellence and Department of Health (United Kingdom) (17 November 2010).

¹⁵⁹ Damien Bruckard and Bernadette McSherry, 'Mental Health Laws for those "Compliant" with Treatment' (2009) 17 *Journal of Law and Medicine* 16, 21.

¹⁶⁰ *Deprivation of Liberty Safeguards: Code of Practice*, above n 94, 41.

¹⁶¹ *Mental Capacity Act 2005 Deprivation of Liberty Safeguard Assessments (England)*, above n 98, 3.

¹⁶² See Peter Lepping, Rajvinder Singh Sambhi, Karen Williams-Jones, 'Deprivation of Liberty Safeguards: How Prepared Are We?' (2010) 36 *Journal of Medical Ethics* 170–1 on the difficulties associated with identifying a deprivation of liberty and the issue of whether the motive of the detaining authority is relevant in assessing whether a deprivation of liberty has occurred.

Restrictions upon liberty in residential care



15.127 The Deprivation of Liberty Safeguards have been criticised by a respected commentator as being ‘complex, voluminous, overly bureaucratic and difficult to understand’ and were described as a ‘significant and costly error’.¹⁶³

PROBLEMS WITH THE AUTOMATIC APPOINTMENT OF ONE DECISION MAKER

15.128 Many responses to the consultation paper referred to the risks associated with extending the reach of the scheme for automatically appointing a substitute decision maker for medical treatment decisions to residential care decisions. This proposal would enable the person responsible to consent to the living arrangements in a supported residential facility for a person who is unable to make their own decision about these matters without any additional oversight.

15.129 The Commission accepts that there is a greater risk of a conflict of interest for a person responsible when making residential care decisions than when making medical treatment decisions because a person responsible might benefit from deciding that a family member should live in supported residential care in circumstances that involve a deprivation of their liberty. In addition, while medical treatment decisions under the automatic appointment provisions are regulated by the professional considerations that govern medical practice, there are no equivalent controls when making decisions about living arrangements that involve a total restraint of liberty.

USE OF GUARDIANSHIP

15.130 The Commission considers that people should be encouraged to appoint an enduring personal guardian to make decisions about living arrangements with the power to authorise restrictions upon their liberty that promote their health or safety. To avoid doubt, new guardianship legislation should indicate that it is possible for a person to give an enduring personal guardian the power to authorise deprivations upon liberty of the person when living in supported residential care that promote their health or safety.

15.131 The Commission believes that when the tribunal appoints a personal guardian for a person with the power to make decisions about residential care it should consider whether to include an express power to authorise deprivations of liberty. To avoid doubt, new guardianship legislation should expressly permit the tribunal to give a personal guardian this power.

15.132 While it is important that personal guardians are clearly permitted to authorise deprivations of liberty for a person’s health or safety as part of residential care arrangements, it is unlikely that guardianship will be an effective means of dealing with most instances in which these practices occur because of the numbers of people involved.

¹⁶³ See Richard Jones, *Mental Capacity Act Manual* (Sweet & Maxwell, 4th ed, 2010) v. See also Peter Lepping, Rajvinder Singh Sambhi, Karen Williams-Jones, ‘Deprivation of Liberty Safeguards: How Prepared Are We?’ (2010) 36 *Journal of Medical Ethics* 170, 171. Scotland has not introduced a similar scheme. Instead, it currently relies on guardianship applications and increased guidance for local authorities about the procedure to follow when making decisions for adults who lack capacity. For detail and a critique of the Scottish approach, see Gary Scot Stevenson, Tracy Ryan and Susan Anderson, ‘Principles, Patient Welfare and the Adults with Incapacity (Scotland) Act 2000’ (2009) 32 *International Journal of Law and Psychiatry* 120.

RECOMMENDATIONS

Legal procedures for decisions involving restrictions upon liberty

232. New guardianship legislation should permit a person with capacity to appoint an enduring personal guardian to make decisions for them about supported residential care that include authorising a restriction upon liberty in order to promote the health or safety of the person.
233. New guardianship legislation should permit the tribunal to appoint a personal guardian to make decisions about supported residential care, for a person who satisfies the criteria for the appointment of a personal guardian, that include authorising a restriction upon liberty in order to promote the health or safety of the person.

A NEW COLLABORATIVE AUTHORISATION PROCESS

- 15.133 The Commission believes that a new collaborative mechanism should be devised for regulating deprivations of liberty of people who are living in supported residential care and who lack the capacity to consent to restrictive living arrangements that are used to promote their health or safety. This mechanism should be as efficient as possible bearing in mind the significance of depriving a person of their liberty, even for their own welfare.
- 15.134 This new mechanism should complement the steps available under existing guardianship laws. It should continue to be possible for people to rely upon the authorisation of a personal guardian for these practices when an appointment has been made prior to the time at which restrictive living arrangements appear necessary or when there is disagreement about the need for them. This new mechanism should replace the informal arrangements that are currently relied upon in many instances. It would also overcome the need to apply to VCAT for the appointment of a personal guardian to authorise restraints upon liberty when a number of people with an interest in the wellbeing of the person concerned believe that some restrictive living arrangements are necessary.
- 15.135 The Commission believes that the new mechanism should have the following features. It should:
- describe how the decision about a restriction upon liberty will be made if the person concerned is objecting but lacks capacity to make the decision
 - describe how this decision should be made if the person does not have the capacity to make it but appears compliant
 - describe the facilities in which the procedure can be used
 - include principles to guide how and when this procedure should be used
 - include principles to guide how decisions should be made collaboratively
 - describe the situations in which the decision must be referred to the tribunal.

RECOMMENDATION

A new collaborative authorisation process

234. New guardianship legislation should establish a collaborative mechanism for authorising restrictions upon the liberty of people who are living in supported residential care and who lack the capacity to consent to restrictive living arrangements that are used to promote their health or safety.

Restrictions upon liberty in residential care



RELEVANT FACILITIES

- 15.136 The Commission believes that new guardianship legislation should identify the supported residential facilities in which it is permissible to rely upon the proposed collaborative process to authorise restrictions upon the liberty of a person who lacks the capacity to make their own decisions about these matters when those restrictions are imposed for their health or safety. The collaborative process would obviate the need for a guardianship application when there was no guardian with the necessary powers to authorise these restrictions and it would provide the facilities in question with clear legal authority to take actions that are now undertaken informally, sometimes in circumstances that might expose them to legal risk.
- 15.137 Many Victorians live in facilities that provide supported residential care. Some people living in these facilities experience significant restrictions upon their movements—such as being locked or effectively locked in premises,¹⁶⁴ or being strapped or wrapped into chairs—in order to protect them from harm. As discussed earlier in the chapter, many of these facilities, especially those with residents that receive some form of public funding for their accommodation, are closely regulated by the Commonwealth and Victorian governments. The proposed collaborative process should be available for use in facilities that are effectively regulated. It is not appropriate that the process should be available for use in other supported residential facilities that operate under limited regulation. Those facilities should be obliged to comply with existing laws that govern deprivations of liberty.
- 15.138 The Commission believes that the Victorian Government should identify the supported residential facilities in which it is permissible to rely upon the proposed collaborative process to authorise restrictions upon liberty. This matter will involve collaboration with the Commonwealth Government because of its significant role in the area of aged care accommodation.

RECOMMENDATION

Relevant facilities

235. New guardianship legislation should describe the residential facilities in which the collaborative mechanism for authorising restrictions upon liberty can be used.

IDENTIFYING A RESTRICTION UPON LIBERTY

- 15.139 The restrictions upon liberty that should be capable of being authorised by the proposed collaborative mechanism are those which would otherwise be unlawful. This means that it should be possible to use the mechanism to authorise actions that would in the absence of legal authority cause a person to succeed in an action for false imprisonment or would result in an order for release in *habeas corpus* proceedings.
- 15.140 While the manner in which ‘restrictions upon liberty’ is described in new guardianship legislation is ultimately a matter for Parliamentary Counsel, the Commission suggests there may be benefit in an approach that does not seek to define ‘restrictions upon liberty’ in detail but which permits the use of practices that would be unlawful unless authorised.

¹⁶⁴ The Commission notes, for example, the widespread use of locked doors in supported residential facilities that can be opened only by a person who is able to enter a number into a keypad adjacent to the door.

- 15.141 While this suggested approach is legally useful because it renders lawful actions that would otherwise be unlawful, it provides insufficient guidance to people who work in supported residential facilities about the practices that fall within the proposed collaborative mechanism. As noted earlier, one of the many difficulties associated with the English Deprivation of Liberty Safeguards has been the lack of clarity about what constitutes a deprivation of liberty in a residential setting.
- 15.142 It could be beneficial to highlight in legislation some common practices and activities that do not amount to a restriction upon liberty which requires authorisation. For example, if a person is restricted to a particular location because of their own physical limitations, rather than because of measures taken by the residential facility, this would not be a 'restriction of liberty'.
- 15.143 The Commission proposes two means of assisting people to identify those practices that amount to a restriction upon liberty. First, the Commission recommends that the Public Advocate should be required to develop guidelines in consultation with appropriate professional groups that identify practices undertaken in supported residential facilities that are a restriction upon liberty and that should be authorised when imposed without consent. Secondly, any person should be permitted to apply to the tribunal for advice about whether a particular practice is a restriction upon liberty that requires authorisation.

RECOMMENDATIONS

Identifying a restriction upon liberty

236. New guardianship legislation should describe those restrictions upon liberty that can be authorised by use of the collaborative mechanism.
237. The Public Advocate should develop guidelines in consultation with appropriate professional groups that identify practices undertaken in supported residential facilities that are a restriction upon liberty and that should be authorised when imposed without consent.
238. Any person with a genuine interest in the personal and social wellbeing of a person living in a relevant facility should be permitted to apply to the tribunal for directions about whether a particular action is a restriction upon liberty that requires authorisation.

GUIDELINES FOR FACILITIES

- 15.144 The Commission believes that new guardianship legislation should require relevant residential facilities to identify when a person living at that facility is experiencing, or is likely to experience, a restriction upon their liberty which requires authorisation. This step can be taken by following a statutory process.

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Chapter 15

Restrictions upon liberty in residential care



RECOMMENDATIONS

Guidelines for facilities

239. New guardianship legislation should require relevant residential facilities to identify when a person is experiencing, or is likely to experience, a restriction upon liberty in their facility and take steps to seek authorisation for this restriction upon liberty.
240. New guardianship legislation should include a process to guide facilities that engage in practices that involve restrictions upon liberty:
- Facilities should identify any restrictive practices that may be used for a particular individual and consider whether less restrictive options are available.
 - Restrictive practices should not be used for the convenience of staff.
 - Any restrictions used should be in place for the shortest possible time.
 - Facilities should inform the health decision maker of any changes to accommodation arrangements that are likely to result in a restriction upon liberty or before using different restrictive practices.

A COLLABORATIVE AUTHORISATION PROCESS

- 15.145 The Commission believes that relevant supported residential facilities should be permitted to rely upon a three-person collaborative authorisation process when the living arrangements for a person who lacks the capacity to make their own decisions about accommodation involve restrictions upon their liberty that are imposed for their own health or safety. The people who should be permitted to participate in the collaborative authorisation process are:
- the person in charge of the residential facility
 - a medical practitioner or other health practitioner approved by regulation
 - the person's health decision maker.¹⁶⁵
- 15.146 The requirement that three people participate in the collaborative decision-making and authorisation process seeks to reflect the significance of allowing anyone other than a court or tribunal to authorise the deprivation of a person's liberty. It also seeks to address concerns that two of three nominated people who will usually be involved in the on-going care of a person with these living arrangements might sometimes experience conflicts of interest.
- 15.147 The appearance of a conflict of interest is often just as important as an actual conflict when dealing with significant issues. Sometimes a person who is a health decision maker might appear to benefit if a family member or person for whom they care is unable to leave a supported residential facility in which they are living. Sometimes the staff at the facility might appear to benefit if the movements of some of the people for whom they care are restricted. In these circumstances, apparent and actual conflicts of interest are minimised by having a shared decision-making process. In order to ensure shared responsibility for decisions, it should not be possible for anyone to have more than one role in the process.

¹⁶⁵ In Chapter 5, the Commission proposes the term 'health decision maker' replace the term 'person responsible' used in Part 4A of the *Guardianship and Administration Act 1986* (Vic) and that this person continue to be an automatically appointed substitute decision maker for medical treatment decisions.

Person in charge of the facility

- 15.148 The first person in the collaborative decision-making process should be the person in charge of the facility. A valuable feature of the Deprivation of Liberty Safeguards in England and Wales is the duty on the residential facility to identify people who are or are likely to be deprived of their liberty and to initiate the authorisation process.
- 15.149 The person in charge of the facility should also be responsible for arranging for the second person in the collaborative decision-making process—a medical practitioner or other approved health practitioner—to assess the person’s capacity and to consider whether the restriction upon liberty is necessary for the person’s health or safety.
- 15.150 The person in charge of the facility should also be responsible for providing the third person in the collaborative decision-making process—the health decision maker—with information that:
- identifies the circumstances in which the proposed restriction of liberty is to be used
 - identifies the duration of the proposed restriction of liberty, and
 - indicates why the proposed restriction upon liberty is necessary for the health or safety of the person.

Medical practitioner or other approved health practitioner

- 15.151 The second person in the collaborative decision-making process is a medical practitioner, or other health practitioner approved by regulation, who would be required to make two assessments. They are, first, whether the person has the capacity to make their own decision about the restrictive living arrangements in question and, secondly, whether the restriction upon liberty is necessary for the health or safety of the person.
- 15.152 In order to maintain the integrity of the process, the legislation should provide that the medical practitioner should not have a financial interest in the residential facility.
- 15.153 When determining whether the restriction upon liberty is necessary for the health or safety of the person, the medical practitioner should be required to consider whether:
- the relevant restrictive practices that amount to a restriction of liberty are necessary to prevent harm to the person
 - the restrictions are proportionate, reasonable and justified in the circumstances
 - the benefits of the restrictions outweigh the risk of negative consequences to the person
 - there are less restrictive options available.

Health decision maker

- 15.154 The third person in the collaborative decision-making process is the health decision maker. The health decision maker must agree to the proposed restriction upon liberty.
- 15.155 Many people thought that the hierarchy of automatic appointees for restriction of liberty decisions should be the same as the hierarchy for medical treatment decisions. The Commission agrees with this view. The scheme would be unworkable in practice if there were different hierarchies of automatic appointees for medical treatment and restriction of liberty decisions.

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Chapter 15

Restrictions upon liberty in residential care

A role for the Public Advocate as health decision maker

15.156 In Chapter 13, the Commission recommends that the Public Advocate become the substitute decision maker of last resort for significant medical treatment decisions. The Commission believes that the Public Advocate should also become the health decision maker of last resort for the collaborative authorisation process.

RECOMMENDATIONS

A collaborative authorisation process

241. The collaborative mechanism for authorising restrictions upon the liberty of people who are living in supported residential care and who lack the capacity to consent to restrictive living arrangements that are used to promote their health or safety should require the approval of three people, who are:

- (a) the person in charge of the residential facility
- (b) a medical practitioner or other health practitioner approved by regulation
- (c) the person's health decision maker.

242. If a person is eligible for more than one role they may only act in one of the decision-making roles.

243. A person is not eligible to act in the role of health decision maker or medical practitioner if they have a financial interest in the residential facility.

The person in charge of the residential facility

244. The person in charge of the residential facility should be responsible for identifying a proposed or current restriction upon liberty for someone living within the facility.

245. In these circumstances the person in charge of the residential facility should arrange for a medical practitioner (or other approved health practitioner) to assess the person's capacity and to consider whether the restriction upon liberty is necessary for the person's health or safety. The person in charge of the facility should provide the health decision maker with a report that:

- (a) identifies the circumstances in which the proposed restriction upon liberty is to be used
- (b) identifies the duration of the proposed restriction upon liberty
- (c) explains how the proposed restriction upon liberty is necessary for the health or safety of the person.

The medical practitioner

246. The medical practitioner (or other approved health practitioner) should be required to undertake two assessments:

- (a) whether the person has the capacity to consent to the restriction upon their liberty
- (b) whether the restriction upon liberty is necessary for the health or safety of the person.

247. When deciding if the restriction upon liberty is necessary for the health or safety of the person, the medical practitioner must determine whether:

- (a) the relevant restrictive practices that amount to a restriction of liberty are necessary to prevent harm to the person
- (b) the restrictions are proportionate, reasonable and justified in the circumstances
- (c) the benefits of the restrictions outweigh the risk of negative consequences to the person
- (d) there are any less restrictive options available.

The health decision maker

248. The health decision maker must agree to the proposed restriction upon liberty.

249. The hierarchy of health decision makers for restriction upon liberty decisions should be the same as the hierarchy for medical treatment decisions. If no-one is available to undertake this role, the Public Advocate should be the health decision maker in the collaborative authorisation process.

250. When deciding whether to agree to the proposed restriction upon liberty, the health decision maker should be required to consider the following matters:

- (a) the assessments by the medical practitioner
- (b) whether the restriction upon liberty is necessary for the health or safety of the person
- (c) whether there are any less restrictive options available.

SAFEGUARDS

Applications to VCAT

15.157 There will be circumstances in which it is not appropriate to use the collaborative process to authorise restrictions upon the liberty of a person living in supported residential care or when there should be external review of the collaborative authorisation process.

15.158 The collaborative authorisation process should not be used when the person concerned consistently resists and opposes restrictions upon their liberty. In these circumstances, an application should be made to the tribunal to consider whether it is necessary to appoint a guardian to make decisions about restrictive living arrangements. If the collaborative authorisation process has been used to authorise restrictions and the person concerned consistently resists and opposes restrictions upon their liberty, the matter should also be referred to the tribunal for decision. The three people who participated in the authorisation process should be obliged to refer the matter to VCAT if they become aware that the person concerned is consistently resisting and opposing restrictions upon their liberty.

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Chapter 15

Restrictions upon liberty in residential care



15.159 The person whose liberty is restricted, or any person with a genuine interest in their wellbeing, should be permitted to apply to the tribunal for consideration of the matter—including use of the collaborative process to authorise those restrictions—or to refer the matter to the Public Advocate with the request that she investigate the matter and decide whether to apply to the tribunal for the appointment of a guardian.

RECOMMENDATIONS

Applications to the tribunal

251. The collaborative mechanism for authorising restrictions upon the liberty of people who are living in supported residential care should not be used in circumstances where the person concerned consistently resists and opposes restrictions upon their liberty.
252. If the collaborative authorisation process has been used to authorise restrictions upon the liberty of a person, the three people who participated in the authorisation process should be obliged to refer the matter to the tribunal if they become aware that the person concerned is consistently resisting and opposing restrictions upon their liberty.
253. A person living in supported residential care in circumstances where they are experiencing restrictions upon their liberty or any person with an interest in their wellbeing should be permitted to apply to the tribunal for consideration of these circumstances or inform the Public Advocate of their concerns and request that she investigate the matter.

Duration of authorisations

- 15.160 It is difficult to determine an appropriate period for the duration of any restrictions upon liberty that are authorised by use of the collaborative process. As indicated earlier, the Commission has sought to strike a balance between protecting vulnerable people and avoiding expensive and unhelpful bureaucratic obligations.
- 15.161 While the authorisation should not operate indefinitely, it should be reviewed at appropriate intervals and renewed when necessary. The Commission believes that an authorisation should be first reviewed within 12 months. Thereafter, it should be possible to make authorisations for a period of up to five years depending upon the circumstances of the particular case.
- 15.162 The Public Advocate should issue guidelines to assist people involved in the collaborative authorisation process to determine the appropriate period for any authorisation of a restriction upon liberty.

RECOMMENDATIONS

Duration of authorisations

254. Any authorisation of restrictions upon the liberty of people who are living in supported residential care made by use of the collaborative mechanism should not operate for more than 12 months in the first instance.
255. The continuing need for those restrictions should be reviewed within the 12-month period if the three people involved in the process believe that the authorisation should be extended.
256. Any review of the authorisation should follow the same process as the initial authorisation.
257. It should be possible to renew any authorisation for a period of up to five years.
258. The Public Advocate should issue guidelines to assist people involved in the collaborative authorisation process to determine the appropriate period for any authorisation of a restriction upon liberty.



Chapter 16

A new registration scheme

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Chapter 16

A new registration scheme

INTRODUCTION

- 16.1 In this chapter, the Commission recommends the establishment of an online register of all appointments of substitute decision makers, co-decision makers and supporters. The online register would be an important step in the modernisation of Victoria's guardianship laws, and would actively encourage people to appoint others to assist them with decision making if the need arose in the future.
- 16.2 The Commission's proposals for an online register of appointments complement the Victorian Parliament Law Reform Committee's (Parliamentary Committee) recommendation in 2010 that there be a register for power of attorney documents.¹
- 16.3 The Commission found that there is widespread support within the community for the establishment of an online register.² The Parliament Law Reform Committee reached a similar conclusion.³
- 16.4 The Commission also believes that there is a strong public interest in the government providing financial support for an online register. Registration will promote recognition and acceptance of both personal and VCAT decision-making appointments. It will also assist in locating, verifying and validating personal appointments.⁴
- 16.5 As the Commission has sought to emphasise throughout this report, the public system of appointing substitute decision makers for people with impaired decision-making ability will struggle to cope with demand over the next few decades unless many people choose to make their own appointments when they have the capacity to do so. In addition, personal autonomy and responsibility are promoted when people are encouraged to make plans for their own assisted decision-making needs. The Commission believes an online register will encourage the use of personal appointments.
- 16.6 This chapter deals with a number of important issues associated with online registration of substitute and assisted decision-making appointments. They are:
- whether registration is compulsory
 - who holds the register
 - what information is on the register
 - the timing of registration
 - how to search the register and safeguard privacy
 - the effect of registration
 - the effect of failing to register
 - who is notified when appointments are activated
 - the cost of registering an appointment and of searching the register
 - transitional arrangements for existing personal appointments.

1 See recommendation 66 of the Victorian Parliament Law Reform Committee Inquiry into Powers of Attorney final report: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 232–6. The Government Response indicates 'support in principle [for] the development and implementation of a register for POA documents to help establish the existence, location and validity of POAs': Victorian Government, *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (2011) 30.

2 See community responses to this proposal later in this chapter.

3 Victorian Government, *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (2011) 230 ('*Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report*').

4 *Ibid* 226–234.

- 16.7 The Commission established a Registry Working Group to assist in identifying issues associated with the establishment of an online register of appointments. The group comprised representatives of the Victorian Registry of Births, Deaths and Marriages, State Trustees Limited, the Australian Bankers' Association, ANZ Trustees Limited, the Public Advocate, the Australian Medical Association, the Law Institute of Victoria and the Royal District Nursing Service.⁵
- 16.8 While the Commission acknowledges the significant contributions made by the members of this group, it is important to emphasise that the recommendations in this chapter are solely the work of the Commission. These recommendations have not been endorsed by the members of the group or the organisations to which they belong.
- 16.9 The Commission urges the Attorney-General to consider reconvening the group in order to gain the benefit of their expertise if the Victorian Government decides to establish an online register of appointments.

CURRENT LAW

- 16.10 There is no law in Victoria which requires people to register substitute decision-making appointments. There is also no practical means of registering appointments voluntarily.
- 16.11 Some other jurisdictions have developed registration schemes for substitute decision-making appointments. Although the Commission has been unable to identify any jurisdiction with an online register, paper-based registration schemes in other jurisdictions provide useful guidance.

OTHER AUSTRALIAN JURISDICTIONS

- 16.12 In most Australian jurisdictions it is mandatory to register powers of attorney for dealings with land only.⁶ In the Northern Territory it is also mandatory to register enduring powers of attorney (financial).⁷
- 16.13 Tasmania is the only jurisdiction in which it is mandatory to register personal appointments of substitute decision makers. In Tasmania, a power of attorney must be registered with the Registrar of Titles to be activated. Any action taken by an attorney has no legal effect unless the power of attorney has been registered.⁸ This currently costs \$126.70.⁹
- 16.14 An appointment of an enduring guardian must be registered with the Tasmanian Guardianship and Administration Board.¹⁰ No fee is charged to register an enduring power of guardianship.¹¹ Once registered, it becomes publicly accessible.

⁵ The Registry Working Group participants were as follows: Helen Trihas; Alistair Craig; Diane Tate; Mercia Chapman; Colleen Pearce, and John Chesterman; Elizabeth Muhlebach and George Joseph; Laura Helm and Kathy Wilson; and Leonie Schween respectively.

⁶ *Powers of Attorney Act* (NT) s 8; *Powers of Attorney Act 2003* (NSW) s 52; *Land Title Act 1994* (Qld) s 132; *Land Titles Act 1925* (ACT) s 130(2); *Powers of Attorney Act 1980* (NT) s 13; *Real Property Act 1886* (SA) ss 155–6; *Transfer of Land Act 1893* (WA) s 143.

⁷ *Powers of Attorney Act 1980* (NT) s 13.

⁸ *Powers of Attorney Act 2000* (Tas) ss 4, 9, 16. In Victoria, there used to be a requirement that a general power of attorney was registered but this was repealed: *Instruments Act 1958* (Vic) s 105, as repealed by *Instruments (Powers of Attorney) Act 1980* (Vic) s 2. The requirement that powers of attorney dealing with real property are registered has also been repealed but preserved in relation to powers created before 1 July 1980: *Instruments Act 1958* (Vic) s 105(2).

⁹ The *Powers of Attorney Act 2000* (Tas) sch 2 notes the fee for registration is \$90.50; however, the fees contained in legislation administered by the Recorder of Titles have increased to \$126.70 and took effect on 1 July 2011: Department of Primary Industries, Parks, Water and Environment (Tasmania) *Fees* (14 October 2011) <<http://www.dpiw.tas.gov.au/inter-nsf/WebPages/JGAY-53F2VU?open>>.

¹⁰ *Guardianship and Administration Act 1995* (Tas) s 32(2)(d). In the ACT and Queensland, it is possible to register enduring powers of attorney that give welfare and medical decision-making powers but there is no requirement to do so: *Powers of Attorney Act 2006* (ACT) s 29; *Powers of Attorney Act 1998* (Qld) s 60.

¹¹ Seniors Rights Victoria endorses this practice: Submission CP 71 (Seniors Rights Victoria).

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Chapter 16

A new registration scheme



16.15 The Tasmanian system of mandatory registration has been in place for many years, and approximately 13,500 enduring guardianship appointments have been registered with the Tasmanian Guardianship and Administration Board.¹² The President of the Tasmanian Guardianship and Administration Board has told the Commission that she believes the Tasmanian experience with mandatory registration has been positive and assists the Board with its work.¹³

ENGLAND AND WALES

16.16 In England and Wales, it is mandatory to register lasting powers of attorney for both personal and financial matters¹⁴ with the Public Guardian.¹⁵ The Public Guardian also maintains a register of orders made by the Court of Protection under mental capacity laws appointing substitute decision makers (known as deputies).¹⁶ The registers are paper-based and there is no capacity to conduct online searches.

16.17 A lasting power of attorney can be registered by the donor when they have capacity, or by the attorney at any time prior to exercising their powers. Registration is expensive—it costs £130 to register an appointment.¹⁷ People with limited incomes are entitled to a reduced fee.¹⁸

16.18 Some information on the register is publicly accessible. Any person can apply to search the register.¹⁹ The search fee is £25.²⁰ Information that will be revealed by an initial search of the register includes:

- the date of birth of the donor/person the order is about
- the names of any deputies²¹ or attorneys
- the date the instrument was made, registered, revoked or cancelled (if applicable)
- whether the instrument relates to ‘property and affairs’ or ‘personal welfare’
- whether deputies/attorneys were appointed jointly or jointly and severally
- whether there are conditions or restrictions on the instrument (but not details about the conditions or restrictions).²²

16.19 If an initial search does not provide all the information needed, a person may apply for additional information using a ‘second tier’ search request. The person must outline what further information they are seeking, the reason why they are seeking it, and the reason they are unable to obtain this information directly from the donor. The Public

12 As at 30 March 2011: consultation with Anita Smith—President, Guardianship and Administration Board, Tasmania (21 February 2011).

13 Consultation with Anita Smith—President, Guardianship and Administration Board, Tasmania (21 February 2011).

14 *Mental Capacity Act 2005* (UK) c 9, s 9(2)(b). ‘Enduring powers’, as they were previously called, made under the *Enduring Powers of Attorney Act 1985* (UK) c 29 are still valid, but since 1 October 2007, only lasting powers of attorney can be made. See *Mental Capacity Act 2005* (UK) c 9, s 66.

15 *Mental Capacity Act 2005* (UK) c 9, sch 1 para 4.

16 These are the English and Welsh equivalents of VCAT orders appointing a guardian or an administrator: *ibid* s 58(1)(b). Note the Office of the Public Guardian is not appointed to this role in the UK.

17 Office of the Public Guardian (United Kingdom), *LPA120: EPA and LPA fee, exemption and remission guidance* (1 October 2011), 1 <<http://www.justice.gov.uk/global/forms/opg/lasting-power-of-attorney/index.htm>>.

18 A person does not have to pay any fees if they are receiving any of a number of benefits, including income support, employment and support allowance and housing or tax credits or benefits, and has not been awarded damages of more than £16,000: Office of the Public Guardian (United Kingdom), *LPA120: EPA and LPA fee, exemption and remission guidance* (1 October 2011), 2 <<http://www.justice.gov.uk/global/forms/opg/lasting-power-of-attorney/index.htm>>.

19 Office of the Public Guardian (United Kingdom), *OPG100 - Application for a search of the Public Guardian Registers* (September 2011) <<http://sitesearch.justice.gov.uk.openobjects.com/kb5/justice/justice/results.page?qt=OPG+100>>.

20 Ministry of Justice (United Kingdom), *Office of the Public Guardian: Fees 2011/2012* (2011) 43.

21 The person appointed to make decisions on behalf of a person who lacks capacity to make decisions: *Mental Capacity Act 2005* (UK) s 16(2).

22 For more information see: Office of the Public Guardian (UK), *LPA 109 Office of the Public Guardian Registers* (September 2011), 7–8 <www.justice.gov.uk/downloads/global/forms/opg/lpa109.pdf>.

Guardian has a discretionary power to grant the request, taking into account matters such as the relationship between the donor and the person making the request, the information requested and the reasons access was requested. No additional fee is charged for a 'second tier' search.²³

- 16.20 There is also a requirement in England and Wales that particular people be notified when an application is made to register a power of attorney. These people are the person who made the appointment, any attorneys and any people who have been nominated to receive notification.²⁴
- 16.21 The people who are notified have a right to object to an application for a power of attorney to be registered. Objections may be made if one of a number of events, specified by the legislation, has occurred that have the effect of revoking the power of attorney.²⁵ These include that:
- the power of attorney is not valid
 - the donor revoked the power of attorney when they had the capacity to do so
 - fraud or undue pressure was used to induce the donor to make the appointment
 - the attorney proposes to behave in a way that would contravene their authority or would not be in the donor's best interests.²⁶

SCOTLAND

- 16.22 In Scotland, it is also compulsory to register enduring powers of attorney for both financial and welfare matters (called continuing and welfare).²⁷ The registration fee is £70.²⁸ A power of attorney must be registered with the Public Guardian before it can come into effect.²⁹
- 16.23 If the Public Guardian is satisfied the attorney is prepared to accept the appointment, a certificate of registration is issued to the attorney. This may be used to confirm the validity of their powers.³⁰
- 16.24 The intention of compulsory registration in Scotland is to make information about the powers publicly available.³¹ The details of the person who made the appointment and the attorney are entered in the public register.³² The fee to search the register is £15.³³
- 16.25 The Scottish legislation also places a duty on attorneys and guardians to keep records of the exercise of their powers.³⁴

COMMUNITY RESPONSES

ONLINE REGISTRATION

- 16.26 In the consultation paper, the Commission proposed an online registration scheme for personal appointments that could also include advance directives. During

23 DirectGov, *The Office of the Public Guardian and the Registers of Attorneys and Deputies* (20 December 2011) <http://www.direct.gov.uk/en/GovernmentCitizensandRights/MentalCapacityandtheLaw/MentalCapacityandPlanningAhead/DG_185924>.

24 *Mental Capacity Act 2005* (UK) c 9, sch 1 paras 6–9.

25 *Ibid* sch 1 paras 13–14.

26 See Court of Protection, *Application to object to the registration of a Lasting Power of Attorney (LPA)* (9 December 2011) <<http://www.justice.gov.uk/global/forms/opg/lasting-power-of-attorney/index.htm>>.

27 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, ss 15, 16.

28 Office of the Public Guardian (Scotland), *Power of Attorney* <http://www.publicguardian-scotland.gov.uk/whatwedo/power_of_attorney.asp>.

29 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, s 19.

30 *Ibid* s 19(2)(b).

31 *Ibid* s 19; *Explanatory Notes, Adults with Incapacity (Scotland) Act 2000* (Scot) [75].

32 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, s 19(2)(a); *Explanatory Notes, Adults with Incapacity (Scotland) Act 2000* (Scot) [76].

33 Office of the Public Guardian (Scotland), *Table of Fees* (1 April 2010) <<http://www.publicguardian-scotland.gov.uk/whatwedo/fees.asp>>.

34 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, ss 21, 65.

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consultations, the Commission raised the possibility that the register could also include VCAT appointments of guardians and administrators.

- 16.27 The views of people who responded to this proposal are recorded at some length because it is important to acknowledge the widespread interest in and support for the establishment of an online register.³⁵ Many people thought that online registration would improve the effectiveness of personal appointments by encouraging their use, by discouraging fraud and by providing third parties with more confidence to rely upon them.³⁶ Many people also supported the inclusion of VCAT appointments of substitute decision makers in the register.³⁷
- 16.28 A number of people and organisations considered the possible advantages and disadvantages of an online registration scheme.³⁸ The Trustee Corporations Association of Australia supported the creation of a online register, suggesting that:
- the advantages of proof of validity and speed of verification could be expected to outweigh cost and privacy concerns, provided registration and access fees are minimal and access is appropriately controlled.³⁹
- 16.29 The College of Neuropsychologists expressed the view that an online register would enable health care professionals and service providers to better identify those with the authority to make decisions.⁴⁰
- 16.30 The Australian Psychological Society considered an online registration system would greatly enhance the capacity of health and community providers to support their clients, particularly in healthcare situations where there is the need to address these issues in a timely way.⁴¹
- 16.31 Victoria Police suggested that 24-hour access to an online register would assist the police to quickly ascertain who is authorised to provide decision-making support for a person.⁴²
- 16.32 State Trustees identified a number of benefits of an online registration system including:
- reducing the risk of persons relying or acting on invalid documents
 - being able to verify whether an enduring power exists and is current
 - providing the ability to ascertain the scope of the power, and whether it has been activated
 - providing scope for monitoring and imposing accountabilities on appointees

35 For eg, consultations with Victorian Registry of Births, Deaths and Marriages (16 February 2011) Alzheimer's Australia Vic and roundtable with people caring for parents with dementia (8 March 2011); Submissions CP 20 (Epworth HealthCare) and CP 59 (Carers Victoria).

36 For eg, consultations with Aged Care Assessment Service in Victoria (28 February 2011), Royal District Nursing Service (9 March 2011), Trustee Corporations Association of Australia (15 March 2011), Australian Bankers' Association (16 March 2011), service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (22 March 2011), Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society (23 March 2011) and metropolitan carers (in partnership with Carers Victoria) (24 March 2011). See also Submissions CP 16 (Victoria Police), CP 19 (Office of the Public Advocate), CP 23 (Dr Kristen Pearson), CP 28 (Financial Ombudsman Service Limited), CP 33 (Eastern Health), CP 58 (The Australian Psychological Society), CP 61 (Disability Services Commissioner), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)), CP 77 (Law Institute of Victoria), CP 78 (Mental Health Legal Centre) and CP 80 (Victorian Civil and Administrative Tribunal).

37 Consultations with Victorian Registry of Births, Deaths and Marriages (16 February 2011), Royal District Nursing Service (9 March 2011), metropolitan carers (in partnership with Carers Victoria) (24 March 2011), Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society (23 March 2011) and Carers Victoria (15 April 2011); Submission CP 70 (State Trustees Limited).

38 Consultations with Victorian Registry of Births, Deaths and Marriages (16 February 2011), Alzheimer's Australia Vic and roundtable with people caring for parents with dementia (8 March 2011), Mental Health Legal Centre (28 April 2011); Submission CP 67 (Trustee Corporations Association of Australia), CP 81 (The Elder Law and Succession Committee, Law Society of NSW).

39 Submission CP 67 (Trustee Corporations Association of Australia).

40 Consultation with the Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society (23 March 2011).

41 The Australian Psychological Society expressed this comment in relation to guardianship and administration orders: Submission CP 58 (The Australian Psychological Society).

42 Submission CP 16 (Victoria Police).

- providing the ability to determine at a later date whether financial transactions were made by the donor themselves, or by the relevant appointee.⁴³
- 16.33 It was also suggested that the register might help to resolve disputes by clarifying the nature and extent of a person’s authority to act for someone else.⁴⁴ Seniors Rights Victoria argued that a registration system could lead to a reduction in the incidence of abuse by preventing people from relying on invalid powers.⁴⁵
- 16.34 Some organisations urged the Commission to consider ways of providing for community groups who might have concerns about or difficulty accessing an online registration system including Aboriginal communities, CALD communities, mental health consumers and the elderly.⁴⁶
- 16.35 Some who opposed the establishment of an online register for personal appointments suggested that because personal appointments are a private matter the bureaucracy associated with a register might deter people from making them.⁴⁷

THE HOLDER OF THE REGISTER

- 16.36 The Victorian Parliament Law Reform Committee recommended that the Victorian Registry of Births, Deaths and Marriages should maintain the register.⁴⁸ Many people and organisations supported this recommendation.⁴⁹
- 16.37 Many other possible holders of the register were identified in submissions and during consultations including State Trustees,⁵⁰ the Land Titles Office and VCAT.⁵¹
- 16.38 Although the Public Advocate thought that the Victorian Registry of Births, Deaths and Marriages would be an appropriate registering authority for enduring powers, she suggested that the Registry would need to develop higher-level practices around document invigilation and abuse recognition because these skills would be important when administering this type of register.⁵²
- 16.39 The Trustee Corporations Association of Australia expressed a similar view to the Public Advocate, concluding that although the Registry would require additional resources and expertise to take on this role, building on its existing infrastructure would be less expensive than establishing a new agency.⁵³

43 Submission CP 70 (State Trustees Limited).

44 Submission CP 28 (Financial Ombudsman Service Limited).

45 Submission CP 71 (Seniors Rights Victoria).

46 Submissions CP 73 (Victoria Legal) and CP 78 (Mental Health Legal Centre).

47 Consultation with Associate Professor Nicholas Tonti-Filipini (3 May 2011); Submissions CP 2 (Stephanie Mortimer), CP 27 (Catholic Archdiocese of Melbourne), CP 49 (Respecting Patient Choices Program—Austin Health) and CP 50 (Margaret Brown).

48 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 247–8 (*Inquiry into Powers of Attorney*).

49 Consultations with the Victorian Registry of Births, Deaths and Marriages (16 February 2011), Max Campbell—Association of Independent Retirees (25 March 2011; Submissions CP 19 (Office of the Public Advocate), CP 65 (Council on the Ageing Victoria), CP 67 (Trustee Corporations Association of Australia), CP 73 (Victorian Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

50 Submission CP 70 (State Trustees Limited).

51 Submissions CP 22 (Alzheimer’s Australia Vic), CP 24 (Autism Victoria), CP 35 (Ursula Smith), CP 37 (Mildura Base Hospital), CP 33 (Eastern Health) and CP 73 (Victoria Legal Aid).

52 Submission CP 19 (Office of the Public Advocate).

53 Submission CP 67 (Trustee Corporations Association of Australia).

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COMPULSORY OR VOLUNTARY REGISTRATION

16.40 The Victorian Parliament Law Reform Committee recommended that registration of enduring personal appointments should be compulsory.⁵⁴ Most submissions supported compulsory registration.⁵⁵ The Trustee Corporations Association of Australia suggested that voluntary registration would provide little security to third parties because they would not know if an appointment is valid and current.⁵⁶ Victoria Legal Aid expressed a similar view about the limited benefits of voluntary registration.⁵⁷

16.41 The Law Institute of Victoria supported compulsory registration but acknowledged that some members do not support compulsory registration because it

might discourage some people from making enduring powers because they will be forced to compulsorily disclose personal information to a government agency. For example, a person might not want family members to know that an enduring power has been executed until it is necessary to activate the power. They might not wish to disclose instructions about sensitive financial assets.⁵⁸

Status of unregistered appointments

16.42 Many people and organisations expressed concern about the legal status of an otherwise valid appointment if registration is compulsory.⁵⁹ There was support for the suggestion that VCAT should have the power to formally validate any document or agreement that has not been registered.⁶⁰

16.43 The Law Institute suggested that requiring VCAT to validate late registrations would be too cumbersome and would unnecessarily waste resources.⁶¹ Its preferred option was for attorneys to register an appointment at any time after activation where the appointment is otherwise valid, and to provide incentives for early registration based on staged pricing structures.⁶²

16.44 State Trustees suggested that in circumstances where there is a need to immediately register and activate a power of attorney the registering organisation could issue an interim certificate of authority.⁶³

FEES

16.45 Many organisations thought registration of personal appointments should be free of charge.⁶⁴ Many people agreed that a registration fee, even if minimal, would be likely to discourage registration.⁶⁵ It was also suggested that a search of the register by the person who has made the appointment should be free, and that a search by regular users such as banks and hospitals should be subject to an annual subscription fee.⁶⁶

54 See recommendation 67: *Inquiry into Powers of Attorney*, above n 48, 236.

55 Submission CP 19 (Office of the Public Advocate). Also roundtable with service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (22 March 2011); Submissions CP 24 (Autism Victoria), CP 33 (Eastern Health), CP 35 (Ursula Smith), CP 37 (Mildura Base Hospital), CP 57 (Aged Care Assessment Service in Victoria), CP 61 (Disability Services Commissioner), CP 67 (Trustee Corporations Association of Australia), CP 70 (State Trustees Limited), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria), CP 78 (Mental Health Legal Centre), CP 80 (Victorian Civil and Administrative Tribunal), and CP 81 (The Elder Law and Succession Committee, Law Society of NSW).

56 Submission CP 67 (Trustee Corporations Association of Australia).

57 Submission CP 73 (Victoria Legal Aid).

58 Submission CP 77 (Law Institute of Victoria).

59 Submission CP 73 (Victoria Legal Aid). See also Submission CP 48 (Centre for the Advancement of Law and Mental Health—Monash University).

60 Submissions CP 22 (Alzheimer's Australia Vic), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

61 Submission CP 77 (Law Institute of Victoria).

62 Ibid.

63 Submission CP 70 (State Trustees Limited).

64 For eg, Submission CP 78 (Mental Health Legal Centre).

65 Consultations with Julian Gardner (29 March 2011), Trustee Corporations Association of Australia; ANZ Trustees Ltd; Equity Trustees Ltd; Trust Company Ltd; Perpetual Trustees (in partnership with Trustee Corporations Association of Australia) (4 March 2011), Trustee Corporations Association of Australia (15 March 2011), Australian Bankers' Association (16 March 2011) and service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (22 March 2011).

66 For eg, consultation with Royal District Nursing Service (9 March 2011).

REGISTRATION TIME LIMITS

- 16.46 The Parliament Law Reform Committee recommended that registration should occur at the time the documents are created.⁶⁷
- 16.47 In the consultation paper, the Commission asked for responses about when registration should occur. There was general agreement that registration should occur when a document is executed or shortly afterwards.⁶⁸ The time suggested varied from two weeks to six months.
- 16.48 In urging the Commission to develop incentives to encourage registration upon or shortly after execution, the Law Institute of Victoria pointed out that if registration is not required until activation there will be a risk that an attorney is unaware of the existence or location of the document. The Institute suggested that the prescribed forms should include a clear notice about the requirement to register the power and details about when and how to do so.⁶⁹

Transitional arrangements for existing appointments

- 16.49 The Public Advocate suggested that a workable transitional arrangement for personal appointments would be to nominate a date after which they would need to be registered in order to be valid. The Public Advocate also suggested that it should be possible to register appointments made prior to the nominated date on a voluntary basis.⁷⁰
- 16.50 The Trustee Corporations Association of Australia suggested that it should not be necessary to register inactivated existing powers of attorney until they are activated. The Association said:
- Our members are holding many thousands of un-activated EPAs and registration of those documents would involve considerable administrative burden.⁷¹
- 16.51 It was widely noted that if registration is compulsory, the process must be efficient, as a delay may be detrimental to the principal in urgent cases.⁷²

Proof of identity and registration

- 16.52 In Chapter 10, the Commission noted that many submissions emphasised the importance of identity checks when personal appointments are created in order to guard against fraud. The Commission recommends in that chapter that the principal be required to show documents proving identity to two witnesses at the time of making the appointment, and that one witness should be required to certify that they had seen these documents.
- 16.53 There was general support for the Commission's proposal that a person who makes an appointment should receive a certificate upon registration that may be used as evidence that an appointment has been registered.⁷³ There was also support for the suggestion that people receive a wallet card upon registration that would serve to alert others in emergencies about the existence of a personal appointment.⁷⁴

67 See recommendation 69: *Inquiry into Powers of Attorney*, above n 48, 238.

68 Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 33 (Eastern Health), CP 37 (Mildura Base Hospital), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 57 (Aged Care Assessment Service in Victoria), CP 67 (Trustee Corporations Association of Australia), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria).

69 Submission CP 77 (Law Institute of Victoria).

70 Submission CP 19 (Office of the Public Advocate).

71 Submission CP 67 (Trustee Corporations Association of Australia).

72 Submission CP 70 (State Trustees Limited). See also, eg, Submission CP 67 (Trustee Corporations Association of Australia).

73 Submissions CP 70 (State Trustees Limited) and CP 71 (Seniors Rights Victoria).

74 Consultations with Victorian Registry of Births, Deaths and Marriages (16 February 2011), metropolitan carers (in partnership with Carers Victoria) (24 March 2011); Submission CP 59 (Carers Victoria).

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ACCESS TO THE REGISTER

16.54 Some people expressed strong views about the need to ensure protection of privacy while also allowing appropriate access to the register. The Privacy Commissioner emphasised the importance of safeguards given the online nature of the registration system:

While there are great benefits in enabling ready access to registers, once information is available online, without restriction, it is capable of being collected, incorporated with other publicly available information, and misused by people with no legitimate interest in or use for the information, including for criminal activity such as identity fraud and identity theft.⁷⁵

16.55 The Mental Health Legal Centre indicated support for the English and Welsh approach where only very limited information is given to a person conducting an initial search of the register. It suggested that the two-tier system of releasing information is particularly appropriate for advance directives.⁷⁶

16.56 Seniors Rights Victoria proposed that regular users and individual users of the register should be required to agree to abide by the terms and conditions of access and to sign a privacy agreement.⁷⁷

16.57 The Federation of Community Legal Centres argued that the importance and complexities of safeguarding privacy highlights the importance of people having access to free or affordable legal advice when making appointments.⁷⁸

A layered approach to access

16.58 The Privacy Commissioner supported the Commission's proposal for a 'layered' or 'tiered' approach to access to information on the register. A number of organisations agreed that layered access to the register is a necessary and practical safeguard to protect people's private information.⁷⁹

16.59 The Privacy Commissioner explained how a layered approach to accessing and searching the register might work:

For example the register could operate, as a minimum, as a type of 'document verification system'. When an individual or organisation needs to check whether a power of attorney document exists and is current, they provide basic information about the document presented and the system responds by verifying with a 'yes' or 'no' whether the document exists and is current.

When this type of verification is available, for example, it may not be necessary for an organisation (for example, a bank or other financial institution) to have access to additional personal information which might be contained in the register, such as the donor's date of birth or address, or whether the donor has made an appointment in relation to his or her medical treatment, and any directions or restrictions in relation to that appointment.

However, and as an example of another 'layer', it may be appropriate for a hospital or other health service provider to be able to verify the nature of an appointment, for example, whether an enduring power of attorney (medical treatment), has been made by an individual, who has been appointed to this role, and whether there are any specific directions or restrictions on any such appointment.⁸⁰

75 Submission CP 60 (Office of the Victorian Privacy Commissioner).

76 Submission 78 (Mental Health Legal Centre).

77 Submission CP 71 (Seniors Rights Victoria).

78 Submission CP 75 (Federation of Community Legal Centres (Victoria)).

79 For eg, consultation with Royal District Nursing Service (9 March 2011); Submission CP 19 (Office of the Public Advocate), CP 24 (Autism Victoria), CP 60 (Office of the Victorian Privacy Commissioner), CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

80 Submission CP 60 (Office of the Victorian Privacy Commissioner).

Authorised access only

- 16.60 There was widespread support for the view that the register should not be open to the public, and that only authorised people and organisations should have access to it.⁸¹
- 16.61 The Public Advocate suggested that access to the register should be restricted to those people who are named in the document and those who need to verify the document's existence in order to implement a decision made under it.⁸²
- 16.62 In the consultation paper the Commission suggested that the person who makes an appointment and the person who is appointed could be given a personal identification number (PIN) that would allow them to access the register as required but would also protect privacy. Organisations that regularly need to know whether a person has a substitute decision maker, such as hospitals and banks, could be given broad access to some of the information on the register. Other people might be given more restricted access to information on the register.
- 16.63 The possibility of PIN access received broad support.⁸³ People acknowledged that this would enable the principal and the representative to access the register to demonstrate that the appointment is valid and to describe the powers available to the substitute decision maker.⁸⁴
- 16.64 The Law Institute of Victoria expressed concern about the utility of an online PIN system for older people who may not be comfortable with electronic technology.⁸⁵
- 16.65 Some organisations suggested that where the register indicates that a power is limited or conditional in some way, further steps would need to be available to access information about the terms of the appointment, such as by applying to an external body.⁸⁶

A gatekeeper to authorise third party access

- 16.66 During consultations, the Commission suggested that the Public Advocate could act as a 'gatekeeper' for access to the register by responding to requests from third parties for information about the existence, validity and extent of powers in a personal appointment. There was support for this idea.⁸⁷
- 16.67 A significant part of this role would be to license regular users of the register to access and download specified types of information.⁸⁸ The Public Advocate noted she would be happy to take on the proposed gatekeeper role.⁸⁹
- 16.68 The Law Institute of Victoria argued that access to non-binding instructions or wishes contained in the appointment document should be limited to attorneys, and that third parties should not be able to access this information.⁹⁰
- 16.69 Organisations suggested as possible regular users included the Aged Care Assessment Service in Victoria (ACAS); the Royal District Nursing Service; Victoria Police;

81 Consultation with Royal District Nursing Service (9 March 2011); Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 24 (Autism Victoria), CP 35 (Ursula Smith), CP 57 (Aged Care Assessment Service in Victoria), CP 70 (State Trustees Limited) and CP 77 (Law Institute of Victoria).

82 Submission CP 19 (Office of the Public Advocate).

83 For eg, consultations with Australian Bankers' Association (16 March 2011), metropolitan carers (in partnership with Carers Victoria), Max Campbell—Association of Independent Retirees (25 March 2011); Submissions CP 71 (Seniors Rights Victoria), CP 75 (Federation of Community Legal Centres Victoria) and CP 78 (Mental Health Legal Centre).

84 For eg, roundtable with metropolitan carers (24 March 2011).

85 Submission CP 77 (Law Institute of Victoria).

86 For eg, Submission CP 33 (Eastern Health), CP 67 (Trustee Corporations Association of Australia) and CP 77 (Law Institute of Victoria).

87 For eg, consultations with Royal District Nursing Service (9 March 2011), Dianne Pendergast—Adult Guardian, Queensland (4 April 2011) and Mental Illness Fellowship Victoria (6 April 2011).

88 For eg, Submission CP 19 (Office of the Public Advocate).

89 Submission CP 19 (Office of the Public Advocate).

90 For, eg, Submission CP 77 (Law Institute of Victoria).

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Ambulance Victoria; banks and other financial institutions; State Trustees; hospitals; Disability Services Commission; Medicare; Centrelink; insurance companies; nursing homes; medical practitioners and legal practitioners.

- 16.70 There was support for a system authorising and licensing regular users to pay an annual licence fee to view designated parts of the register. This would enable them to check whether an appointment had been made, and the nature of the powers that had been granted.⁹¹

Notification upon activation

- 16.71 In the consultation paper the Commission proposed that the list of people who should be notified when a personal appointment is activated could include:

- the person who made the appointment
- a public authority such as the Public Advocate or State Trustees
- people nominated by the person who made the appointment.⁹²

- 16.72 Notification provides a safeguard against abuse by alerting the person who made the appointment and third parties that the attorney or guardian is now using the powers given to them by the principal for use when that person does not have the capacity to make their own decisions.

- 16.73 The Parliamentary Committee recommended that the person making the appointment should be able to nominate monitors to oversee the operation of an appointment. It recommended that these people also be notified of the activation of an appointment and be entitled to object to its use.⁹³

- 16.74 There was support for mandatory notification to the donor that an appointment had been activated. It was considered, however, that other notifications should be a matter of personal preference and specified in the document.⁹⁴

- 16.75 It was also argued that the principal should be able to specify parties who they do not wish to be notified. Victoria Legal Aid suggested:

People should be able to ask that someone not be notified. Provided there is no logical reason to notify the person, and/or the donor has provided good reasons and evidence as to why the person should not be notified, their privacy should be respected and the person not notified.⁹⁵

- 16.76 There was no support for the idea that a public authority should be notified when a personal appointment is activated. State Trustees said:

Notification (as far as notification to the world at large is concerned) should be to the organisation that maintains the register. The overall advantage of notification in both cases is that it would increase general oversight, thereby reducing the opportunities for abuse of the enduring power.⁹⁶

⁹¹ For eg, consultations with the Royal District Nursing Service (9 March 2011) and Australian Bankers' Association (16 March 2011).

⁹² Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 15 (2011) 159.

⁹³ See recommendations 75 and 76: *Inquiry into Powers of Attorney*, above n 48, 250.

⁹⁴ For eg, Submissions CP 65 (Council on the Ageing Victoria), CP 71 (Seniors Rights Victoria) and CP 75 (Federation of Community Legal Centres (Victoria)).

⁹⁵ Submission CP 73 (Victoria Legal Aid).

⁹⁶ Submission CP 70 (State Trustees Limited). See also Submissions CP 63 (Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)), CP 67 (Trustee Corporations Association of Australia) and CP 78 (Mental Health Legal Centre).

16.77 The Public Advocate agreed with this view:

OPA does not believe it should be necessary to require a public authority to be notified of the activation of an enduring power. This would constitute another layer of bureaucracy over and above registration of the document, and OPA does not believe the benefits of this requirement would outweigh the costs.⁹⁷

FLUCTUATING DECISION-MAKING ABILITY

16.78 The need for a registration scheme to be able to respond to a person's fluctuating decision-making ability was raised in community responses to the consultation paper. Some people's decision-making ability may fluctuate on a daily basis or periodically. In other instances, a person's loss of capacity may only be temporary. In these circumstances, there might be a need for constant notifications whenever an appointment is activated and deactivated.⁹⁸

16.79 Some organisations suggested that a registration system should provide for the deactivation of powers when a principal regains capacity. This step was seen as preferable to obliging the principal to revoke the appointment and make another one after regaining capacity.⁹⁹

16.80 Seniors Rights Victoria suggested that notification should only be required when activation first occurs if a person's capacity is fluctuating.¹⁰⁰

16.81 The Public Advocate suggested that it should be possible to gain quick access to VCAT when a person's capacity fluctuates and there is concern about the activation or use of a personal appointment.

REGISTRATION OF INSTRUCTIONAL DIRECTIVES

16.82 Documents that record a person's wishes about the future—known as instructional or advance directives—are discussed in Chapter 11. Some people and organisations expressed views about whether these directives should be included in an online register.

16.83 The major reasons for including instructional directives in the register were identified in one submission:

The Consultation Paper observed that one of the challenges with advance directives is to ensure that they are known to those who are making decisions about treatment. There may also be an additional practical problem, namely that some medical professionals are reluctant to have regard to directives as they have philosophical concerns about their use.

For these reasons, we believe that there should be an opportunity for individuals to electronically register their advance directive, coupled with an obligation on medical professionals to satisfy themselves (by searching the register) that the treatment being given is not contrary to the instructions in an advance directive.¹⁰¹

16.84 Some people suggested there may be potential for a directive to form part of a person's electronic health record should such a national system be established.¹⁰²

97 Submission CP 19 (Office of the Public Advocate).

98 For eg, *ibid* and CP 67 (Trustee Corporations Association of Australia).

99 For eg, Submissions CP 71 (Seniors Rights Victoria) and CP 75 (Federation of Community Legal Centres (Victoria)).

100 Submission CP 71 (Seniors Rights Victoria).

101 Submission CP 63 (Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)). See also Submission CP 78 (Mental Health Legal Centre).

102 Submissions CP 49 (Respecting Patient Choices Program—Austin Health), CP 63 (Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)), CP 68 (Australian Nursing Federation) and CP 69 (Australian Medical Association (Victoria)).

A new registration scheme



- 16.85 There were differing views about whether it should be compulsory to register instructional directives.¹⁰³ Some expressed the view that it should be compulsory for instructional directives to be registered in order to promote autonomy, to emphasise the importance of these instruments, to encourage accountability, to minimise abuse and to avoid confusion.¹⁰⁴
- 16.86 State Trustees argued that failure to register an advance directive should not render the document ineffective:
- a person who has to hand a valid but unregistered advance directive should be required to give the document as much weight as a registered document. A more recent document should outweigh an earlier one, to the extent of any inconsistency.¹⁰⁵
- 16.87 Victoria Legal Aid stressed the need to ensure that directives are reviewed at appropriate intervals to ensure they still reflect the wishes of the principal. Victoria Legal Aid noted that this is particularly important if they are to be enforceable.¹⁰⁶ It suggested that reviews could be triggered by sending annual reminders to those who have registered instructional directives.¹⁰⁷
- 16.88 The Mental Health Legal Centre noted that a further issue of importance when dealing with medical and lifestyle instructional directives is the highly personal nature of some of the information included in them, which emphasises the need for clear access policies.¹⁰⁸

THE COMMISSION'S VIEWS AND CONCLUSIONS

A NEW VICTORIAN ONLINE REGISTER

- 16.89 The Commission believes that there should be an online Victorian register of substitute decision-making appointments. The register should also include associated appointments—such as those of co-decision makers and supporters—and advance directives. A register would be a highly effective means of encouraging people to appoint others to assist them with decision making. It would also play an important role in promoting understanding and acceptance of the various appointments by people and organisations that regularly engage in transactions requiring formal authorisation concerning people who have impaired decision-making ability.
- 16.90 The Commission's recommendations in this chapter complement the proposals advanced by the Victorian Parliament Law Reform Committee in August 2010.¹⁰⁹ They also seek to implement the broad community support for the establishment of a register.
- 16.91 While the Commission agrees with the Parliamentary Committee that a national register is desirable, it is unlikely to be an achievable option in the short term.¹¹⁰ The many Victorians who would benefit from the existence of a register should not have to wait until there is national resolve and consensus for this step. Victoria can provide leadership in this field as it did a generation ago when the existing guardianship laws were first developed.

¹⁰³ For eg, Submissions CP 20 (Epworth HealthCare), CP 50 (Margaret Brown), CP 63 (Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

¹⁰⁴ For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 24 (Autism Victoria), CP 33 (Eastern Health), CP 35 (Ursula Smith) and CP 55 (Office of the Health Services Commissioner).

¹⁰⁵ Submission CP 70 (State Trustees Limited).

¹⁰⁶ Submission CP 73 (Victoria Legal Aid).

¹⁰⁷ Ibid.

¹⁰⁸ Submission CP 78 (Mental Health Legal Centre).

¹⁰⁹ *Inquiry into Powers of Attorney*, above n 48, 232–6.

¹¹⁰ Ibid 232–3.

- 16.92 Given the widespread personal and business use of the Internet and the efficiencies it creates, it makes sense to establish an online register if this step is technologically possible, affordable and supported by the people who would use it regularly. Following detailed discussions with the Registry Working Group, the Commission is satisfied that all of these goals are achievable by the registration scheme outlined in this chapter.
- 16.93 Many people and organisations such as hospitals, health professionals, banks and other financial institutions, and police and emergency services should be able to find out with comparative ease at any time of day whether someone has the authority to make decisions for a person with whom they are dealing who has impaired decision-making ability. The register proposed in this chapter is designed to overcome the problem that people cannot be expected to carry personal appointment documents with them at all times and tribunal orders appointing substitute decision makers are not easily accessible.
- 16.94 The Commission believes that an online registration system would be far more effective than a paper-based register because it would be more readily searchable, continually accessible and easy to update.

Appointments and directives in the register

- 16.95 The Commission believes that the register should include all of the following appointments and advance directives:
- enduring personal guardians
 - enduring financial administrators
 - supporters for personal matters
 - supporters for financial matters
 - personal guardians appointed by VCAT
 - financial administrators appointed by VCAT
 - co-decision makers appointed by VCAT
 - instructional directives
 - personal appointments and VCAT appointments made under current laws.

A new registration scheme



RECOMMENDATIONS

Establishment of the register

259. New guardianship legislation should establish an online register for the following appointments and directives:

- (a) enduring personal guardians
- (b) enduring financial administrators
- (c) supporters for personal matters
- (d) supporters for financial matters
- (e) personal guardians appointed by VCAT
- (f) financial administrators appointed by VCAT
- (g) co-decision makers appointed by VCAT
- (h) instructional health directives and other instructional or advance directives
- (i) personal appointments and VCAT appointments made under earlier laws.

260. The online registration scheme should be user-friendly, cheap and easy to access, and publicly subsidised. It should aim to be the model for a similar scheme in every Australian state and territory.

Mandatory registration of appointments

- 16.96 The Commission believes that in order to realise some of the primary benefits of establishing a register—such as ease of locating, verifying and validating the continuing existence of an appointment—it should be mandatory to register a personal appointment for it to be valid. This would mean that any act performed under a personal appointment would be of no legal effect until the document was registered.
- 16.97 There will always be circumstances, however, when it would be unfair to invalidate all actions purporting to have been authorised by an appointment that is not valid. There are existing provisions in the *Instruments Act 1958 (Vic)*¹¹¹ and the *Guardianship and Administration Act 1986 (Vic)* (G&A Act)¹¹² that allow a court or VCAT to declare that actions taken in good faith by innocent people in reliance upon an invalid appointment or without awareness of an appointment are valid. VCAT should have similar corrective powers when dealing with actions taken under unregistered personal appointments.
- 16.98 In addition, VCAT should be required to inform the holder of the register of all relevant appointments that it makes under new guardianship laws in order to ensure that these orders are accessible at all times.

Instructional directives

- 16.99 In Chapter 11 the Commission recommends that instructional health care directives should be binding, except in some limited circumstances, and that other personal directives should guide rather than bind decisions about the principal.
- 16.100 The Commission notes the Advance Directives Review Committee (South Australia) recommended that a state registration scheme for advance directives should not be introduced.¹¹³ The Committee argued that, as there was a lack of evidence that such

¹¹¹ *Instruments Act 1958 (Vic)* s 125U.

¹¹² *Guardianship and Administration Act 1986 (Vic)* s 52(3).

¹¹³ Advance Directives Review Committee (South Australia), *Second Report of the Review of South Australia's Advance Directives* (2008) 40.

registers were an effective way of protecting patients' rights, the cost of a register was not justified.¹¹⁴

- 16.101 The Committee also noted the difficulties around 'activation' based registers, particularly given the complexities of fluctuating capacity and changing life circumstances.¹¹⁵ It argued for the introduction of other less expensive means of indicating the existence of an advance directive, such as the use of 'wallet cards'.¹¹⁶
- 16.102 The Commission does not believe that it should be compulsory to register any instructional or advance directives in the short term. It should be possible, however, to include such a document on the register voluntarily.
- 16.103 There are significant differences between personal appointments and instructional or advance directives. For example, often a third party such as a medical practitioner or bank will need to know with considerable certainty whether they should accept the authority claimed by a personal guardian or financial administrator to make a very important decision for a person who is unable to make their own decision. There is potential for great conflict—and for the interests of the person who is unable to make their own decision to be jeopardised—if questions of decision-making authority cannot be resolved quickly and decisively. This potential for conflict does not arise when dealing with instructional or advance directives because there is no person purporting to have the authority to make decisions for a person who is unable to do so.
- 16.104 The Commission urges the Attorney-General to keep this matter under review with the assistance of the Public Advocate. It would be advisable to re-consider mandatory registration of instructional health care directives if there were evidence of significant disputes about the existence or effect of these documents.

RECOMMENDATIONS

Compulsory registration of personal appointments

261. It should be compulsory to register the personal appointments referred to in Recommendation 259. VCAT should be required to inform the holder of the register of all relevant appointments that it makes under new guardianship laws. It should not be compulsory to register an instructional or advance directive but it should be permissible to do so.

Effect of actions taken under an unregistered appointment

262. Any act performed under a personal appointment should have no legal effect unless the document is registered. VCAT should be permitted to order that legal effect be given to any action taken by a person acting on the reasonable belief that an appointment had been validly made and registered.

THE REGISTRATION PROCESS

Who should hold the register?

- 16.105 The Commission agrees with the Parliamentary Committee's recommendation that the Victorian Registrar of Births, Deaths and Marriages should maintain the proposed register.¹¹⁷

¹¹⁴ Ibid 37–40.

¹¹⁵ Ibid 38.

¹¹⁶ Ibid 40.

¹¹⁷ See Recommendations 69 and 73: *Inquiry into Powers of Attorney*, above n 48, 238, 248. The Government Response to this inquiry noted further consideration of both recommendations. The Government also noted it would consider the outcomes of the Commission's review: *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report*, above n 3, 2, 31–2.

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Chapter 16

A new registration scheme

- 16.106 The Victorian Registry of Births, Deaths and Marriages, which was established in 1853, performs a number of record-keeping functions under Victorian and Commonwealth legislation.¹¹⁸ The Registrar reports to the Secretary of the Department of Justice.¹¹⁹
- 16.107 The Registrar's functions include recording and providing certificates for all births, adoptions, marriages and deaths occurring in the state of Victoria; registering domestic and caring relationships for people who ordinarily reside in Victoria; and registering changes of name for people who were born or reside in Victoria.¹²⁰
- 16.108 The Commission believes that the task of establishing and maintaining the proposed online register sits well with the Registrar's existing functions and capability. The Registrar has the facilities and expertise to assume responsibility for this task. The Registrar also has the existing capacity to maintain documents that contain sensitive private information and experience dealing with the National Proof of Identity Framework, which will be important when devising procedures to safeguard against fraud.
- 16.109 Neither VCAT nor the Public Advocate has the necessary facilities or expertise to host the register. While State Trustees has some expertise in this area, its status as a commercial organisation that competes with private enterprise in some fields would make it very difficult for it to assume this public responsibility.

RECOMMENDATION

The holder of the register

263. The Registrar of Births, Deaths and Marriages should be responsible for maintaining the Register of Appointments and Directives.

Registration time limits

- 16.110 The Commission believes that the law should encourage people to register a personal appointment shortly after they make it. This will ensure that relevant people are aware of its existence when it is required. Many appointments would be lost if registration were only required when the principal had lost capacity. Compulsory registration at the time the document is made would also help to guard against fraud because the principal would receive formal notification that an appointment has been registered.
- 16.111 The Commission notes that the Parliamentary Committee suggested that registration should occur within 60 days of executing the document. The Commission recommends that registration within 90 days of execution is appropriate.
- 16.112 There should be an effective mechanism to deal with cases of hardship when an appointment has not been registered within time. VCAT should have a discretionary power to permit registration at any time if it believes that exceptional circumstances justify waiving the 90 day time limit upon registration. VCAT should also have a power to permit registration at any time if:

118 The State and Commonwealth Acts and Regulations are as follows: *Births, Deaths and Marriages Registration Act 1996* (Vic); Births, Deaths and Marriages Registration Regulations 2008 (Vic); *Adoption Act 1984* (Vic); *Marriage Act 1961* (Cth); Marriage Regulations 1963 (Cth); *Coroners Act 2008* (Vic); *Relationships Act 2008* (Vic); Relationships (Fees) Regulations 2009 (Vic); *Assisted Reproductive Treatment Act 2008* (Vic); *Information Privacy Act 2000* (Vic); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Freedom of Information Act 1982* (Vic); *Status of Children Act 1974* (Vic). See Victorian Registry of Births, Deaths and Marriages, *About us* <<http://online.justice.vic.gov.au/CA2574F700805DE7/page/About+us?OpenDocument&1=70-About+us-&2=-&3=->>>.

119 Department of Justice (Victoria), *Department of Justice – Organisational Chart* (13 December 2011), 1 <<http://www.justice.vic.gov.au/home/about+us/our+organisation/departamental+structure/justice+-+doj+organisational+chart+%28pdf%29>>>.

120 Victorian Registry of Births, Deaths and Marriages, *About us* <<http://online.justice.vic.gov.au/CA2574F700805DE7/page/About+us?OpenDocument&1=70-About+us-&2=-&3=->>>.

- a document has not been registered because it failed to comply with statutory requirements, such as those concerned with witnessing, and
- the principal no longer has capacity to make an appointment, and
- VCAT finds that the document is a proper record of the wishes of a principal with capacity at the time it was made.

In these circumstances, VCAT should also have the power to make any other appointment or order it could make under guardianship legislation which would give effect to the wishes of the principal.

RECOMMENDATIONS

Registration time limits

264. A document appointing a person as an enduring personal guardian, as an enduring financial administrator, or as a supporter for personal or financial matters must be registered within 90 days of being made in order to be valid unless VCAT determines that there are exceptional circumstances that justify registration beyond this time limit.

Unregistered appointments

265. When a personal appointment is not registered within 90 days of being made, or when a document presented for registration is not registered because it was not made in accordance with the relevant statutory requirements and the principal no longer has the capacity to make the appointment in question, VCAT may:

- order that the document be registered if it believes that the document is a proper record of the wishes of a principal with capacity at the time it was made
- make any other order under guardianship legislation which it believes would give effect to the wishes of the principal.

Procedures at the time of registration

- 16.113 The Registrar of Births, Deaths and Marriages should be required to check each personal appointment before accepting it for registration to determine whether it appears to have been validly made. The processes involved in filing documents and checking identity are operational matters that should be determined by the Registrar following consultation with stakeholder groups such as those represented on the Commission's Registry Working Group.
- 16.114 The Registrar should have the power to return any documents for correction or to refuse to accept a document for registration. It should be possible for VCAT to review the merits of any decisions of this nature.
- 16.115 The Commission believes that the Registrar should be required to take the following steps when a personal appointment is accepted for registration:
- include the appointment in the online register
 - give the principal a registration certificate that contains the names of the relevant parties and the nature of the appointment
 - give the principal a password or PIN which enables the principal to view the appointment in the online register
 - give the representative a password or PIN which enables the representative to view the appointment in the online register.

A new registration scheme



- 16.116 The requirement to provide the principal with a certificate mirrors existing practices when births, deaths and marriages are registered. It should assist those people who want a document and who are not comfortable with online facilities. The Victorian Registry of Births, Deaths and Marriages advised the Commission that it is possible to validate current certificates through a validation service (CertValid) that is open only to subscriber organisations.¹²¹
- 16.117 The proposed password or PIN would enable the principal and the person appointed as their representative to check the terms of the appointment at any stage without recourse to the document and would also permit them to allow a third party to view and download a copy of the appointment.

RECOMMENDATIONS

Checking the validity of documents

266. The Registrar of Births, Deaths and Marriages must determine whether any personal appointment appears to have been validly made in accordance with the relevant statutory requirements before accepting it for registration. The Registrar may return the document for correction or may refuse to register it if it does not appear to have been validly made. It should be possible for any interested person to seek review in VCAT of the merits of any decision by the Registrar to refuse to accept a document for registration in the register.

Procedures at the time of registration

267. Upon accepting a personal appointment for registration the Registrar of Births, Deaths and Marriages must:

- (a) include the appointment in the online register
- (b) give the principal a registration certificate that contains the names of the relevant parties and the nature of the appointment
- (c) give the principal a password or PIN which enables the principal to view the appointment in the online register
- (d) give the representative a password or PIN which enables the representative to view the appointment in the online register.

Fees

- 16.118 There was widespread support for a low-cost system that encourages people to make and register personal appointments. The Commission does not believe that a 'user pays' system is appropriate in Victoria because fees of the magnitude of those charged in England and Wales would discourage people from using the system and would ultimately lead to greater public expense because of the need for more tribunal appointments.
- 16.119 The Commission believes that even nominal fees are likely to discourage people from making and registering personal appointments. The Commission believes, however, that people who wish to alter the terms of an appointment or change an appointment regularly should pay a fee when doing so. It would seem appropriate to direct that a fee is payable when a person seeks to register more than one personal appointment in any category during a calendar year or to vary the terms of an appointment more than once in any calendar year. The Registrar should have the power to waive the fee in exceptional circumstances.

¹²¹ Consultation with Victorian Registry of Births, Deaths and Marriages (16 February 2011).

RECOMMENDATION

Fees

268. There should be no fee for registering a personal appointment. There should be a fee payable, subject to waiver, when a person seeks to register more than one personal appointment in any category during a calendar year.

Variation and revocation

- 16.120 It should be possible for a principal with capacity to vary or revoke a personal appointment at any time. It seems appropriate that the processes for these steps are similar to those required when first making an appointment.
- 16.121 The principal should be able to file a document with the Registrar varying or revoking a registered appointment. The Registrar should be required to indicate on the register whether an appointment has been revoked or varied. That revocation or variation should be effective from the time of registration.
- 16.122 It should also be possible for the holder of an appointment to resign at any time while the principal has capacity. The holder of the appointment should be required to file a document with the Registrar and the resignation should be effective from the time of registration. This simple process is not appropriate when the principal no longer has capacity to make another appointment. The Commission deals with this issue in Chapter 10.

RECOMMENDATIONS

Revocation by the principal

269. A principal (with capacity) may revoke or vary a personal appointment at any time by filing an appropriate notice with the Registrar. A personal appointment is revoked from the date and time at which the Registrar includes a note on the register that the appointment has been revoked.

Resignation and revocation by the representative

270. A representative may resign and thereby revoke a personal appointment at any time when the principal has capacity by filing a notice of resignation with the Registrar. A personal appointment is revoked from the date and time at which the Registrar includes a note on the register that the appointment has been revoked.

Notice of activation

- 16.123 In Chapter 10, the Commission recommends that it should be possible for a principal to appoint an enduring financial administrator with powers that commence upon the principal's incapacity or at some other time. The Commission also recommends that it should only be possible for a principal to appoint an enduring personal guardian with powers that commence upon the principal's incapacity.
- 16.124 In order for the register to be a useful tool for third parties seeking information about a person's authority to make decisions for a principal, it is imperative that it contain information about the activation of the appointment. The representative should be required to notify the Registrar when they have activated powers that commence upon the principal's incapacity. The Registrar should then include a note to this effect on the register.

A new registration scheme

- 16.125 In view of the fact that there can often be a need for quick decisions to be made when a person loses capacity, the process of notifying the Registrar that the powers have been activated and of including this information on the register should operate as quickly as possible. While this process is an operational matter for the Registrar, the Commission believes that online notification should be possible.
- 16.126 There are likely to be challenges in practice in those cases where a person's capacity to make their own decisions fluctuates. It will be necessary to allow the representative to give the Registrar notice when the powers are activated or deactivated. While this step is an appropriate response to the fact a person's capacity to make decisions can change, constant activation and deactivation of the powers of a substitute decision maker will prove very difficult for some institutions.
- 16.127 In cases where powers are activated and deactivated regularly it might be appropriate for the Registrar to have the power to refer the matter to VCAT or the Public Advocate for investigation.

RECOMMENDATIONS

Commencement upon incapacity of the principal

271. If the powers of a representative commence when the principal lacks capacity to make decisions, the representative must advise the Registrar when they reasonably believe that the principal lacks capacity to make decisions and the representative proposes to commence using their powers. It should be possible for the representative to make this notification online in order to respond to situations in which quick notice is required.
272. The Registrar must include a note on the register when advised that a representative has commenced using their powers and notify the principal that the appointment has been activated.

Effect of registration

- 16.128 As discussed earlier, some of the primary benefits of establishing a register are to enable those dealing with a person with impaired decision-making ability to discover whether another person has been appointed to make decisions for that person (or to assist them when doing so), to know the extent of that person's authority, and to check whether the appointment is valid and current.
- 16.129 At present, third parties determine whether they are willing to accept the authority of a representative to make decisions for a principal because there is no register of personal appointments or certification by a public official about the authenticity of an appointment. Third parties also decide whether they are prepared to accept the authority of a guardian or administrator appointed by VCAT to make decisions for a represented person. As the Commission points out in Chapter 5, guardians and administrators sometimes have trouble in practice because some people will not accept their authority to make binding decisions for another person.
- 16.130 It will be necessary for new guardianship legislation to describe the effect of registration so that third parties will be aware of the consequences of relying upon an entry in the register. The Commission believes that the existence of a register cannot absolve third parties of the responsibility to be satisfied of the identity of the people with whom they are dealing and of the legitimacy of the appointment in question.
- 16.131 It is appropriate, however, to declare legislatively that a registered appointment is presumptive evidence that the principal referred to in the document has appointed

the person referred to in the document as their representative with authority to exercise the powers in relation to their personal or financial affairs in the circumstances described in the document. Otherwise, a registered appointment should operate according to its terms.

- 16.132 It is also appropriate to declare in new guardianship legislation that a personal appointment is effective until it is revoked by the principal, by order of VCAT, by an occurrence referred to in the document, by resignation of the representative, or by the death of the principal.
- 16.133 It should be possible for a person holding a personal appointment or any other person with an interest in the affairs of the principal to apply to VCAT for directions about the extent of that person's powers or about how those powers should be exercised.

RECOMMENDATIONS

Effect of registration

273. A registered personal appointment is presumptive evidence that the principal referred to in the document has appointed the person referred to in the document as their representative with authority to exercise the powers in relation to their personal or financial affairs in the circumstances described in the document. A registered personal appointment operates according to its terms and is effective until it is revoked by the principal, by order of VCAT, by an occurrence referred to in the document, by resignation of the representative, or by the death of the principal.

Guidance about powers

274. A person holding a personal appointment or any other person with an interest in the affairs of the principal may apply to VCAT for directions about the extent of that person's powers or about how those powers should be exercised.

ACCESS TO THE REGISTER

- 16.134 The Commission believes that the register should not be open to the public for search at any time. There is no public interest in allowing any member of the community to discover whether one person has appointed another to make decisions for them in particular circumstances or whether VCAT has appointed a substitute decision maker for a person.
- 16.135 Access to the register should be limited to those people and organisations that need to know whether one person has the authority to make decisions for another or to assist them when doing so. Access can be limited to those who need to know information that is kept on the register by licensing regular users and by deciding whether access should be granted on a case-by-case basis for non-regular users.
- 16.136 Access to the register should also be layered—people should be given access to the amount of information they need to know in order for them to conduct their dealings with a person with impaired decision-making ability. The amount of information a regular user needs is a matter for negotiation with the official who issues licences to access the register. The register should operate in such a way that it generates an electronic record whenever licensed regular users access any part of the register. In order to discourage people from trawling the register, it should be an offence for a licensed regular user to access any part of the register that they do not have a legitimate interest in viewing.

16

Chapter 16

A new registration scheme



- 16.137 The Commission believes that the 'gatekeeper' function of authorising access to the register is best performed by the Public Advocate because of her expertise in the way in which people with impaired decision-making ability interact with the rest of the community. The 'gatekeeper' would be required to license regular users and decide the terms of their access. The 'gatekeeper' would also consider applications by non-regular users for access to the register. From time to time, businesses and others will have a legitimate interest in finding out whether a person with whom they are dealing has some form of decision-making assistance. The 'gatekeeper' would be required to determine each application on its merits and allow a level of access that was appropriate in the circumstances or disallow the application if there were no demonstrated need to have access to information on the register.
- 16.138 Many organisations and groups of people often need to know whether a particular person has some form of decision-making assistance. These include hospitals; medical practitioners; banks and other financial institutions; the Aged Care Assessment Service in Victoria (ACAS); the Royal District Nursing Service; Victoria Police; Ambulance Victoria; State Trustees and other trustee companies; Commonwealth authorities such as Medicare and Centrelink; insurance companies; nursing homes; and legal practitioners. This list is not exhaustive, it merely seeks to illustrate the many different people and organisations that are likely to be regular users of the online register.
- 16.139 Regular users should receive an annual renewable licence to view designated parts of the register, and should pay an annual licence fee. The costs of operating the register could be met in part by the proposed licence fees. Because the register will be of considerable benefit to large organisations such as banks and hospitals it seems appropriate that they pay for this service.
- 16.140 The principal and his or her representative should be able to view that part of the register that concerns the principal's appointment at any time. They should also be permitted to allow any third person to view and download that part of the register. Access would be gained by use of a password or PIN allocated to the principal and the representative at the time of registration.

RECOMMENDATIONS

Access to the register

275. Only authorised people and organisations should have access to the register. It should be possible for people authorised to access the register to view online those parts of the register they are permitted to view at any time. Only the Registrar of Births, Deaths and Marriages and the Public Advocate should be authorised to have access to the entire register.

Access to the register by the principal and the representative

276. The principal and their representative should be able to view at any time that part of the register that concerns the principal's appointment of the representative and both should be permitted to allow any third person to view and download that part of the register.

Public Advocate to authorise regular users

277. The Public Advocate should be permitted to authorise people and organisations that satisfy her that they will be regular, appropriate and responsible users of the register to have online access to those parts of the register that the Public Advocate believes they should be entitled to view and download.

Annual licence and access fee

278. Regular users should receive an annual renewable licence to view designated parts of the register and they should pay an annual licence fee.

Access to the register by regular users

279. Licensed regular users should have access to those parts of the register and to a level of detail concerning particular personal appointments that the Public Advocate considers they have a legitimate interest in viewing. The register should operate in such a way that it generates an electronic record whenever licensed regular users access any part of the register. It should be an offence for a licensed regular user to access any part of the register that they do not have a legitimate interest in viewing.

Public Advocate to authorise other users

280. The Public Advocate may grant any person authority to view any part of the register if the Public Advocate is satisfied that the person has a legitimate interest in viewing that part of the register. There should be a fee to view the register in these circumstances.

Transitional arrangements

- 16.141 It will be necessary to devise extensive transitional arrangements to deal with the registration and status of personal appointments made prior to the establishment of the register. Again, the Commission urges the Attorney-General to seek advice from the Registry Working Group about effective transitional arrangements.
- 16.142 While existing appointments should continue to operate according to their terms, steps should be taken to register them whenever possible within a reasonable period. It will be necessary to authorise the holder of any existing appointment to register that document. This authorisation could be given by deeming any existing appointment to include a power to register the document.
- 16.143 It is an arbitrary exercise to determine a period within which existing appointments should be registered in order to remain valid. The Commission suggests that a period of five years is appropriate.
- 16.144 In Chapter 10 the Commission recommended that the registration of a personal appointment should revoke previous appointments made under the G&A Act. However, it was noted that the appointment of an agent under the *Medical Treatment Act 1988* (Vic) should survive the registration of an appointment of an enduring personal guardian under new guardianship legislation unless the enduring personal guardian is given medical treatment decision-making powers, including the power to complete a refusal of treatment certificate.

RECOMMENDATIONS

Transitional arrangements—earlier appointments

281. Personal appointments made prior to the introduction of the new guardianship legislation should continue to operate according to their terms.
282. Existing personal appointments should be deemed to include a power that they be registered on the new register.
283. Existing personal appointments must be registered within five years of the commencement date of new guardianship legislation in order to be valid.

Chapter 17

Responsibilities of substitute decision makers

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Responsibilities of substitute decision makers

INTRODUCTION

- 17.1 This chapter addresses the responsibilities of substitute decision makers, particularly the principles and considerations that should guide the decisions they make.
- 17.2 The tension between the values of ‘autonomy’ and ‘protection’, or ‘beneficence’, have been at the heart of debates and developments in modern guardianship laws.¹ This chapter considers these competing values when proposing that decision-making principles should be modernised so that they reflect the emphasis on participation, equality and autonomy embodied within the United Nations’ *Convention on the Rights of Persons with Disabilities* (the Convention).² In particular, the Commission suggests that the principle of ‘substituted judgment’ should have greater prominence in new guardianship laws.
- 17.3 The Commission also proposes that similar principles should apply to all substitute decision-making arrangements, regardless of how they are appointed. This change reflects the Commission’s recommendation for more integration of the law across the various substitute decision-making appointments.
- 17.4 This chapter also considers other responsibilities substitute decision makers have in the performance of their roles, including an obligation to avoid conflicts of interests, and a duty of confidentiality to the represented person.
- 17.5 The Commission’s recommendations about how substitute decision makers should be held accountable for their conduct and the decisions they make is discussed in Chapter 18.

CURRENT LAW

- 17.6 The responsibilities of guardians, administrators and the person responsible for medical decisions are set out primarily in the *Guardianship and Administration Act 1986* (Vic) (‘G&A Act’). These substitute decision makers also have general law responsibilities, such as fiduciary duties, which await development by the courts in case law.
- 17.7 The responsibilities of enduring financial attorneys are found in the *Instruments Act 1958* (Vic) and the general law. The responsibilities of medical ‘agents’ in refusing medical treatment are detailed in the *Medical Treatment Act 1988* (Vic).
- 17.8 We consider each appointment in more detail below.

OBJECTS OF THE GUARDIANSHIP AND ADMINISTRATION ACT

- 17.9 All decision makers under the G&A Act—including guardians, administrators and the person responsible for medical decisions—must exercise their powers so that:
- the means which is least restrictive of a person’s freedom of decision and action as is possible in the circumstances is adopted
 - the best interests of a person with a disability are promoted
 - the wishes of a person with a disability are given effect to wherever possible.³
- 17.10 These matters guide the performance of ‘every function, power, authority, discretion, jurisdiction and duty conferred or imposed’ by the G&A Act.

1 Terry Carney, ‘Guardianship, Citizenship and Theorising Substitute Decision Making Law’ in I Doren and A Soden, *Beyond Elder Law: New Directions in Law and Ageing* (Springer, forthcoming 2012).

2 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) (‘*Convention on the Rights of Persons with Disabilities*’).

3 *Guardianship and Administration Act 1986* (Vic) s 4(2). See also *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006).

17.11 The G&A Act also provides specific guidance about how particular substitute decision makers—guardians, administrators and the person responsible for medical decisions—should exercise their powers.

GUARDIANS AND ENDURING GUARDIANS

17.12 The overriding responsibility for guardians in exercising their powers is to act in the ‘best interests’ of the represented person.⁴ The G&A states this can be achieved by:

- acting as an advocate for the represented person
- encouraging the represented person to participate as much as possible in the life of the community
- encouraging and assisting the represented person to become capable of caring for themselves and making reasonable judgments in relation to matters affecting them
- protecting the represented person from neglect, abuse or exploitation
- acting in consultation with the represented person, taking into account their wishes as far as possible.⁵

17.13 These principles apply equally to ‘private guardians’, such as a family member or friend, and the Public Advocate when appointed as a guardian by the Victorian Civil and Administrative Tribunal (VCAT). They also apply to personally appointed enduring guardians.⁶

17.14 In practice, enduring guardians have the added responsibility of determining if the person appointing them has lost the ability to make a decision. This means that they are obliged to decide when and to what extent their powers come into operation.⁷

Guardianship standards

17.15 The Australian Guardianship and Administration Council⁸ has developed a set of National Guardianship Standards to guide guardians about how to perform their role.⁹ The Public Advocate has largely adopted these standards in her own Guardianship Standards.¹⁰

17.16 The Public Advocate’s Guardianship Standards include:

- providing information to the represented person about the guardian’s role, authority and guardianship service standards, and providing information to relevant health care professionals about substitute decision making
- seeking views from the represented person through ongoing personal contact, following these views wherever possible, and considering any objections the represented person has to a proposed course of action
- seeking views of family and others in the represented person’s life for important decisions
- taking into consideration the recommendations of health professionals where relevant

4 *Guardianship and Administration Act 1986 (Vic)* s 28(1).

5 *Ibid* s 28(2).

6 *Ibid* s 35B(5).

7 *Ibid* ss 35B(1)–(3).

8 The Australian Guardianship and Administration Council comprises all the guardianship tribunals, public advocates, and the primary public trustee bodies in each Australian state and territory. For further details, see the Australian Guardianship and Administration Council’s website: <<http://www.agac.org.au/>>.

9 Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (7 October 2009) <http://www.agac.org.au/images/stories/national_stands_public_guardianship.pdf>.

10 Office of the Public Advocate (Victoria), *Guardianship Standards* (11 August 2010) <<http://www.publicadvocate.vic.gov.au/about-us/199/>>.

Responsibilities of substitute decision makers

- advocating for the least restrictive alternative that meets the needs of the person
- making decisions in accordance with the legislative principles and the terms of the order, and providing written reasons for decisions upon request
- recording information relevant to making decisions, including reasons for decisions
- participating in guardianship reassessments, including by requesting a reassessment if the guardian believes a cancellation or change of the order is appropriate, and by providing a written report to VCAT detailing decisions made and a recommendation about the order
- ensuring the privacy and confidentiality of the represented person and key people in their life.¹¹

17.17 These standards apply to public guardians and community guardians appointed by the Public Advocate, and are also recommended for private guardians.¹²

ADMINISTRATORS

17.18 Like guardians, administrators are required to act in the best interests of the represented person. The G&A Act states that this includes:

- encouraging and assisting the represented person to become capable of managing their estate
- acting in consultation with the represented person, taking into account their wishes as far as possible.¹³

17.19 Administrators are also subject to responsibilities at general law, as their relationship with a represented person is one that attracts fiduciary duties.¹⁴

17.20 The Public Advocate summarises the core responsibilities of administrators as:

- always acting in the best interests of the represented person
- consulting with the represented person as much as possible
- avoiding transactions where there is a real or perceived conflict of interest
- ensuring the ongoing appropriateness of any investments made on behalf of the represented person.¹⁵

General responsibilities

17.21 The G&A Act also contains detailed instructions about the powers and duties of administrators. The Commission considers the powers of administrators in more detail in Chapter 12, but some of these powers are drafted in a way that also encompass responsibilities.

¹¹ Ibid.

¹² Office of the Public Advocate (Victoria), *Administration Guide: A Guide for People Appointed as Administrators under the Guardianship and Administration Act 1986* (2009) <<http://www.publicadvocate.vic.gov.au/file/file/Administration/Administration%20Guidev2%20for%20web5.pdf>>; Office of the Public Advocate (Victoria), *Community Guardianship Manual* (2008), 23–5 <http://www.publicadvocate.vic.gov.au/file/file/Volunteers/Community_Guardianship_Manual.pdf>.

¹³ *Guardianship and Administration Act 1986* (Vic) s 49(2).

¹⁴ For a general discussion of fiduciary relationships and their obligations, see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41. In relation to the fiduciary nature of administration in Victoria, see *State Trustees Limited v Hayden* (2002) 4 VR 229 [49]; *HH (Guardianship)* [2008] VCAT 2344 (12 November 2008) [103].

¹⁵ Office of the Public Advocate (Victoria), *Administration Guide: A Guide for People Appointed as Administrators under the Guardianship and Administration Act 1986* (2009), 7 <<http://www.publicadvocate.vic.gov.au/file/file/Administration/Administration%20Guidev2%20for%20web5.pdf>> ('Administration Guide').

17.22 Administrators, to the extent that their authority under the G&A Act and the administration order allows, have 'the general care and management of the estate of the represented person'.¹⁶ It is their duty to:

take possession and care of, recover, collect, preserve and administer the property and estate of the represented person and generally to manage the affairs of the represented person and to exercise all rights statutory or otherwise which the represented person might exercise if the represented person had legal capacity.¹⁷

17.23 They also have the power to:

do all acts and exercise all powers concerning the estate as effectually and in the same manner as the person whose estate they are administering could have done if they were not under a legal disability.¹⁸

Investment of funds

17.24 In exercising their powers to invest the funds of the represented person, administrators may:

- continue investing the represented person's money in the same way it had been previously invested
- in the case of money deposited in the person's bank account, redeposit this money into the account when it becomes payable
- exercise the same powers as if the administrator were a trustee of the estate under the *Trustee Act 1958 (Vic)*.¹⁹

17.25 The Trustee Act imposes additional responsibilities in relation to the power of investment. In particular, it contains the 'prudent person principle', which guides the exercise of investment responsibilities.²⁰

17.26 Under this principle, professional investors are required to 'exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons'.²¹ Non-professional investors are required to 'exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons'.²²

17.27 The Trustee Act also imposes more specific obligations in relation to investment decisions, which the Public Advocate advises should guide administrators.²³ This requires administrators to consider:

- the purposes of the administration order and the needs and circumstances of the represented person
- the desirability of diversifying the represented person's investments
- the nature of and risk associated with existing investments and other property
- the need to maintain the real value of the capital or income
- the risk of capital or income loss or depreciation
- the potential for capital appreciation
- the likely income return and the timing of income return

¹⁶ *Guardianship and Administration Act 1986 (Vic)* s 58B(1)(a).

¹⁷ *Ibid* s 58B(1)(b).

¹⁸ *Ibid* s 58B(1)(c).

¹⁹ *Ibid* s 51.

²⁰ *Trustee Act 1958 (Vic)* s 6(1).

²¹ *Ibid* s 6(1)(a).

²² *Ibid* s 6(1)(b).

²³ *Administration Guide*, above n 15, 7–8.

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- the length of the term of the proposed investment
- the probable duration of the order
- the liquidity and marketability of the proposed investment
- the total value of the estate
- the tax consequences of the proposed investment
- the likely effect of inflation on the proposed investment
- the costs (including commissions, fees, charges and duties payable) of making the proposed investment
- the results of a review of existing trust investments.²⁴

Fees

17.28 Professional administrators such as State Trustees charge fees to the represented person for the services they provide, but private administrators may only claim out-of-pocket expenses for performing their role unless VCAT orders otherwise.²⁵ The fees a professional administrator may charge are set out in the VCAT order.

VCAT advice and approval

17.29 VCAT administration orders commonly require VCAT approval of major transactions, such as the sale of real estate, before they can go ahead. Administrators may also seek advice from VCAT before undertaking a course of action.²⁶

National Standards for Financial Managers

17.30 In 2011, the Australian Guardianship and Administration Council prepared 'National Standards for Financial Managers'.²⁷ These standards are intended to apply to financial managers (called 'administrators' in Victoria) appointed by an Australian tribunal.

17.31 The standards require that financial managers:

- keep the represented person informed about all aspects of their financial affairs
- advocate for the represented person as necessary, including to ensure that the person is not unfairly treated or financially abused
- seek views and involve the represented person in relation to major decisions
- protect the assets of the represented person, and identify any entitlements the person may have
- make decisions with the represented person that are in their best interests, including by consulting with the person and other important people in their life
- invest money for the benefit of the represented person and develop a budget to meet their needs
- make payments to the represented person for their benefit
- keep records of the represented person's financial affairs and of major decisions
- respect the privacy and confidentiality of the represented person
- protect and respect the legal rights of the represented person

²⁴ *Trustee Act 1958* (Vic) s 8(1).

²⁵ *Guardianship and Administration Act 1986* (Vic) s 47A.

²⁶ *Ibid* s 55.

²⁷ Australian Guardianship and Administration Council, *National Standards for Financial Managers* (January 2011) <http://www.agac.org.au/images/stories/nat_stds_fin_mgrs.pdf>.

- be professional, by treating the represented person with dignity and respect, communicating in ways the person can understand, avoiding conflicts of interest and not imposing personal views on the person
- contribute to reviews of orders by preparing reports to the tribunal and making recommendations where appropriate.²⁸

ATTORNEYS APPOINTED UNDER THE INSTRUMENTS ACT 1958 (VIC)

17.32 The responsibilities of personally appointed financial attorneys are derived from the *Instruments Act 1958* (Vic) and the general law. Upon accepting their appointment, an attorney must undertake to:

- exercise their powers with reasonable diligence to protect the interests of the represented person
- avoid acting where there is any conflict of interest between the interests of the represented person and the attorney's interests
- exercise their powers in accordance with the requirements under the Instruments Act.²⁹

17.33 The Instruments Act also requires attorneys to keep and preserve accurate records and accounts of all dealings and transactions made under the power.³⁰

17.34 The Instruments Act does not place a clear duty on attorneys to consider the represented person's preferences when making a decision.

17.35 As with administrators, the relationship between the attorney and the represented person is one that attracts fiduciary duties, including a duty for the attorney not to act in their own interest.³¹

17.36 The Public Advocate has summarised attorneys' other legal responsibilities as:

- acting in the represented person's best interests
- recognising the represented person's right to participate in decisions as much as possible
- respecting the represented person's worth, dignity and human rights
- recognising the represented person as a valued member of society and encouraging their participation in community life
- taking into account the importance of the represented person's existing supportive relationships, values, culture and language
- ensuring that decisions are appropriate to the represented person's characteristics and needs
- ensuring confidentiality
- keeping the represented person's property separate, except where it is jointly owned
- not exceeding the powers set out in the appointment form.³²

17.37 These requirements are not explicitly set out in the Instruments Act.

²⁸ Ibid.

²⁹ *Instruments Act 1958* (Vic) s 125B(5). This undertaking is part of the compulsory form for enduring power of attorney (financial) approved by the Secretary of the Department of Justice. See *Instruments Act 1958* (Vic) ss 123(1), 125ZL and 'The Instruments (Enduring Powers of Attorney) Act 2003—Approved Forms' in Victoria, *Victorian Government Gazette*, No G9, 2004, 437–41.

³⁰ *Instruments Act 1958* (Vic) s 125D.

³¹ For a discussion of the obligations under a fiduciary relationship, see *Re OAC* [2008] QGAAT 72 (14 October 2008) [13]–[20].

³² Office of the Public Advocate (Victoria), *Advice for Attorneys (Financial)* (18 January 2011), 3 <http://www.publicadvocate.vic.gov.au/file/file/Powerofattorney/OPA_Advice%20for%20Attorneys%20Financial_Web_08.pdf>. We discuss the person responsible role in more detail in Chapter 13.

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PERSON RESPONSIBLE

17.38 The primary responsibility of the person responsible for medical and dental decisions is to make decisions that are in the best interests of the patient.³³ In doing so, the person responsible must take into account:

- the wishes of the patient, as far as they can be ascertained
- the wishes of any nearest relative or any other family members
- the consequences to the patient if the treatment is not carried out
- any alternative treatment available
- the nature and degree of any significant risks associated with the treatment or any alternative treatment
- whether the treatment is only to promote and maintain the health and wellbeing of the patient.³⁴

17.39 The person responsible may only consent to a medical research procedure if they believe it would not be contrary to the patient's best interests.³⁵ The matters to consider are similar to those that are relevant when making medical treatment decisions.³⁶

AGENT APPOINTED BY AN ENDURING POWER OF ATTORNEY (MEDICAL)

17.40 Where an agent decides to refuse treatment under the *Medical Treatment Act 1988* (Vic), they must be informed about the patient's current condition. This information must be sufficient to allow the patient, if they had capacity, to make their own decision about whether to refuse the treatment.³⁷ If this has happened, and the agent understands that information, they³⁸ may make a decision to refuse treatment on behalf of the patient.³⁹ An agent may refuse medical treatment (rather than 'withhold consent') only where:

- the medical treatment would cause unreasonable distress to the patient, or
- there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to their health and wellbeing, would consider that the medical treatment is unwarranted.⁴⁰

17.41 We consider issues around medical and dental procedures and treatment for people who cannot consent in more detail in Chapter 13.

CONFIDENTIALITY

17.42 The G&A Act does not specifically require substitute decision makers to maintain the confidentiality of any information about the represented person that they obtain by virtue of that relationship. Victoria's legislation is out of step with that of some other Australian jurisdictions on this issue. For example, the New South Wales legislation prohibits disclosure of information obtained by a guardian or financial manager⁴¹ other than in compliance with one of the exceptions set out in the Act.⁴²

33 *Guardianship and Administration Act 1986* (Vic) s 42H(2).

34 *Ibid* s 38(1).

35 *Ibid* s 42S(3).

36 *Ibid* s 42U(1). The major difference between medical research procedures and medical treatment is that for medical research procedures the availability of alternative treatment, and whether the procedure is only to promote the health and wellbeing of the patient, are not mandatory considerations.

37 *Medical Treatment Act 1988* (Vic) s 5B(1)(a).

38 This power to refuse treatment can also be given to and exercised by a guardian: *Medical Treatment Act 1988* (Vic) s 5B(1)(a).

39 *Medical Treatment Act 1988* (Vic) s 5B(1).

40 *Ibid* s 5B(2).

41 'Financial manager' is the term used in New South Wales law to describe an 'administrator'.

42 *Guardianship Act 1987* (NSW) s 101.

17.43 Although the equitable duty of confidence probably obliges substitute decision makers to maintain the confidentiality of any information about the represented person that they obtain by virtue of that relationship,⁴³ the Commission is unaware of any circumstances in which a person has sought to invoke this general law duty.

COMMUNITY RESPONSES

17.44 The consultation paper proposed that new guardianship laws should provide substitute decision makers with clear guidance about their responsibilities. It proposed:

- a more consistent approach to decision making across different substitute decision-making appointments
- more guidance about how the wishes of the represented person should guide substitute decision makers
- including the concept of ‘substituted judgment’ as a decision-making principle
- replacing the notion of ‘best interests’ with that of ‘personal and social wellbeing’.

17.45 The Commission proposed these reforms in response to concerns that current guidance was inadequate and fragmented, and because the law should better reflect contemporary views about the rights and interests of people with impaired decision-making ability.

17.46 The suggestion concerning the principle of ‘substituted judgment’—which involves a substitute decision maker seeking to make the judgments and decisions that the person themselves would make in the circumstances—was the most significant reform proposal and the one that generated the most responses.

EXPRESSED WISHES, BEST INTERESTS AND SUBSTITUTED JUDGMENT

17.47 The consultation paper asked a number of questions about the different principles that should guide substitute decision makers when they are making decisions. These questions raised challenging issues such as:

- how to balance wishes a person expressed in the past, when they had capacity, with wishes they are expressing now when they no longer have capacity to make their own decisions
- how to balance the person’s wishes with what the decision maker thinks is best for them
- how to make the decision that the person themselves would make now if they had the capacity to do so (substituted judgment).

17.48 Seniors Rights Victoria linked these issues to the United Nations’ Convention:

Article 12(4) of the CRPD [the Conventions] provides that measures relating to the exercise of legal capacity should respect the rights, will and preferences of the person, be proportionate and tailored to the person’s circumstances, apply for the shortest time possible and be subject to regular review. We believe that the rights, will and preferences of the person should be the starting point, and not just a consideration, in the decision-making process of a substitute decision maker.⁴⁴

⁴³ For discussion of the equitable duty of confidence, see GE Dal Pont, DRC Chalmers and JK Maxton, *Equity and Trusts: Commentary and Materials* (Lawbook, 4th ed, 2007) 170–225.

⁴⁴ Submission CP 71 (Seniors Rights Victoria).

Responsibilities of substitute decision makers



17.49 Many submissions acknowledged the complexity of these issues and referred to the difficulties associated with relying too heavily upon the stated wishes of the represented person, either in the past or at the time of the decision. Difficulties can arise because:

- All people will change their minds over time.⁴⁵
- Past wishes and current wishes can conflict with each other and the way to balance the two has to be determined according to what best promotes the personal and social wellbeing of the person, rather than by prescribing that one statement of wishes should have precedence over the other.⁴⁶

17.50 The Law Institute of Victoria also argued that the law should not be too prescriptive about this issue:

The LIV cautions against prescriptive guidance about how a substitute decision maker should balance the wishes a person expresses at the time a decision is made, and any past wishes, views, beliefs and values the person has expressed. The LIV considers that each decision should be dealt with on a case by case basis and we note that the approach may vary depending on the relevant decision, knowledge of and nature of wishes expressed and the extent that decision-making capacity is impaired. It may also depend on whether the person has previously had capacity for those decisions.⁴⁷

17.51 Victoria Legal Aid stressed the importance of dialogue with the represented person in these situations of conflict between past wishes and current wishes. It highlighted the ways in which acquiring a disability might itself trigger a change in the person's views:

The decision maker should also be required to discuss with the represented person any evidence of their previously expressed wishes, views and beliefs and seek to understand the basis on which they have now changed those wishes. If there is a reasonable basis for the change, then the principle of substituted judgment suggests that the current wishes should be followed. It is quite human for preferences and wishes to change over time, and it is not surprising that someone who has acquired a disability and consequent incapacity may have changed their views and wishes over time.⁴⁸

17.52 The Federation of Community Legal Centres saw substituted judgment as a means of helping to clarify and resolve some of the tensions that can arise in relation to conflicting stated wishes. It referred to the way in which this issue has been dealt with in the United Kingdom's *Mental Capacity Act 2005* (UK):

In that Act, the phrase 'factors that the person would have been likely to consider if they were able to' gives effect to the principle underpinning substituted judgment. It suggests that if the person had capacity when past wishes were known, then these wishes should be given more weight than wishes expressed in the present when the person is now assessed as not having capacity with respect to those particular decisions.⁴⁹

45 Submission CP 24 (Autism Victoria).

46 Submission CP 19 (Office of the Public Advocate).

47 Submission CP 77 (Law Institute of Victoria).

48 Submission CP 73 (Victoria Legal Aid).

49 Submission CP 75 (Federation of Community Legal Centres).

17.53 But the Council on the Ageing sounded a note of caution:

We would agree that this [substituted judgment] should be the starting point for making decisions on behalf of a person who can't make decisions for themselves. It may not always be possible to know what a person would have decided, in situations that are new or conflicting with their usual preferences. Promotion of the personal and social wellbeing of the person may need to be considered as well.⁵⁰

17.54 The risk of relying too heavily on substituted judgment, with its 'difficult and unclear ... evidentiary basis', was raised by State Trustees, which saw the proposal as too open to abuse and too likely to lead to individuals being deemed incapable of ever changing a pre-existing mindset.⁵¹

17.55 Some responses, such as those given in the Commission's consultations with National Disability Services, saw the concept as being in principle a good one, but nevertheless one to which it would be difficult to give substance and meaning.⁵²

OTHER CONSIDERATIONS

Treating the represented person with courtesy and respect

17.56 The consultation paper asked if the law should specifically require substitute decision makers to treat represented persons, and people who are important to them, with courtesy and respect.

17.57 Many people with disabilities who have had a guardian or an administrator and who spoke with the Commission, or who made submissions, stressed the importance of this issue, as well as that of having decisions explained to them.⁵³

17.58 These views were echoed in other submissions, particularly in those by Victoria Legal Aid⁵⁴ and the Mental Health Legal Centre.⁵⁵

Acting honestly and responding to conflicts of interest

17.59 The Commission also asked whether the law should specifically require substitute decision makers to act honestly and to respond appropriately to conflicts of interest.

17.60 This proposal was broadly supported, both in community consultations and in submissions,⁵⁶ although State Trustees drew attention to what they saw as the highly subjective nature of some of these concepts:

Duties of honesty, courtesy and respect can have a strong subjective element, especially in a context of disabilities affecting perception. Breaches of such duties may therefore be difficult to objectively assess and even harder to enforce. They should therefore be part of the guiding principles, rather than stand alone duties.⁵⁷

50 Submission CP 65 (Council on the Ageing Victoria).

51 Submission CP 70 (State Trustees Limited).

52 Roundtable with service providers (in partnership with National Disability Services (Victoria)) (28 March 2011).

53 For eg, consultations with VALID Eastern Regional Client Network (21 February 2011), VALID Western Regional Client Network (1 March 2011) and VALID Northern Regional Client Network (2 March 2011); Submission CP 3 (Anna Kure).

54 Submission CP 73 (Victoria Legal Aid).

55 Submission CP 78 (Mental Health Legal Centre).

56 For eg, Submissions CP 21 (Action for More Independence & Dignity in Accommodation), CP 27 (Catholic Archdiocese of Melbourne), CP 71 (Seniors Rights Victoria), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

57 Submission CP 70 (State Trustees Limited).

Responsibilities of substitute decision makers

Separate principles for financial decisions

17.61 In the consultation paper, the Commission asked if new guardianship laws should contain the same decision-making principles for financial decisions and personal decisions. Most submissions responding to this question indicated that the same principles should apply to both areas of decision making.⁵⁸ Victoria Legal Aid, however, provided a qualified response:

as a general rule, the principle of substituted judgment should prevail and the financial decision maker should make the decision that the represented person would have wanted to be made in the circumstances. However, if the represented person's wishes are financially unviable or would unduly compromise their financial security, VLA suggests that the financial decision could depart from the principle of substituted judgment, but should be required to file a notice and statement of reasons with the represented person and investigations unit, perhaps attached to the VCAT Guardianship List, both of which should be able to seek a VCAT hearing to determine whether the financial decision maker should be permitted to depart from the principle of substituted judgment (and the represented person's wishes).⁵⁹

17.62 State Trustees argued that guiding principles should be tailored for the different substitute decision-making roles.⁶⁰ This view was supported by the Trustee Corporations Association of Australia, which argued that the prudent person principle, as set out in section 6 of the Trustee Act, should be included in legislation appointing financial substitute decision makers.⁶¹

Privacy and confidentiality

17.63 In the consultation paper, the Commission proposed that new guardianship legislation should contain a provision similar to section 101 of the *Guardianship Act 1988* (NSW), which regulates the circumstances under which information obtained in the course of the substitute decision-making arrangement can be disclosed to others. There was widespread community support for this proposal.⁶²

17.64 Some organisations that supported the Commission's proposal also raised additional issues. For example, State Trustees made the following points:

- The 'secrecy provision' in section 17 of the *State Trustees (State Owned Companies) Act 1994* (Vic) should be repealed and replaced by a provision that imposes a duty of confidentiality on all administrators.
- The expression 'other lawful excuse', as used in the New South Wales Act, is too vague and potentially too restrictive.⁶³

17.65 State Trustees also noted that under current legislation, where a represented person dies or ceases to be a represented person, a number of disclosure obligations on the administrator apply. These include the obligation to provide the represented person or their representative with all documents relating to the estate,⁶⁴ and to allow the represented person or their representative to inspect and copy all books, accounts and documents relating to the estate.⁶⁵ State Trustees was concerned that it will

58 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 24 (Autism Victoria), CP 47 (Dr Michael Murray), CP 56 (Disability Discrimination Legal Service) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

59 Submission CP 73 (Victoria Legal Aid).

60 Submission CP 70 (State Trustees Limited).

61 Roundtable with Trustee Corporations Association of Australia; ANZ Trustees Ltd; Equity Trustees Ltd; Trust Company Ltd; Perpetual Trustees (in partnership with Trustee Corporations Association of Australia) (4 March 2011).

62 For eg, Submissions CP 24 (Autism Victoria), CP 33 (Eastern Health), CP 59 (Carers Victoria), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

63 Submission CP 70 (State Trustees Limited).

64 *Guardianship and Administration Act 1986* (Vic) s 58D(1)(b).

65 *Guardianship and Administration Act 1986* (Vic) s 58E.

rarely if ever be appropriate for a corporate administrator to be compelled to hand over its 'entire file', given the likelihood it will contain third party information of a sensitive and confidential nature.

OTHER JURISDICTIONS

17.66 The 'best interests' of the represented person is the core guiding principle for decisions made by guardians and administrators in Victoria and in most other Australian jurisdictions.⁶⁶ However, South Australia and Queensland have adopted a different approach.⁶⁷ The South Australian legislation emphasises an approach of 'substituted judgment', while Queensland seeks to maximise the person with impaired capacity's involvement in decision making. The Australian Capital Territory adopts an approach that balances a person's 'wishes' with their 'interests'.⁶⁸

SOUTH AUSTRALIA—SUBSTITUTED JUDGMENT AS THE PARAMOUNT CONSIDERATION

17.67 Substituted judgment is an approach that requires the decision maker to attempt, as far possible, to make the decision the represented person would have made if they did not have impaired capacity.

17.68 In South Australia's *Guardianship and Administration Act 1993 (SA)*, substituted judgment is the 'paramount' decision-making principle:

consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion.⁶⁹

17.69 Guardians and administrators in South Australia are directed to determine what they believe the wishes of the person would have been if they had mental capacity. However, the application of this principle is limited by the requirement that such an approach can only be adopted to the extent that there is 'reasonably ascertainable evidence' upon which to base the decision.⁷⁰

17.70 In addition to adopting a 'substituted judgment' approach, guardians and administrators in South Australia are directed to consider the 'present wishes' of the person, 'unless it is not possible or reasonably practicable to do so'.⁷¹ They are also directed to make decisions that are 'the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection'.⁷²

17.71 The South Australian Public Advocate, John Brayley, has argued that substituted judgment is a preferable approach to best interests' decision making.⁷³ Similarly, Jeremy Moore, President of the South Australian Guardianship Board, has argued that a substituted judgment approach 'ensures the greatest respect is given to the autonomy of the represented person', and allows the person to 'live the life they would have lived, but for the incapacity'.⁷⁴

66 For eg, *Guardianship and Administration Act 1995 (Tas)* ss 6(b), 27(1), 57(1); *Guardianship and Administration Act 1990 (WA)* ss 51(1), 70(1); *Adult Guardianship Act (NT)* s 4(b). New South Wales guardianship laws require that the 'welfare and interests' of the represented person be given paramount consideration: see *Guardianship Act 1987 (NSW)* s 4(a).

67 In South Australia, best interests still guides the conduct of agents appointed under a medical power of attorney: see *Consent to Medical Treatment and Palliative Care Act 1995 (SA)* s 8(8). In Queensland, the health care principle includes consideration of whether treatment 'is in all the circumstances, in the adult's best interests': see *Guardianship and Administration Act 2000 (Qld)* sch 1 pt 2 cl 12(1)(b)(ii).

68 See *Guardianship and Management of Property Act 1993 (ACT)* ss 4(2), 5A.

69 *Guardianship and Administration Act 1993 (SA)* s 5(a).

70 *Ibid.*

71 *Ibid* s 5(b).

72 *Ibid* s 5(d).

73 John Brayley, Office of the Public Advocate (South Australia), *Supported Decision Making in Australia: Presentation Notes (2009)*, 4 <http://www.opa.sa.gov.au/documents/08_News_&_Articles/Supported%20Decision%20Making.pdf>.

74 Submission IP 60 (Guardianship Board of South Australia).

Responsibilities of substitute decision makers

17.72 In circumstances where adopting this approach proves impossible, however, South Australian Public Trustee, Mark Bodycoat, has suggested that the principle of best interests is the most appropriate alternative.⁷⁵ He suggests that both substituted judgment and best interests are principles that remain prone to decision makers imposing their own values on the person.⁷⁶ Mr Bodycoat has also highlighted that administrators have legal responsibilities as trustees which can come into tension with the decision-making principles in the *Guardianship and Administration Act 1993 (SA)*.⁷⁷

QUEENSLAND

17.73 Queensland has a comprehensive set of principles underpinning its guardianship laws. In Chapter 6, we discuss these 'general principles' as they relate to Queensland guardianship laws as a whole.

17.74 While guardians and administrators are required to apply all the General Principles,⁷⁸ clause 7 of the General Principles, entitled 'Maximum participation, minimal limitations and substituted judgment', outlines the core decision-making guidelines for guardians and administrators:

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
- (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
- (3) So, for example—
 - (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
 - (b) to the greatest extent practicable, for exercising power or a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
 - (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.
- (4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.
- (5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.
- (6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

17.75 These principles emphasise the role of guardians and administrators in ensuring the person is supported to make their own decisions where possible, and participate in the decision-making process to the greatest possible extent. Guardians and administrators are also directed to use 'substituted judgment' where appropriate.

⁷⁵ Mark Bodycoat, Public Trustee (South Australia), 'I Walk the Line: Some of the challenges of good trusteeship' (Paper presented at Rights Responsibilities and Rhetoric conference, Adelaide, 8–9 October 2009) <http://www.publictrustee.sa.gov.au/uploads/Mental_Health_Conference/BODYCOAT%20paper.pdf>.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* Section 39(1)(b) of the *Guardianship and Administration Act 1993 (SA)* deems administrators to be trustees.

⁷⁸ *Guardianship and Administration Act 2000 (Qld)* s 34.

17.76 Like South Australia, the Queensland principles do not rely on the notion of 'best interests' (except in the context of medical decisions),⁷⁹ but require decisions that are 'consistent with the adult's proper care and protection'.⁸⁰

Queensland Law Reform Commission reform proposals

17.77 In 2010, the Queensland Law Reform Commission recommended amendments to the principles of Queensland's guardianship laws, including principles about how decision makers should exercise their powers.⁸¹ The report provided a majority and minority view about how the law should change, and the Queensland Government has indicated support for the minority view.⁸²

Majority view

17.78 The majority view was that decision makers should act:

- in a way that promotes and safeguards the person's rights, interests and opportunities, and
- in the way least restrictive of the person's rights, interests and opportunities.⁸³

17.79 In doing so, decision makers should adopt a 'structured decision-making' approach which requires them to undertake the following process before exercising their powers:

- First, the decision maker should recognise and take into account the importance of preserving the person's right to make their own decisions.
- Secondly, the principle of substituted judgment should be applied if possible.
- Thirdly, other views and wishes expressed by the person should be recognised and taken into account.
- Fourthly, other considerations of the General Principles of Queensland's guardianship laws should be recognised and taken into account.⁸⁴

Minority view

17.80 The minority view also requires decision makers to act in a way that promotes and safeguards the person's rights, interests and opportunities, and is least restrictive of the person's rights, interests and opportunities.⁸⁵

17.81 In doing so, the minority view requires decision makers to recognise a person's right to make their own decisions if they are able to do so or can be supported to do so. If the person cannot be supported to make their own decision, the principle of 'substituted judgment' should be the starting point for decision making, with any other views and wishes expressed by the person also recognised and taken into account.⁸⁶

AUSTRALIAN CAPITAL TERRITORY

17.82 Guardianship laws in the Australian Capital Territory have decision-making principles that follow a structured approach. These principles seek to give effect to the person's 'wishes', but balance this with the person's 'interests' where necessary.

79 Ibid sch 1 pt 2 cl 12(b)(ii).

80 Ibid sch 1 pt 1 cl 7(5).

81 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, 74–106 ('*A Review of Queensland's Guardianship Laws*').

82 Queensland Department of Justice and Attorney General, *Queensland Government Initial Response to the Queensland Law Reform Commission's Report: A Review of Queensland's Guardianship Laws* (2011) 12–14.

83 *A Review of Queensland's Guardianship Laws*, above n 81, vol 1, 146.

84 Ibid vol 1, 146–7.

85 Ibid vol 1, 147.

86 Ibid vol 1, 147–8.

Responsibilities of substitute decision makers

- 17.83 Decision makers in the Australian Capital Territory must give effect to the person's wishes unless doing so is likely to 'significantly adversely affect the person's interests'.⁸⁷ A person's interests are separately defined, and include:
- protection of the person from physical or mental harm or deterioration
 - the ability of the person to:
 - take care of themselves
 - live in and be a part of the community
 - maintain their preferred lifestyle
 - promotion of the person's financial security
 - prevention of the person becoming destitute.⁸⁸
- 17.84 The decision maker must give effect to the person's wishes as far as possible without significantly adversely affecting the person's interests.⁸⁹ If this is impossible, the person's interests must be promoted.⁹⁰ Decision makers must also interfere with the person's life to the 'smallest extent necessary', and encourage the person to look after themselves and participate in the community to the greatest possible extent.⁹¹

ENGLAND AND WALES—BEST INTERESTS WITH CLEARER GUIDANCE

- 17.85 Like the G&A Act, acting in the best interests of a person lacking capacity remains a core principle of the *Mental Capacity Act 2005* (UK), which applies in England and Wales.⁹² However, the Mental Capacity Act provides more extensive guidance than the Victorian legislation for deciding what is in a person's best interests.⁹³ The Mental Capacity Act's best interests guidance includes:
- not making superficial assumptions based on the person's age, appearance, a condition they may have or an aspect of their behaviour
 - consideration of the likelihood the person will regain capacity
 - acting to encourage the person to participate in decision making
 - considering the person's past and presently expressed wishes, beliefs and values, and factors that the person would have been likely to consider if they were able to
 - consulting with relevant people in the person's life, including those nominated by the person.⁹⁴

CONFIDENTIALITY RESPONSIBILITIES IN OTHER JURISDICTIONS

- 17.86 Other Australian jurisdictions place obligations on guardians and administrators to maintain the confidentiality of information they acquire in the course of their role. For example, as we noted earlier, section 101 of the *Guardianship Act 1987* (NSW) provides:

A person shall not disclose any information obtained in connection with the administration or execution of this Act unless the disclosure is made:

- (a) with the consent of the person from whom the information was obtained,

⁸⁷ *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a).

⁸⁸ *Ibid* s 5A.

⁸⁹ *Ibid* s 4(2)(b).

⁹⁰ *Ibid* s 4(2)(c).

⁹¹ *Ibid* ss 4(2)(d)–(f).

⁹² *Mental Capacity Act 2005* (UK) c 9.

⁹³ *Ibid* s 4.

⁹⁴ *Ibid* ss 4(1), (3)–(4), (6)–(7).

- (b) in connection with the administration or execution of this Act,
 - (c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings,
 - (d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or
 - (e) with other lawful excuse.
- 17.87 It is an offence punishable by a fine of 10 penalty units or imprisonment for 12 months, or both, to contravene this provision.⁹⁵ Similar, slightly expanded, provisions are in the Queensland legislation.⁹⁶
- 17.88 In Alberta, Canada, guardians who obtain relevant personal information may only use it ‘for the purpose of exercising the authority and carrying out the duties and responsibilities of the guardian’.⁹⁷ The guardian must ‘take reasonable care to ensure the information is kept secure from unauthorised access, use or disclosure’.⁹⁸ A guardian is obliged not to gather personal information about the represented person beyond that specifically authorised by the Act.⁹⁹
- 17.89 There are similar provisions in the Albertan legislation concerning the powers of a trustee and a specific decision maker—the equivalents of an administrator and a person responsible—to gather personal information about a represented person and the authority of the holder of the information to disclose it to the trustee or the specific decision maker.¹⁰⁰

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

- 17.90 The United Nations’ *Convention on the Rights of Persons with Disabilities* contains principles that are relevant when considering the responsibilities of substitute decision makers. Articles 12(4) and 12(5) are the most important provisions.

ARTICLE 12(4)

- 17.91 Article 12(4) requires that measures relating to the exercise of legal capacity (such as guardianship, administration and powers of attorney):
- respect the rights, will and preferences of the person
 - are free of conflict of interest and undue influence
 - are proportional and tailored to the person’s circumstances
 - apply for the shortest time possible
 - are subject to regular review by a competent, independent and impartial authority.¹⁰¹
- 17.92 The first two requirements—that measures respect the rights, will and preferences of the person and are free from conflict of interest—concern the responsibilities of substitute decision makers, while the other requirements relate to how these arrangements are established and reviewed.

⁹⁵ *Guardianship Act 1987* (NSW) s 101.

⁹⁶ *Guardianship and Administration Act 2000* (Qld) ss 249–249A.

⁹⁷ *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, s 41(6)(a).

⁹⁸ *Ibid* s 41(6)(b).

⁹⁹ *Ibid* s 41(7).

¹⁰⁰ *Ibid* ss 72, 99.

¹⁰¹ *Convention on the Rights of Persons with Disabilities* art 12(4).

Responsibilities of substitute decision makers

Respect for the rights, will and preferences of the person

17.93 'Respect for the rights, will, and preferences of the person' is to some extent reflected in the way the G&A Act deals with the 'wishes' of the person.¹⁰² However, these requirements are more qualified than the wording of the Convention, which provides that the rights, will and preferences of the person are the starting point for decision making. While the Convention emphasises supporting people to exercise their rights, will and preferences, the G&A Act places the person's wishes alongside other considerations.

Freedom from conflict of interest and undue influence

17.94 The Convention's requirement of support that is free from conflict of interest and undue influence is dealt with in part by the requirement in the G&A Act that VCAT not appoint a guardian or administrator whose 'interests conflict or may conflict' with the person's.¹⁰³ Avoiding conflicts of interest is not a duty explicitly imposed upon guardians and administrators by the G&A Act, but it does form part of their fiduciary responsibilities under the general law.¹⁰⁴

ARTICLE 12(5)—EQUAL RECOGNITION BEFORE THE LAW

17.95 Article 12(5) of the Convention requires measures which ensure that people with disabilities are not arbitrarily deprived of their property, and have the same rights as others to:

- own or inherit property
- control their own financial affairs
- access bank loans, mortgages and other forms of financial credit.

17.96 People with Disability Australia have argued that article 12(5) protects against both arbitrary deprivation of property and the arbitrary deprivation of the capacity to manage property, and requires that people with disabilities be provided with the support they need to exercise these financial rights themselves.¹⁰⁵

ARTICLE 22—RESPECT FOR PRIVACY

17.97 Article 22, which deals with respect for privacy, is another part of the Convention that bears significantly on the responsibilities of substitute decision makers. Article 22 states:

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.
2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

17.98 This protection against arbitrary or unlawful interference with privacy is also provided for more generally in Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).¹⁰⁶

¹⁰² *Guardianship and Administration Act 1986* (Vic) ss 4(2)(c), 28(2)(e), 49(2)(b).

¹⁰³ *Ibid* ss 23(1)(b), 47(1)(c)(ii).

¹⁰⁴ For a general discussion of fiduciary relationships and their obligations, see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41. In relation to the fiduciary nature of administration in Victoria, see *State Trustees Limited v Hayden* (2002) 4 VR 229 [49]; *HH (Guardianship)* [2008] VCAT 2344 (12 November 2008) [103].

¹⁰⁵ Submission IP 28a (People with Disability Australia).

¹⁰⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

THE COMMISSION'S VIEWS AND CONCLUSIONS

17.99 The Commission believes that new guardianship laws should seek to provide:

- clear guidance about the responsibilities of substitute decision makers that better reflects contemporary views about this role as illustrated by the relevant provisions of the Convention
- a more consistent approach to the responsibilities of substitute decision makers for personal appointments and tribunal appointments.

PRINCIPLES THAT SHOULD GUIDE SUBSTITUTE DECISION MAKING

Promotion of personal and social wellbeing

17.100 The Commission believes that substitute decision makers should have an overarching responsibility to act in a way that promotes the personal and social wellbeing of the represented person.

17.101 The principle of substituted judgment—which involves attempting to make the decisions the person would make themselves if able to do so—should be the paramount guiding principle in new Victorian guardianship laws, as it is now in South Australia.

17.102 This approach was broadly supported in consultations and submissions. However, the Commission also acknowledges that there are limits to the application of the principle of substituted judgment. Rigid application of the principle may be impossible in some cases, while in others it may not be the best way of approaching the decision because it would lead to unacceptable outcomes for the person. The Commission therefore believes that substitute decision makers must retain a degree of flexibility when determining how they fulfil their responsibilities.

17.103 The Commission's proposal that the overarching goal of substitute decision making should be 'promotion of the personal and social wellbeing' of the represented person is consistent with the recommendation of the Victorian Parliament Law Reform Committee Inquiry into Powers of Attorney.¹⁰⁷

Substituted judgment—the paramount principle

A more structured approach to decision making

17.104 Currently, Victoria's guardianship laws require substitute decision makers to consider a person's wishes when making decisions for them,¹⁰⁸ but provide no guidance about what this means. In practice, substituted decision makers often probably seek to make decisions that the person would make themselves. The Public Advocate explicitly encourages the use of substituted judgment by its guardians where appropriate.¹⁰⁹

17.105 Substituted judgment provides decision makers with a more structured approach to carrying out the person's wishes. It is not a simple matter of doing what the person did prior to losing capacity. Making the decision the person would make themselves requires substitute decision makers to consider the expressed wishes of the person—both past and present—and to place these wishes in the context of the person's current circumstances and the decision that needs to be made. It is a relatively sophisticated approach to substitute decision making, but also one that acknowledges the uniqueness of the represented person.

¹⁰⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 173–4 ('*Inquiry into Powers of Attorney*').

¹⁰⁸ *Guardianship and Administration Act 1986* (Vic) ss 4(2)(c), 28(2)(e), 49(2)(b).

¹⁰⁹ Office of the Public Advocate (Victoria), *Adult Guardianship in Victoria* (2006), 2 <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG00_Adult_Guardianship_in_Victoria_09.pdf>.

Responsibilities of substitute decision makers

Enhances autonomy

17.106 Substituted judgment decisions preserve the autonomy of the person by seeking to place them in the same position they would have been if they had the capacity to make the decision themselves. One of the core goals of guardianship laws should be to enable the person to continue to live their own life as much as possible.

Consistent with the Convention

17.107 Together with the Commission's proposals for supported and co-decision-making arrangements outlined in Chapters 8 and 9, the Commission believes that a 'substituted judgment' approach to decision making enhances the compatibility of Victorian guardianship laws with the Convention. Where supported and co-decision-making mechanisms are unable to assist the person, substituted judgment decision making provides a means to assist the person to exercise capacity in a way that respects their rights, will and preferences.¹¹⁰

Some limitations of substituted judgment

17.108 The Commission recognises that there a number of limitations to the use of a 'substituted judgment' approach to decision making.

Application may be difficult or impossible in some circumstances

17.109 There are some situations where it may be impossible to apply the principle or where an attempt to do so would be misleading. Examples of this might include situations where:

- a person has never been able to express meaningful preferences for more complicated decisions
- a professional guardian has been appointed, and there is very limited evidence available for the guardian to accurately determine what the person would have wanted
- a person has lost capacity, and a situation arises for which the person has genuinely never expressed any clear wishes
- a person's circumstances and priorities have changed so much since they lost capacity that their previously held wishes and values are a poor indication of what they might want in the future.

17.110 Adopting a purely 'substituted judgment' approach to decisions in circumstances where there is a lack of clear evidence upon which to base that decision is fraught with difficulties. Trying to make or rationalise decisions on this basis will not necessarily enhance the person's autonomy.

17.111 Different people in a person's life might also have very different interpretations of what that person would have done themselves, which could prove challenging for the substitute decision maker.¹¹¹

Values of the decision maker can still be imposed

17.112 A 'substituted judgment' approach does not remove all concerns about subjective, value-laden decision making. 'Best interests' decision making is often criticised for inviting a decision maker to do what they think would be best, thereby imposing their own values on the person. It is also possible for substituted judgment to be applied in

¹¹⁰ See *Convention on the Rights of Persons with Disabilities* art 12(4).

¹¹¹ This issue was highlighted in the Commission's consultation with Alzheimer's Australia Vic and roundtable with people caring for parents with dementia (8 March 2011).

this way because a decision maker could justify imposing their own values on a person on the basis that ‘this is really what the person would have wanted’.¹¹²

Substituted judgment is a relatively sophisticated concept

17.113 Making decisions on behalf of another person is a significant responsibility that requires the decision maker to consider their actions carefully. Substituted judgment is a relatively sophisticated concept that may prove challenging for some people appointed to these roles—particularly those who have a lifelong caring relationship with the represented person and may be unaccustomed to thinking about decision making in this way.

Other approaches to decision making may be preferable in some cases

17.114 There may be circumstances where the substituted judgment approach does little to advance a person’s wellbeing. This issue can be particularly apparent in relation to the management of a person’s finances.

17.115 For example, a person may have managed their money poorly throughout their life because it was not a matter of great interest to them. However, the administrator may have the skills and knowledge to invest funds in a much more advantageous way than the person themselves could, and thereby provide the person with access to funds to improve their quality of life.

Unacceptable harm to the person

17.116 There may be circumstances where a strict application of the substituted judgment principle leads to unacceptable harm to the person.

17.117 An example might be a situation where a person has always been adamant that, no matter what the circumstances, they wish to remain in their own home for the rest of their life. Even in circumstances of advanced dementia, it might be clear that the person would have wanted to remain at home despite the risks to their safety and wellbeing, but a substitute decision maker might determine that this would involve unacceptable risk of harm to the person.

17.118 The Commission believes that there must be a point—often difficult to determine in practice—at which it is permissible for a substituted decision maker to move away from a substituted judgment approach in order to protect a represented person from harm.

17.119 For these reasons, the Commission believes that substituted judgment should be the paramount, but not the sole, consideration in the exercise of decision-making power. New guardianship legislation should provide sufficient flexibility to allow substitute decision makers to consider what would be the most desirable outcome for the person in the circumstances bearing in mind, whenever possible, what the represented person would do in the circumstances.

17.120 At present, the law seeks to achieve this balance through application of the ‘best interests’ principle. While well intentioned, this legal standard is often criticised.¹¹³ The Public Advocate has argued that over time, best interests ‘has come to constitute somewhat of a euphemism for overriding free will’.¹¹⁴ ‘Best interests’ is also a term strongly associated with decision making for children,¹¹⁵ which tends to reinforce paternalistic attitudes to adults with impaired decision-making capacity.

112 The potential for substituted judgment to hide other motives for decision making has been highlighted in other jurisdictions: see Louise Harmon, ‘Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment’ (1990) 100 *Yale Law Review* 1.

113 See, eg, Bruce Jennings, ‘Agency and Moral Relationship in Dementia’ (2009) 40(3–4) *Metaphilosophy* 425.

114 Submission IP 8 (Office of the Public Advocate) 17. See also Barbara Carter, *Principles and Values in Victorian Guardianship Legislation* (Office of the Public Advocate (Victoria), 2009) 14.

115 See, eg, *Family Law Act 1975* (Cth) pt VII; *Children, Youth and Families Act 2005* (Vic) s 10; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 3(1), 9, 18, 20–21, 37(c).

Responsibilities of substitute decision makers



- 17.121 The way in which ‘best interests’ is currently framed in Victorian guardianship laws—which includes a requirement to consider the person’s wishes and encourage them to become capable of making their decisions¹¹⁶—could not be described as completely paternalistic. However, the Commission believes the continued use of ‘best interests’ as the primary consideration for substitute decision makers is unhelpful because it would impede evolution of the practice of acting in a manner that respects the rights, will and preferences of represented persons to the maximum possible extent.
- 17.122 The Commission believes that the overarching goal of substitute decision makers should be to ‘promote the personal and social wellbeing’ of the represented person. This terminology was initially proposed by the Public Advocate, who argued that the concept of ‘wellbeing’ avoided the negative connotations that have become associated with best interests, and placed more emphasis on the person and the outcomes sought for that person.¹¹⁷ The Victorian Parliament Law Reform Committee’s 2010 *Inquiry into Powers of Attorney* endorsed this more ‘modern’ terminology as an alternative to best interests, and recommended that promoting the personal and social wellbeing of the person should form part of the decision-making principles for powers of attorney.¹¹⁸

Guidance around the promotion of personal and social wellbeing

- 17.123 Substitute decision makers should be given additional guidance about what it means to promote the personal and social wellbeing of the person. There are a number of considerations to balance when providing that guidance, including:
- protection of the rights of people with impaired capacity
 - clear and comprehensible guidance for substitute decision makers
 - guidance that is practically workable and can cater for the many different decisions a substitute decision maker may be asked to make.
- 17.124 The Commission has sought to balance these considerations when devising recommendations about the responsibilities of substitute decision makers.
- 17.125 New guardianship legislation should direct substitute decision makers to exercise their powers in a way that promotes the personal and social wellbeing of the represented person. The legislation should also guide substitute decision makers by informing them that they promote the personal and social wellbeing of the represented person if they apply the principles that are discussed in the following paragraphs.

Substituted judgment—the paramount consideration

- 17.126 As discussed, the Commission believes that substituted judgment should be the starting point and the paramount consideration for substitute decisions. New legislation should also provide additional guidance about how to put this principle into practice whenever possible.

Consult with the person, and give effect to their wishes

- 17.127 A direction to consult with the person and give effect to their wishes whenever possible also falls within the principle of substituted judgment. However, in circumstances where substituted judgment cannot be applied, the person will still have wishes and preferences that should be considered.

¹¹⁶ *Guardianship and Administration Act 1986* (Vic) ss 28(c)–(d), 49(2).

¹¹⁷ Barbara Carter, *Principles and Values in Victorian Guardianship Legislation* (Office of the Public Advocate (Victoria), 2009) 9, 14.

¹¹⁸ *Inquiry into Powers of Attorney*, above n 107, 173–4.

Support the person to make decisions

17.128 The Commission believes that supported decision making can and does occur in the context of substitute decision-making arrangements. Guidance to substitute decision makers should emphasise their role in supporting the person to make their own decisions where possible.

Advocate for the person, and protect and promote their rights and dignity

17.129 The role of substitute decision maker often involves representing a person's interests. This inevitably involves a degree of advocacy in pursuit of their rights and interests. It is important that substitute decision makers not only seek to make good decisions, but also act to ensure those decisions are implemented and respected by others.

Encourage the person to be independent and self-reliant

17.130 Guardians and administrators are currently required to encourage the represented person to become capable of managing their own affairs.¹¹⁹ This requirement should continue, although the outcome may be impossible in some circumstances.

Encourage the person to participate in community life

17.131 Encouraging the person to participate in community life is also part of the existing role of guardians.¹²⁰ The Commission believes that this is an important role for all substitute decision makers, and reflects one of the broad goals of the Convention—the inclusion of people with disabilities in society.¹²¹

Respect the person's supportive relationships, friendships and connections with others

17.132 The important role of supportive relationships in the lives of people with impaired capacity—including family, friends, advocates, and other relationships of importance to the person—was consistently emphasised in consultations and submissions. As exercising substitute decision-making powers can affect these relationships, it is important that substitute decision makers consider those potential impacts and respect these relationships.

Recognise and take into account the person's cultural and linguistic circumstances

17.133 The importance of substitute decision makers recognising and taking into account the diverse cultural and religious values and practices of people with impaired capacity was emphasised in consultations and submissions.¹²² Respect for cultural and linguistic identity and values also forms an important protection in the Charter¹²³ and the Convention,¹²⁴ and is recognised in guardianship laws in other jurisdictions.¹²⁵

17.134 The Commission believes it is appropriate for substitute decision makers to be specifically mindful of the represented person's cultural and linguistic circumstances when exercising their powers.

119 *Guardianship and Administration Act 1986* (Vic) ss 28(2)(c), 49(2)(a).

120 *Ibid* s 28(2)(b).

121 *Convention on the Rights of Persons with Disabilities* art 3(c).

122 For eg, roundtables with members of migrant communities (in partnership with Spectrum Migrant Resource Centre) (19 May 2011) and Turkish and Vietnamese (in partnership with Advocacy Disability Ethnicity Community) (10 May 2011); Submission CP 32 (Ethnic Communities' Council of Victoria).

123 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19.

124 *Convention on the Rights of Persons with Disabilities* art 30.

125 *Guardianship Act 1987* (NSW) s 4(e); *Guardianship and Administration Act 1990* (WA) ss 51(2)(h), 70(2)(h); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9.

Responsibilities of substitute decision makers

Protect the person from abuse, neglect and exploitation

- 17.135 The G&A Act requires guardians to protect the person from abuse, neglect and exploitation.¹²⁶ The Commission believes this protection is also relevant to the exercise of powers by financial decision makers when the abuse, neglect and exploitation is of a financial nature.
- 17.136 Protection from abuse, neglect and exploitation is a principle that may at times conflict with other principles, most notably the paramount principle of substituted judgment. Achieving an appropriate balance often involves careful consideration of the person's individual circumstances.

Financial decisions—prudent person principle

- 17.137 While most of the decision-making principles should apply to all substitute decision makers, there are some important principles that are only relevant when making financial decisions. The Commission believes that financial substitute decision makers should be guided by the 'prudent person principle'. This principle, which regulates the conduct of trustees in investment decisions, provides two useful and accepted standards determined by a person's level of expertise:
- (a) if the trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons, [the trustee must] exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
 - (b) if the trustee is not engaged in such a profession, business or employment, [the trustee must] exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.¹²⁷
- 17.138 The Commission acknowledges that the objective standard of 'prudence' is a principle that may conflict with other more subjective principles, such as the proposed paramount principle of substituted judgment.¹²⁸
- 17.139 The Commission believes that financial decision makers should be required to apply the prudent person principle in managing a person's finances *to the extent this promotes their personal and social wellbeing*. In practice, the prudent person principle might not be applied if it would unreasonably deprive the person of access to funds for something that is of great importance to them, or would require investment in a manner completely at odds with the person's conscience. For example, if ethical investment is of great importance to the represented person, a substitute decision maker should proceed on this basis, rather than seek the higher returns that a prudent person could achieve through other investments.

Medical decisions

- 17.140 In Chapter 13, the Commission recommends additional considerations that should guide substitute decision makers when making medical decisions. These largely reflect the current guidance found in the G&A Act.

¹²⁶ *Guardianship and Administration Act 1986* (Vic) s 28(2)(d).

¹²⁷ *Trustee Act 1958* (Vic) s 6(1).

¹²⁸ This tension has already been highlighted by the South Australian Public Trustee: see Bodycoat, above n 75. In South Australia, substituted judgment is the paramount consideration for administrators, and administrators are also deemed to be trustees: see *Guardianship and Administration Act 1993* (SA) ss 5(a), 39(1)(b) and *Trustee Act 1936* (SA) s 7(1).

RECOMMENDATIONS

Decision-making principles

284. New guardianship legislation should require substitute decision makers to exercise their powers in a manner that promotes the personal and social wellbeing of the represented person.

285. Substitute decision makers promote the personal and social wellbeing of the person when, as far as possible, they:

- (a) have paramount regard to making the judgments and decisions that the person would make themselves after due consideration if able to do so
- (b) act in consultation with the person, giving effect to their wishes
- (c) support the person to make or participate in decisions
- (d) act as an advocate for the person, and promote and protect their rights and dignity
- (e) encourage the person to be independent and self-reliant
- (f) encourage the person to participate in the life of the community
- (g) respect the person's supportive relationships, friendships and connections with others
- (h) recognise and take into account the person's cultural and linguistic circumstances
- (i) protect the person from abuse, neglect and exploitation.

Additional guidance for substitute decision makers

286. In determining the judgments and decisions a represented person would make after due consideration, substitute decision makers should be guided by:

- (a) the wishes and preferences the person expresses at the time a decision needs to be made, in whatever form the person expresses them
- (b) any wishes the person has previously expressed, in whatever form the person has expressed them
- (c) any considerations the person was unaware of when expressing their wishes which are likely to have significantly affected those wishes
- (d) any circumstances that have changed since the person expressed their wishes which would be likely to significantly affect those wishes
- (e) the history of the person, including their views, beliefs, values and goals in life.

Additional financial decision-making principles: prudent person principle

287. Where exercising the power of investment, financial administrators must, to the extent that it promotes the personal and social wellbeing of the represented person:

- (a) exercise the care, skill and diligence that a reasonably prudent person would exercise in managing financial matters
- (b) in the case of a person who is a professional financial administrator, exercise the skill and diligence that a reasonably prudent professional financial manager would exercise in a similar situation.

Responsibilities of substitute decision makers

OTHER RESPONSIBILITIES

- 17.141 The Commission believes that substitute decision makers would also benefit from additional guidance about the manner in which they should conduct themselves when carrying out their role.
- 17.142 While substitute decision makers are currently obliged to follow most of the following requirements, these matters are not specifically referred to in the G&A Act. It is unrealistic to expect most substitute decision makers to be aware of the extent of their duties as fiduciaries. It is also important that substitute decision makers are aware of the limits of the authority granted to them by the appointment or order, and their responsibility not to act beyond the scope of those powers. The Commission believes that these legal matters should be set out clearly in new guardianship legislation, as should the more general expectations about treating the represented person with respect.

Not exceed powers

- 17.143 While the requirement not to exceed the powers granted is implied from the terms of appointment or order, the Commission believes that substitute decision makers should be mindful of the limits of their authority and not exercise or purport to exercise substitute decision-making powers they have not been granted.

Act honestly, diligently and in good faith

- 17.144 The introduction of a specific requirement to act honestly, diligently and in good faith was broadly supported in consultations. While these duties probably form part of the fiduciary obligations¹²⁹ of all substitute decision makers, the Commission sees merit in including them in new guardianship legislation.

Respond to situations of conflict and place the represented person's interest first

- 17.145 The duty of substitute decision makers to avoid conflicts of interest may be inferred from the requirement that guardians and administrators should act in the best interests of the represented person. It also clearly forms part of their general law duties as fiduciaries, and is specifically required of attorneys.¹³⁰ To underline the importance of this duty, and promote awareness, the Commission believes that guardianship laws should specifically require substitute decision makers to identify and respond appropriately to conflicts of interests.
- 17.146 This requirement complements the Commission's recommendations in Chapters 9, 10 and 12 that the power of co-decision makers and substitute decision makers to enter into 'conflict transactions' be specifically limited.

Communicate with the represented person

- 17.147 A consistent concern raised throughout the Commission's consultations has been that some substitute decision makers—particularly professional substitute decision makers—do not always adequately involve the person in the decision-making process, and do not always effectively communicate decisions they have made on behalf of the person. The Commission recognises that there may be practical barriers to this occurring in some cases, including situations where the person has a very limited

¹²⁹ For a general discussion of fiduciary relationships and their obligations, see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, and more specifically in relation to the fiduciary nature of the relationship of guardianship see *Clay v Clay* (2001) 202 CLR 410, 428–430, where the fiduciary nature of guardianship of children is considered. In relation to the fiduciary nature of administration in Victoria, see *State Trustees Limited v Hayden* (2002) 4 VR 229 (10 April 2002) [49]; *HH (Guardianship)* [2008] VCAT 2344 (12 November 2008) [103].

¹³⁰ *Instruments Act 1958* (Vic) s 125B(5)(b).

capacity to understand the implications of the decision even with support. However, it is appropriate that substitute decision makers be under a general obligation to involve the person in decisions wherever possible, and keep the person informed about decisions that affect their life.

Treat the person and important people in their life with dignity and respect

- 17.148 The role of a substitute decision maker is a challenging one that may involve making difficult decisions with which the represented person or others disagree.
- 17.149 The Commission heard concerns from some represented persons and carers about their dealings with public guardians and administrators, with some people reporting that they did not feel administrators had treated them with respect.¹³¹
- 17.150 The Commission believes there is value in including a requirement that substitute decision makers must treat the represented person and important people in their life with dignity and respect.

Respect for privacy and confidentiality

- 17.151 The Commission believes that new legislation should clearly set out the responsibilities of substitute decision makers, and other people who provide decision-making support, to maintain the confidentiality of information concerning the person they are representing or assisting.
- 17.152 In Chapter 12, the Commission recommends that all substitute decision makers should have a specific power to access relevant confidential information about a represented person. The Commission also makes recommendations about third parties' authorisation of the disclosure of that information.
- 17.153 Substitute decision makers should also be required to maintain the confidentiality of information they obtain about a represented person other than in limited circumstances. Those circumstances are when:
- it is reasonably necessary to disclose that information to a third person in order to perform their functions as a substitute decision maker
 - disclosure is otherwise required or permitted by law.
- 17.154 The Commission believes that it should be an offence for a substitute decision maker to make an unauthorised disclosure of personal information about a represented person. This view has also been expressed in consultations and submissions.¹³²
- 17.155 A provision of this nature would overcome the need for the 'secrecy provision' in section 17 of the *State Trustees (State Owned Company) Act 1994 (Vic)*, which unfairly treats State Trustees differently to other administrators. All substitute decision makers should have the same obligations to maintain the confidentiality of information they obtain in the course of fulfilling their duties. Section 17 should be repealed if new guardianship legislation imposes a clear statutory duty of confidentiality on all substitute decision makers.

¹³¹ Roundtables with people with disabilities, carers and advocates in Morwell (in partnership with Gippsland Disability Resource Council) (29 March 2010), mental health consumers (in partnership with Mental Health Legal Centre and Victorian Mental Illness Awareness Council) (7 April 2010), carers in Hastings (in partnership with Carers Victoria) (8 April 2010) and State Trustees client (7 May 2010).

¹³² For eg, Submissions CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre), who specifically recommended criminal sanctions; and Submissions CP 24 (Autism Victoria), CP 33 (Eastern Health), CP 59 (Carers Victoria), CP 71 (Seniors Rights Victoria) and CP 73 (Victoria Legal Aid), who generally agreed that Victorian guardianship legislation should contain a provision similar to section 101 of the *Guardianship Act 1988* (NSW), which attracts a criminal sanction if breached.

Responsibilities of substitute decision makers

ADDITIONAL RESPONSIBILITIES FOR FINANCIAL ADMINISTRATORS

17.156 Financial substitute decision making can be an onerous task, particularly for people who have not received any training about the role and who have been used to intermingling their own financial affairs with those of the represented person. The Commission believes that it is desirable to give financial administrators additional statutory guidance about their role in order to encourage proper practices from the outset.

Maintain appropriate records

17.157 Although financial substitute decision makers are currently required, either directly¹³³ or indirectly,¹³⁴ to maintain appropriate records of their transactions, the Commission believes this responsibility could be more clearly articulated in new guardianship legislation.

17.158 The requirement to keep appropriate records is an important practice when managing the financial affairs of another person because it not only assists with the management of affairs, but also enables external scrutiny to occur where necessary.

17.159 The Commission suggests use of the term 'appropriate' in recognition of the fact that the record-keeping requirements might depend upon the nature and size of the estate, and the nature of the relationship between the substitute decision maker and the represented person.

17.160 In Chapter 18, the Commission considers the requirements of financial substitute decision makers to provide accounts for external scrutiny, and the level of detail which should be required.

Keep property separate except where jointly owned

17.161 A duty to keep the represented person's property separate, except where jointly owned, also forms part of administrators' and attorneys' responsibilities.¹³⁵ The Commission believes that new legislation should clarify this responsibility of financial decision makers, as is the case in Queensland.¹³⁶

CONSEQUENCES FOR FAILURE TO ADHERE TO RESPONSIBILITIES

17.162 The legislative responsibilities of substitute decisions makers are intended to provide guidance in the performance of substitute decision-making roles. They also provide a standard against which the actions of substitute decision makers can be measured where necessary—in particular by VCAT during regular and unscheduled reviews of substitute decision-making arrangements. Failure to adhere to responsibilities might cause VCAT to vary or revoke a substitute decision-making arrangement. Serious breaches of responsibilities might also lead to sanctions against the substitute decision makers.

17.163 We discuss the consequences of breaches of a substitute decision maker's responsibilities in more detail in Chapter 18.

¹³³ Section 125D of the *Instruments Act 1958* (Vic) requires an enduring attorney to keep accurate records of all dealings and transactions.

¹³⁴ Administrators are ordinarily required to provide accounts to VCAT for examination: *Guardianship and Administration Act 1986* (Vic) s 58.

¹³⁵ See, eg, *Administration Guide*, above n 15, 6.

¹³⁶ *Guardianship and Administration Act 2000* (Qld) s 50; *Powers of Attorney Act 1998* (Qld) s 86.

RECOMMENDATIONS

Other responsibilities of substitute decision makers

288. New guardianship legislation should provide that substitute decision makers must:

- (a) not exceed the powers granted under the appointment or under the statute
- (b) act honestly, diligently and in good faith
- (c) identify and respond to situations where the substitute decision maker's interests conflict with those of the represented person, ensure the represented person's interests are always the paramount consideration, and seek external advice where necessary
- (d) communicate with the represented person throughout the decision-making process and explain, as far as possible, decisions being made on their behalf
- (e) treat the person and important people in their life with dignity and respect.

Responsibilities of substitute decision makers to keep personal information confidential

289. New guardianship legislation should provide that a substitute decision maker should only collect personal information that is relevant to and necessary for carrying out their role under the Act.

290. A substitute decision maker should have an obligation not to disclose any personal information obtained in connection with the administration or execution of the Act unless the disclosure is made:

- (a) for a purpose that is relevant to and necessary for carrying out their role under the Act
- (b) for the purposes of legal proceedings arising out of the Act or of any report of such proceedings, or
- (c) with other lawful excuse.

It should be an offence to breach this obligation.

291. Section 17 of the *State Trustees (State Owned Company) Act 1994* (Vic) should be repealed if new guardianship legislation contains a provision that implements recommendation 290.

Additional financial responsibilities

292. Financial administrators should also be required to:

- (a) keep appropriate records or accounts of dealings, transactions and investments
- (b) keep the person's property separate from that of the financial guardian, except where jointly owned.



Chapter 18

Accountability

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INTRODUCTION

- 18.1 The terms of reference ask the Commission to consider ‘the need to ensure that the powers and duties of guardians and administrators ... are effective, appropriate and consistent with Australia’s human rights obligations and the Victorian Charter’ and ‘whether there should be a mechanism to address unconscionable conduct of a guardian or administrator’.¹
- 18.2 In this chapter, we look at ways of improving the accountability of those people who are appointed to make decisions for others in order to ensure that these tasks are performed lawfully and responsibly. While there must be effective accountability mechanisms, they should not be so onerous that they discourage people from agreeing to undertake these difficult roles.
- 18.3 We consider the means by which substitute decision makers are held accountable for the way in which they comply with their responsibilities and perform their duties under guardianship laws. The Commission also discusses new civil penalty provisions for a new public wrong that applies to everyone who exercises responsibility to care for a person with impaired decision-making ability.

CURRENT LAW

- 18.4 The Victorian Civil and Administrative Tribunal (VCAT) has primary responsibility for overseeing the activities of substitute decision makers. It makes and reviews guardianship and administration orders and hears applications in cases where enduring attorneys, enduring guardians, and agents appointed under the *Medical Treatment Act 1988* (Vic) are alleged to be acting contrary to the best interests of the represented person. The Public Advocate assists VCAT to perform this role by conducting investigations and providing VCAT with reports. The major sanction open to VCAT when it finds that a substitute decision maker has not performed their duties adequately is to remove that person’s authority to act in this role.²

GUARDIANS AND ADMINISTRATORS

- 18.5 While the *Guardianship and Administration Act 1986* (Vic) (G&A Act) imposes duties upon guardians and administrators, it does not describe them in any detail. The G&A Act imports duties from another area of the law as a shorthand, but imprecise, means of imposing duties upon guardians and it relies upon the general law in order to impose duties upon administrators.
- 18.6 A plenary guardian has the duties ‘which the plenary guardian would have if he or she were a parent and the represented person his or her child’.³ A limited guardian appears to have the ‘parental’ duties that accompany their limited ‘parental’ powers.⁴ An administrator has the duty to care for and manage the estate of a represented person.⁵ It appears that this duty must be performed as it would be by a fiduciary, with the duties of an administrator probably being similar to, but not as extensive as, the duties of a trustee.⁶

1 Victorian Law Reform Commission, *Guardianship Review Terms of Reference* (May 2009) 3(h) (*‘Guardianship Review Terms of Reference’*).

2 VCAT has power under s 35D of the *Guardianship and Administration Act 1986* (Vic) to revoke the appointment of an enduring guardian or alternative enduring guardian. Pursuant to s 63(1) of the *Guardianship and Administration Act 1986* (Vic) and after ‘completing a reassessment the Tribunal may by order amend, vary, continue or replace the order subject to any conditions or requirements it considers necessary or revoke the order’.

3 *Guardianship and Administration Act 1986* (Vic) s 24(1).

4 *Ibid* s 25(1).

5 *Ibid* s 58B(1)(a).

6 See, eg, *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417; *State Trustees Limited v Hayden* [2002] VSC 98 [49].

- 18.7 Guardians and administrators are subject to regular reassessments of their appointment by VCAT. For guardians, this usually happens at least once a year, and for administrators every three years.⁷
- 18.8 Following appointment by VCAT, administrators are typically required to lodge a financial statement and plan, detailing how they will manage the represented person's estate.⁸
- 18.9 Administrators are also generally required to lodge an annual statement of accounts—known as an 'Account by Administrator'—with VCAT, which is examined but not audited by State Trustees.⁹ This form can now be completed online.¹⁰ Where unacceptable spending is identified, VCAT may require the administrator to repay the sum to the estate if it is satisfied that the administrator has failed to exercise their powers in good faith and with reasonable care.¹¹
- 18.10 While the G&A Act provides that the state of Victoria is not liable to compensate any person for the actions of guardians and administrators,¹² it does not absolve guardians and administrators from any general law liability for the consequences of their conduct. The G&A Act also includes criminal penalties for breaches of the Act, which may be up to 20 penalty units (\$2443).¹³

PERSON RESPONSIBLE

- 18.11 The person responsible for medical decision making is subject to a formal external assessment only if someone challenges a decision made by that person in VCAT.¹⁴ However, the person responsible operates in an environment where there are other accountability mechanisms because the role is limited to situations where medical professionals, who are themselves subject to professional regulation, offer treatment for the represented person.
- 18.12 In addition to the general offence of contravening the Act, the G&A Act contains a specific offence for a person who either consents, or claims to have authority to consent, to a medical procedure when they know that no such authority exists or they lack reasonable grounds for believing they have this authority.¹⁵ There are heavy penalties for medical practitioners who perform special procedures or medical research procedures without proper authorisation.¹⁶

⁷ *Guardianship and Administration Act 1986* (Vic) s 61(1). See also Anstat, *Victorian Civil and Administrative Tribunal: Guardianship and Administration* (pt 6–6 at September 2008) [61.01]. The Act requires that initial orders be reassessed within 12 months, and thereafter at least once every three years. However, VCAT has the discretion to order otherwise.

⁸ Office of the Public Advocate (Victoria), *Administration Guide: A Guide for People Appointed as Administrators under the Guardianship and Administration Act 1986* (2009), 4 <<http://www.publicadvocate.vic.gov.au/file/Administration/Administration%20Guidev2%20for%20web5.pdf>>.

⁹ The examiner must provide a report to VCAT indicating whether it is able to conclude that the administrator is acting in the person's best interests, and if it is unable to conclude that the person is acting in the person's best interests, it must provide reasons: see Victorian Civil and Administrative Tribunal, *Statement for Examiners Appointed by VCAT Under the Guardianship and Administration Act 1986* (11 November 2005) <[http://www.vcat.vic.gov.au/CA256902000FE154/lookup/guardianship/\\$file/statement_for_examiners.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/lookup/guardianship/$file/statement_for_examiners.pdf)>. In 2008–09, State Trustees performed 5421 examinations, and reported 959 cases of anomalies and concerns arising from these examinations to VCAT: email from State Trustees to Victorian Law Reform Commission, 4 November 2010, 7. State Trustees charges \$173 for advice to administrators and the same amount for each examination of accounts by administrators (minimum charge is one hour): 'State Trustees Fees and Charges' in Victoria, *Victorian Government Gazette*, G25, 23 June 2011, 1387.

¹⁰ This can be done at the following website: <<http://services.business.vic.gov.au/fpp/completeFormInitAction.do?lic=2044&agency=2170>>.

¹¹ *Guardianship and Administration Act 1986* (Vic) s 58(3)–(4).

¹² *Ibid* s 70(2).

¹³ *Ibid* s 80. Victoria, *Gazette: Special*, No S 158, 26 May 2011, 1.

¹⁴ Applications may be made under *ibid* s 42N.

¹⁵ *Guardianship and Administration Act 1986* (Vic) s 42.

¹⁶ *Ibid* ss 42G(1), 42Y(1).



ENDURING GUARDIANS, ATTORNEYS AND AGENTS

- 18.13 Substitute decision makers appointed under one of the three enduring instruments in Victoria are not subject to any regular external reassessment.¹⁷ These arrangements generally operate privately, unless an application to VCAT causes it to review the operation of the enduring power.¹⁸
- 18.14 Although financial attorneys are required to keep adequate records,¹⁹ unlike administrators there is no general requirement that attorneys submit accounts to any external body for review. However, VCAT may require that accounts are lodged for examination or audit if concerns about the manner in which the financial attorney is acting are drawn to its attention.²⁰
- 18.15 While enduring guardians may be subject to the same criminal penalty as guardians for contravening the G&A Act, there is no specific offence in the *Instruments Act 1958* (Vic) for misconduct by attorneys appointed under that Act. In the case of an agent, the general penalty under the G&A Act would only apply for breaches that occur if they are acting under the person responsible provisions of the G&A Act (part 4A). There are no provisions in the Medical Treatment Act that deal with contraventions of that Act by a medical agent.

EDUCATION AND SUPPORT FOR SUBSTITUTE DECISION MAKERS

- 18.16 The Public Advocate works with VCAT to provide optional training sessions to newly appointed guardians and administrators, and publishes guides for guardians and enduring guardians, administrators, financial attorneys, medical agents and other medical decision makers.²¹ The Public Advocate also has a private guardian support program, and a general telephone advice service.²²

COMMUNITY RESPONSES

- 18.17 The Commission sought responses to various proposals in the consultation paper to enhance the accountability of substitute decision makers. Some people had expressed concerns about current levels of oversight and accountability of substitute decision makers and the skills of people performing these roles. Some carers who had experience of administration also argued that current reporting requirements are overly complicated and burdensome.
- 18.18 While many people and organisations saw benefit in enhanced accountability mechanisms, a common theme was that these should not be too onerous for guardians and administrators who already assume considerable burdens. For example, the submission by the Catholic Archdiocese of Melbourne expressed general concern about the accountability proposals, saying that VCAT's current ability to review whether guardians or attorneys are acting on a 'best interests' basis is sufficient.²³

17 There is no external review for enduring guardians under the *Guardianship and Administration Act 1986* (Vic); for enduring attorneys (financial) under the *Instruments Act 1959* (Vic); or enduring attorneys (medical treatment) under the *Medical Treatment Act 1988* (Vic).

18 VCAT may revoke the appointment of an enduring guardian under s 63D of the *Guardianship and Administration Act 1986* (Vic); an enduring attorney (financial) under s 125X of the *Instruments Act 1959* (Vic); and an enduring attorney (medical treatment) under 5C of the *Medical Treatment Act 1988* (Vic).

19 *Instruments Act 1958* (Vic) s 125D.

20 *Ibid* s 125ZB.

21 These guides are available at Office of the Public Advocate (Victoria), *Index of Publications* (30 November 2010) <<http://www.publicadvocate.vic.gov.au/publications/124/>>.

22 For more information see the Office of the Public Advocate's website: <<http://www.publicadvocate.vic.gov.au>>.

23 Submission CP 27 (Catholic Archdiocese of Melbourne).

18.19 A number of carers said that reporting by financial decision makers should be commensurate with the size of the estate.²⁴ Thus, if an administrator is managing a disability support pension, their reporting obligations should reflect the small sums of money involved.

PRIVATE GUARDIANS AND ATTORNEYS LODGING PERIODIC REPORTS WITH VCAT

18.20 Many people supported the requirement proposed in the consultation paper that private guardians and attorneys lodge periodic reports about their activities with a public official.²⁵ However, while the Public Advocate believed that this requirement should apply to private guardians, she did not support it in relation to private attorneys because the burden and expense would be disproportionate to any 'improved attorney decision-making'.²⁶ The Public Advocate warned that:

periodic reports by guardians will not be particularly instructive as regards the quality or otherwise of guardianship decisions that have been made. Determining whether particular decisions have been made in accordance with the personal and social wellbeing of the person in question will require more than the information could reliably be contained in a periodic report. Thus the move to periodic reporting by private guardians will need to be only one mechanism by which to monitor their activities.²⁷

18.21 Victoria Legal Aid supported the proposal. It shared the Public Advocate's concern about the 'lack of oversight and conduct of private guardians and administrators and the possibility of financial and other abuse occurring, unintentionally or through lack of knowledge or understanding of duties'.²⁸ Alzheimer's Australia (Victoria) also favoured periodic reports, reviewable by VCAT, but only if VCAT could effectively fulfil this role so that the requirement became more than a formality.²⁹

18.22 The Law Institute of Victoria supported the proposal but said that the reporting obligation should not be too difficult and discourage individuals from acting in the role. They also made the point that if attorneys were obliged to submit reports, there would need to be a system of 'compulsory registration' to ensure compliance. The submission highlighted the Public Advocate's argument that periodic reports would not shed light on the 'quality' of particular decisions.³⁰

PERIODIC DECLARATIONS OF COMPLIANCE

18.23 There was a mixed response to the question about whether it would be useful to require substitute decision makers to provide periodic declarations of compliance with their responsibilities.

18.24 The Public Advocate and the Law Institute of Victoria pointed out that a declaration would not be an effective means of highlighting abuse, neglect or exploitation.³¹ The Trustee Corporations Association of Australia also doubted the need for declarations without active oversight of substitute decision makers and said that '[b]y accepting those roles they are implicitly acknowledging their responsibilities'.³²

24 Roundtables with metropolitan carers (in partnership with Carers Victoria) (24 March 2011), carers, advocates and service providers in Bendigo (in partnership with Regional Information & Advocacy Council) (30 March 2011), service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (22 March 2011) and Gippsland Carers Association (19 April 2011); Submission CP 59 (Carers Victoria).

25 Submissions CP 22 (Alzheimer's Australia Vic); CP 24 (Autism Victoria); CP 29 (STAR Victoria); CP 33 (Eastern Health); and CP 56 (Disability Discrimination Legal Service).

26 Submission CP 19 (Office of the Public Advocate).

27 Ibid.

28 Submission CP 73 (Victoria Legal Aid).

29 Submission CP 22 (Alzheimer's Australia Vic).

30 Submission CP 77 (Law Institute of Victoria).

31 Submissions CP 19 (Office of the Public Advocate) and CP 77 (Law Institute of Victoria).

32 Submission CP 67 (Trustee Corporations Association of Australia).



AN OATH OR DECLARATION BY SUBSTITUTE DECISION MAKERS

- 18.25 The proposal that substitute decision makers should take an oath or sign a statement agreeing to comply with their responsibilities before they undertake their roles was generally not supported.
- 18.26 It was suggested that it would be an ineffective way of identifying or countering potential abuse by appointed substitute decision makers.³³ Moreover, it would probably become a formality with little substantive effect.³⁴

RANDOM AUDITS OF SUBSTITUTE DECISION MAKERS

- 18.27 Most of the submissions that commented on the issue supported random audits of substitute decision makers. The Trustee Corporations Association of Australia said that random audits might be a cost-effective means to improve compliance.³⁵ However, Alzheimer's Australia Victoria stressed the need for such audits to be seen as being 'protective' rather than punitive, otherwise this may increase 'the stress of a carer'.³⁶ In a similar vein, while supportive of audits, Star Victoria noted that enhanced accountability must assist by providing 'information for improvement both at the individual and systemic level through the provision of training and support'.³⁷
- 18.28 The Public Advocate thought random audits a good idea for those who make financial decisions but not in relation to guardianship or medical decisions, saying that increased investigatory powers for its office are more useful for these decisions than audits.³⁸ The Law Institute of Victoria agreed with this suggestion.³⁹
- 18.29 Autism Victoria favoured a system of accreditation for substitute decision makers that would encompass audits.⁴⁰ Another submission also supported accreditation but opposed audits other than in cases where the Public Advocate is informed about any potential abuse and chooses to investigate.⁴¹

VCAT POWER TO ORDER REPAYMENT OF MISUSED FUNDS

- 18.30 There was broad support for the Commission's proposal to give VCAT the power to order administrators or attorneys to repay funds that have been misused.⁴²
- 18.31 State Trustees referred to the shortcomings in the current processes for recovering misused funds:

[There is an] absence of cost-effective remedies for those represented persons who have suffered unjustifiable loss at the hands of a substituted decision maker. Currently the only remedy is civil action either in the Magistrates' Court, the County Court or the Supreme Court.⁴³

33 Roundtable with seniors groups (Aged and Community Care Victoria; Council on the Ageing Victoria; Seniors Information Victoria; Elder Rights Advocacy; National Seniors (Victoria)) (8 April 2011); Submissions CP 24 (Autism Victoria) and CP 77 (Law Institute of Victoria).

34 Submission CP 77 (Law Institute of Victoria).

35 Submission CP 67 (Trustee Corporations Association of Australia).

36 Submission CP 22 (Alzheimer's Australia Vic).

37 Submission CP 29 (STAR Victoria).

38 Submission CP 19 (Office of the Public Advocate).

39 Submission CP 77 (Law Institute of Victoria).

40 Submission CP 24 (Autism Victoria).

41 Submission CP 35 (Ursula Smith).

42 Submissions CP 14 (BENETAS), CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 24 (Autism Victoria), CP 29 (STAR Victoria), CP 33 (Eastern Health), CP 35 (Ursula Smith), CP 47 (Dr Michael Murray), CP 38 (Aged Care Crisis), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 59 (Carers Victoria), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

43 Submission CP 70 (State Trustees Limited). See also Submission CP 77 (Law Institute of Victoria).

18.32 State Trustees further added:

State Trustees can confirm that there have been alleged misappropriation matters abandoned only because the represented person did not have sufficient financial resources to fund ongoing litigation. Unfortunately these types of matters do not usually attract the engagement of a 'no-win no-fee' law firm competent in this jurisdiction and, in the absence of a clear public interest element, the Public Interest Law Clearing House (PILCH) is reluctant to act. In such cases of misappropriation, VCAT should be empowered to hear the matter itself and, if appropriate, to order restitution or compensation to remedy the represented person's losses.⁴⁴

18.33 The Mental Health Legal Centre also expressed concerns regarding the process of the recovery of misused funds, commenting that the current process is an inaccessible option for many of their clients due to the adverse cost implications.⁴⁵

INTRODUCTION OF CIVIL PENALTIES

18.34 In the consultation paper, the Commission proposed the introduction of more penalties for substitute decision makers who misuse their powers. There was widespread support for the introduction of civil penalties into guardianship legislation.⁴⁶ The Public Advocate noted that the introduction of civil penalties would improve compliance with the legislation.⁴⁷

18.35 State Trustees and Seniors Rights Victoria stated that a civil penalty regime would be beneficial where the wrong committed falls short of criminality and Victoria Police do not need to be involved. State Trustees also suggested that any financial penalties could be passed on to the individual wronged through compensation or restitution.⁴⁸

18.36 The Federation of Community Legal Centres was also in favour of civil penalties in guardianship legislation, noting that more serious criminal conduct is likely to be covered by existing criminal offences.⁴⁹

18.37 The Catholic Archdiocese of Melbourne opposed increasing penalties, noting that current provisions are sufficient, and expressing concerns that the threat of penalties may dissuade a person from accepting a substitute decision-making role.⁵⁰

18.38 In the consultation paper, the Commission asked what types of conduct should warrant a penalty. The types of conduct identified included:

- physical and mental abuse, or physical harm to a person⁵¹
- theft and misappropriation of funds⁵²
- any conduct involving dishonesty or actions made in bad faith⁵³
- not acting in the represented person's best interest⁵⁴
- not acting in accordance with the principles of the Act.⁵⁵

44 Submission CP 70 (State Trustees Limited).

45 Submission CP 78 (Mental Health Legal Centre).

46 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 29 (STAR Victoria), CP 33 (Eastern Health), CP 59 (Carers Victoria), CP 65 (Council on the Ageing Victoria), CP 70 (State Trustees Limited), CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

47 Submission CP 19 (Office of the Public Advocate).

48 Submissions CP 70 (State Trustees Limited) and CP 71 (Seniors Rights Victoria).

49 Submission CP 75 (Federation of Community Legal Centres (Victoria)).

50 Submission CP 27 (Catholic Archdiocese of Melbourne).

51 Submissions CP 24 (Autism Victoria), CP 35 (Ursula Smith), CP 41 (June Walker) and CP 47 (Dr Michael Murray).

52 For eg, CP 33 (Eastern Health), CP 47 (Dr Michael Murray), CP 70 (State Trustees Limited) and CP 73 (Victoria Legal Aid).

53 For eg, Submissions CP 24 (Autism Victoria) and CP 59 (Carers Victoria).

54 For eg, Submissions CP 9 (Stephen Lake), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 77 (Law Institute of Victoria).

55 Submissions CP 22 (Alzheimer's Australia Vic) and CP 73 (Victoria Legal Aid).



- 18.39 The Law Institute of Victoria provided an exhaustive list, suggesting the following conduct should attract penalties:
- procuring a substitute decision-making role by threat or deception
 - not acting honestly with reasonable diligence to protect the represented person's best interests
 - knowingly exercising powers under a revoked substitute decision-making power.⁵⁶
- 18.40 Some submissions suggested that a distinction should be drawn between intentional or knowing abuse of powers and omissions to act.⁵⁷ The Public Advocate supported consideration of Queensland's guardianship laws, which have detailed penalty provisions.⁵⁸ State Trustees suggested that there should be a defence of having acted honestly and reasonably, as is the case in Queensland.⁵⁹

VCAT DISCRETIONARY POWER TO APPOINT A GUARDIAN OR ADMINISTRATOR ON THE CONDITION THAT THEY COMPLETE TRAINING

- 18.41 There was broad support for the proposal that VCAT have a discretionary power to appoint guardians or administrators on condition that they undertake training.
- 18.42 Council on the Ageing (Victoria) said that they support the proposal because:
- many people are uncertain about their responsibilities in these roles. Training would not only clarify what is required of them, but would also provide greater understanding of the guiding principles and the purpose and intent of the substitute decision making.⁶⁰
- 18.43 Some participants in consultations advocated compulsory training.⁶¹ While highlighting the resource implications of more training, Seniors Rights Victoria recommended that it be obligatory for all 'non-professional' appointees.⁶² Victoria Legal Aid favours the provision of training as a prerequisite to appointment,⁶³ while the Homeless Persons' Legal Clinic said that the voluntary information sessions currently provided by the Public Advocate should be required for all private appointees.⁶⁴
- 18.44 The Mental Health Legal Centre recommended that any training of guardians or administrators for people with a mental illness be 'consumer-led'.⁶⁵

THE COMMISSION'S VIEWS AND CONCLUSIONS

- 18.45 The Commission believes that new guardianship legislation should contain stronger and more modern accountability requirements.
- 18.46 While there is broad support for enhancing the accountability mechanisms for substitute decision makers, that support is tempered by a preference for reforms that do not impose unreasonable burdens on substitute decision makers, many of whom are unremunerated carers of the represented person. There is also broad support for providing substitute decision makers with more information and training about their difficult responsibilities.

⁵⁶ Submission CP 77 (Law Institute Victoria).

⁵⁷ Submissions CP 9 (Stephen Lake) and CP 19 (Office of the Public Advocate).

⁵⁸ Submission CP 19 (Office of the Public Advocate).

⁵⁹ Submission CP 70 (State Trustees Limited).

⁶⁰ Submission CP 65 (Council on the Ageing Victoria).

⁶¹ For eg, roundtable with disability advocates (in partnership with Disability Advocacy Resource Unit) (13 April 2011).

⁶² Submission CP 71 (Seniors Rights Victoria).

⁶³ Submission CP 73 (Victoria Legal Aid).

⁶⁴ Submission CP 74 (PILCH Homeless Persons' Legal Clinic).

⁶⁵ Submission CP 78 (Mental Health Legal Centre).

- 18.47 While the existing accountability measures can be developed, the trust and confidence that will always be an integral part of all substitute decision-making arrangements should not be endangered by overly burdensome requirements.
- 18.48 New accountability measures should seek to promote understanding of the responsibilities and duties of substitute decision makers rather than provide for detailed policing of compliance with complex rules. At the same time, it should be easier for public authorities to respond to instances of abuse, neglect or exploitation, and for the penalties for engaging in this conduct to reflect the degree of wrongdoing involved in taking advantage of vulnerable people. It should also be easier to take action to recover funds or property misappropriated by financial substitute decision makers.

ENHANCED TRAINING AND EDUCATION

- 18.49 The Commission sees great value in enhanced training for all substitute decision makers, the vast majority of whom are well-meaning people who have accepted appointment to a very difficult and unfamiliar role.
- 18.50 The Commission believes that VCAT should have the power to order that a person complete training as a condition of appointment to a substitute decision-making role so that new personal guardians and financial administrators⁶⁶ are encouraged to learn about their roles and responsibilities. VCAT currently provides voluntary training for administrators. This program could be extended to include enduring financial administrators.
- 18.51 The Public Advocate could assume responsibility for providing training programs for private guardians appointed by VCAT and enduring guardians. This step is a logical extension of the Public Advocate's useful guides and advice for private guardians.
- 18.52 Individual training of substitute decision makers should be accompanied by community education about guardianship legislation. With appropriate funding, both the Public Advocate and State Trustees would be well-placed to promote community awareness and understanding of new guardianship legislation.

RECOMMENDATIONS

Enhanced training and education

293. New guardianship legislation should permit VCAT to appoint a person as a personal guardian or a financial administrator subject to the condition that the person undertakes a designated training program.
294. The Public Advocate and State Trustees should be funded to provide the community with information about the operation of new guardianship legislation.

UNDERTAKINGS BY SUBSTITUTE DECISION MAKERS

- 18.53 The Commission believes it is important that substitute decision makers formally acknowledge their responsibilities and duties at an appropriate time. Although many people saw little value in requiring a substitute decision maker to take an oath or affirmation of office, the Commission believes that it is desirable for all substitute decision makers to sign an undertaking upon commencing their role to act in accordance with their responsibilities.

⁶⁶ In Chapter 5, the Commission recommends changing the term 'guardian' to 'personal guardian' and the term 'administrator' to 'financial administrator'.



- 18.54 Substitute decision makers appointed by VCAT could sign an undertaking at the time of the appointment, while personally appointed substitute decision makers could sign an undertaking at the time of appointment or when they invoke their powers.
- 18.55 Undertakings signed by tribunal-appointed substitute decision makers could be retained on the VCAT file and undertakings of personally appointed substitute decision makers could be held at the proposed online register of personal appointments.⁶⁷
- 18.56 Even though the Commission does not recommend a specific sanction for failure to comply with an undertaking, the document would be available for use in any subsequent proceedings concerning failure of a substitute decision maker to comply with a particular duty.

RECOMMENDATIONS

Undertakings by substitute decision makers

295. New guardianship legislation should require all substitute decision makers to undertake in writing to act in accordance with their responsibilities and duties.
296. Tribunal-appointed substitute decision makers should be required to sign the undertaking at the time of their appointment. Personally appointed substitute decision makers should be required to sign the undertaking at the time of invoking their powers.

REPORTS BY FINANCIAL ADMINISTRATORS

- 18.57 The Commission believes that it is desirable to streamline the reporting obligations of financial administrators in some instances. While the Commission recommends continuing the current requirement that financial administrators lodge financial statements with VCAT annually and at any other time when directed, we also recommend that the nature of the reporting obligations should be determined, in some instances, by both the size of the estate and the nature of the relationship between the parties. Even though it is important that the estate of a person of moderate means be as well-managed as the estate of a wealthy person, the reporting obligations imposed on private individuals who act as the administrators of small estates for partners or adult children without any payment for their work should not be too onerous.
- 18.58 When appointing a financial administrator to manage the affairs of a person, the tribunal should determine whether a particular estate is a small estate that warrants 'short form' reporting requirements or whether the 'usual' accounts are required. The Commission suggests some legislative guidance about this matter—a small estate could be one with a capital value of less than \$10,000, and no income other than a Centrelink pension or benefit.
- 18.59 The 'short form' statement should not require a full accounting of all income and expenditure. It should include:
- a declaration that expenditure has been solely for the benefit of the represented person
 - details of any gifts made by the represented person to others
 - details of any individual expenditure of more than a moderate sum (perhaps \$1000 on current values)

⁶⁷ In Chapter 16, the Commission recommends establishing an online register of personal appointments.

- details of any major changes in the represented person's income or expenditure
- details of any major changes in the represented person's assets or liabilities.

18.60 While VCAT already has a general power to waive payment of the fee for examining accounts, it seems appropriate that no fee be payable to examine a 'short form' statement.

RECOMMENDATIONS

Reports by financial administrators

297. New guardianship legislation should provide that financial administrators are obliged to lodge annual financial reports with VCAT for examination, unless VCAT decides to exempt the financial administrator from this requirement.

298. VCAT should have a discretionary power to determine the manner in which any financial report is made, with the size of the estate and the relationship between the parties being relevant considerations.

299. VCAT should have the power to direct a more limited form of reporting when the financial administrator is responsible for managing a small estate. In these circumstances, it should be possible for VCAT to direct that the financial administrator file a 'short form' statement, which should include:

- a declaration that expenditure has been solely for the benefit of the represented person
- details of any gifts made by the represented person to others
- details of any individual expenditure of more than a specified amount
- details of any major changes in the represented person's income or expenditure
- details of any major changes in the represented person's assets or liabilities.

300. No fee should be payable for examination of a 'short form' statement.

301. New guardianship legislation should contain guidance about determining whether an estate is a small estate.

302. VCAT should have a discretionary power to direct a financial administrator to lodge accounts for examination or audit at any time.

VCAT'S POWER TO ORDER REPAYMENT OF MISUSED FUNDS

18.61 There is strong support for VCAT having the power to order repayment of funds misappropriated or misused by financial administrators and enduring financial administrators.⁶⁸ The Victorian Parliament Law Reform Committee's *Inquiry into Powers of Attorney* recommended VCAT should have this power in relation to misuse of funds by enduring attorneys.⁶⁹ At present, the only sanctions open to VCAT when an administrator or enduring attorney abuses their powers in relation to the represented person's property or finances are to revoke the appointment and, in the case of administrators, to disallow an expenditure item in the annual accounts.⁷⁰ The administrator must repay any disallowed item to the estate of the represented person.

⁶⁸ In Chapter 5, the Commission recommends changing the term 'enduring attorney' to 'enduring financial administrator'.

⁶⁹ Recommendation 62: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 212–14 (*'Inquiry into Powers of Attorney'*).

⁷⁰ *Guardianship and Administration Act 1986* (Vic) ss 58(2C)–(4).

18

Chapter 18

Accountability

- 18.62 As State Trustees identified, the current requirement that proceedings to recover misused funds be taken in the courts relying upon general law causes of action is often a risky and expensive undertaking. VCAT is a more attractive jurisdiction in which to conduct these proceedings because of its supervisory role in relation to administrators and enduring attorneys and because it is a low-cost tribunal with fewer complex procedural requirements than the courts.
- 18.63 However, if VCAT is to have the power to order that a substitute financial decision maker repay misused or misappropriated funds to the estate of the represented person, it could only do so after finding that the substitute decision maker failed to comply with an existing general law obligation or breached some new statutory duty for which damages are payable. Given the broad range of circumstances in which a substitute financial decision maker could misuse or misappropriate the funds of a represented person, the Commission does not believe it is desirable to design a new statutory duty or to limit the potential remedies to damages.
- 18.64 The Commission believes that a simpler way to give VCAT the power to deal with these matters is for it to have jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute financial decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties. VCAT should have the power to order any remedy that could be ordered by the Supreme Court in these proceedings.
- 18.65 A common means of attempting to recover lost funds would be to seek an award of damages in proceedings for breach of fiduciary obligations. However, there may be other proceedings—such as claims of unjust enrichment⁷¹ or actions in negligence—and other remedies that might be more appropriate. For this reason, the Commission sees no need to place arbitrary limits on the jurisdiction that VCAT should have in these cases.
- 18.66 In view of the fact that the President of VCAT is a Supreme Court judge and the Vice Presidents are County Court judges, it is difficult to argue that VCAT lacks sufficient legal expertise to respond appropriately to claims of this nature. However, VCAT should have the power to transfer any of these proceedings to the Supreme Court or the County Court if it believes that one of those courts is a more appropriate venue for a particular case.
- 18.67 It will be necessary for any substitute financial decision maker who is alleged to have misused or misappropriated funds to receive adequate notice of the claims made against them and of the remedies sought. This natural justice requirement will pose difficulties for VCAT in cases where the represented person is unable to take responsibility for these steps. In most cases, it would be undesirable, or impossible, for VCAT to frame the claim against the financial substitute decision maker and quantify any remedies sought. Therefore, VCAT will need to identify an appropriate person to be the 'moving party' in most proceedings of this nature. As the costs risks usually associated with court proceedings will be irrelevant in most cases, it might be possible for the Public Advocate or State Trustees to play this role at times.
- 18.68 Although recovery of funds misused or misappropriated by a substitute financial decision maker is the primary focus of this recommendation, it seems appropriate that VCAT should also have jurisdiction in relation to any causes of action that could be pursued in the Supreme Court against personal guardians who abuse or misuse their powers, or fail to perform their duties. It is clearly possible for a personal guardian to abuse their powers for personal or other advantage, or to act in other ways that are unlawful and for which there is some civil remedy.

⁷¹ We discuss the meaning of unjust enrichment in the glossary.

- 18.69 Extending VCAT's jurisdiction to all causes of action against all substitute decision makers falls within VCAT's description of itself as a 'one stop shop' for dealing with a range of matters.⁷² It would make VCAT a 'one stop shop' for all guardianship matters. This step would also promote development of the law of fiduciary obligations as it applies to substitute decision makers and those people they represent. It is highly likely that the costs risks associated with litigation in the higher courts has stifled the widespread application of this useful body of law to guardianship relationships.
- 18.70 The Commission recommends that VCAT should have jurisdiction to deal with claims that could be made against substitute decision makers in the courts for abuse of their powers. This proposal is an important means of addressing 'unconscionable conduct of a guardian or administrator'.⁷³

RECOMMENDATIONS

VCAT's power to order repayment of misused funds

303. New guardianship legislation should provide that VCAT have jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties. VCAT should have the power to order any remedy that the Supreme Court could order in these proceedings.
304. VCAT should be permitted to transfer any cases of this nature to the Supreme Court or the County Court if it considers that one of these courts is a more appropriate venue for the proceedings.

CIVIL PENALTIES FOR A NEW PUBLIC WRONG

- 18.71 There was broad support for the proposal that new guardianship legislation contain civil penalties for substitute decision makers who misuse or abuse their powers. As noted earlier in the chapter, the Commission received a range of views about the conduct to which penalties should apply.
- 18.72 Strong anecdotal evidence and a growing body of research data⁷⁴ indicates that people with impaired decision-making ability are sometimes abused by people who care for them or who make decisions for them. A recent report by the Ombudsman to Parliament about the physical abuse of a man with an intellectual disability at a community residential unit is a good example of the sort of behaviour that generates widespread concern.⁷⁵
- 18.73 While some of this behaviour would probably constitute the criminal offences of assault or theft, the criminal justice system is sometimes unable to deal effectively with these matters. There is no specialist unit within Victoria Police to investigate claims of abuse of people with impaired decision-making ability and it is often difficult to present evidence that satisfies the criminal standard of proof in cases of this nature.

⁷² Victorian Civil and Administrative Tribunal, *Annual Report 2010/11* (2011) 2.

⁷³ *Guardianship Review Terms of Reference*, above n 1, 3(h).

⁷⁴ See, eg, *Protecting Elders Assets Study (PEAS): Ethical Management of Older Persons' Financial Assets (2009-2011)*. State Trustees Limited commissioned a group of academics at Monash University to undertake a study to explore the issue of financial elder abuse and how it can be combated. For more information about the three year research project see: State Trustees Limited, *Financial Elder Abuse Research Project* (2011) <<http://www.statetrustees.com.au/financial-elder-abuse/financial-elder-abuse-research-project>>.

⁷⁵ See Ombudsman Victoria, *Ombudsman Investigation: Assault of a Disability Services Client by Department of Human Services Staff* (2011). The report can be accessed from the Ombudsman Victoria website: <<http://www.ombudsman.vic.gov.au/www/html/285-parliamentary-reports-2011.asp>>.



- 18.74 It is important, however, that abuse of vulnerable people be characterised as a public wrong in some circumstances, even when criminal proceedings are unavailable or unlikely to succeed. This is a field where the law can play an important role in setting standards.
- 18.75 The Commission believes that new guardianship legislation should impose civil penalties for conduct amounting to ‘abuse, neglect or exploitation’ of people with impaired decision-making ability. Although it is unlikely that civil penalty proceedings would be common, this reform would be an important way of highlighting that it is unacceptable to mistreat vulnerable people.
- 18.76 Three issues arise when designing a new public wrong:
- the nature or description of the wrongful behaviour
 - the description of the people in respect of whom this behaviour is unlawful
 - the identity of the people who must not behave in this manner.
- 18.77 There have been no relevant developments in other jurisdictions to provide guidance. Queensland legislation makes it unlawful for a substitute decision maker to exercise powers other than honestly and with reasonable diligence,⁷⁶ or contrary to the terms of their appointment.⁷⁷ The practical effect of these provisions is to make it an offence in Queensland for substitute decision makers to fail to perform two of their fiduciary duties rather than to create entirely new wrongs.
- 18.78 The Commission believes that new Victorian guardianship legislation should go further and prohibit unacceptable treatment of people with a disability. It should be unlawful for someone with responsibility to care for a person with impaired decision-making ability because of a disability to abuse, neglect or exploit that person. This new public wrong would clearly overlap with some existing criminal offences—such as assault and theft—and some existing civil wrongs or torts—such as trespass to the person and trespass to goods. Protection of vulnerable people is enhanced by the creation of a new public wrong that sits between a criminal offence and a tort. Criminal and civil proceedings should continue to be available and taken when they are appropriate.

Abuse, neglect and exploitation

- 18.79 The terms ‘abuse’, ‘neglect’ and ‘exploitation’ encompass the many forms of unacceptable behaviour that should be prohibited in legislation. It is also possible to leave it to the courts to give meaning to these broad terms in the context of particular cases or to provide some statutory guidance about the type of conduct that is unlawful. The Commission believes it is desirable to do both; new legislation should contain non-exhaustive descriptions of prohibited conduct, with the courts also having the power to develop a body of case law that gives detailed meaning to these terms over time.
- 18.80 While drafting is ultimately a matter for Parliamentary Counsel, the Commission considers that it is useful to give broad indications of the activities that fall within the three forms of prohibited conduct—abuse, neglect and exploitation. The term **abuse** could be defined to mean any intentional conduct involving injury to or maltreatment of a person with impaired decision-making ability and can include:
- physical abuse, such as causing physical harm to the person
 - sexual abuse, such as engaging in sexual activity with the person without their valid consent
 - financial abuse, such as taking the person’s money without their valid consent.

⁷⁶ *Guardianship and Administration Act 2000* (Qld) s 35.

⁷⁷ *Ibid* s 36.

18.81 The term **neglect** could be defined to mean any intentional or negligent conduct that amounts to failure to perform duties owed to the person and can include:

- physical neglect, such as not providing the person with adequate food or attention to physical needs
- financial or property neglect, such as not taking adequate care of the person's finances or property.

18.82 The term **exploitation** could be defined to mean taking advantage of the person for one's own benefit or gain, and can include:

- financial exploitation, such as the use of another person's finances principally for one's own benefit
- sexual exploitation, such as allowing a person, or images of a person, to be used in a sexual manner for one's own financial gain or benefit.

Extending the scope of the wrong beyond formal substitute decision makers

18.83 As mentioned above, the Commission believes that it should be unlawful for a *person with responsibility to care for a person with impaired decision-making ability because of a disability* to abuse, neglect or exploit that person. The notion of having a responsibility to care for a vulnerable person is a central component of this proposed wrong. The people covered by this description would include all substitute decision makers, co-decision makers and supporters, as well as all people who care for people with impaired decision-making ability because of a disability and all unpaid carers and informal decision makers. While the Commission is mindful of the need for effective responses to 'unconscionable conduct of a guardian or administrator', it believes that the protection afforded and the standards set by a new public wrong should extend beyond formal substitute decision makers.

18.84 All of the people identified in the previous paragraph probably already have some form of legal duty to care for the person for whom they have responsibility, with that duty being theoretically but not often practically enforceable by the person concerned. The Commission's recommendation effectively crystallises these legal duties in a public wrong and places enforcement in the hands of public authorities.

18.85 Devising a workable description of the people who should be protected by this new public wrong is challenging. As guardianship law deals with the needs of people with impaired decision-making ability because of a disability, this description seems appropriate.

The importance of civil penalties

18.86 Civil penalties are now used in many different areas of regulatory activity, such as the marketplace, the environment and the workplace. They have proved particularly useful for regulating the activities of corporate entities, by imposing large fines designed to deter similar conduct in the future.⁷⁸ Through these fines, civil penalties convey public disapproval of conduct that is not easily prosecuted under the criminal law. However, under Australian law, 'civil penalties are not exclusively monetary and may also include injunctions, banning orders, licence revocations, and orders for reparation and compensation'.⁷⁹

⁷⁸ See, eg, the pecuniary penalty of \$36 million ordered against Visy for price fixing in the packaging industry with Amcor: *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd and Others (No 3)* (2007) 244 ALR 673.

⁷⁹ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 74 ('*Principled Regulation*').



- 18.87 The Australian Law Reform Commission writes that civil penalties:
are closely founded on the notion of preventing or punishing public harm. The contravention itself may be similar to a criminal offence (for example, breaches of a director's duties or publishing misleading material) and may involve the same or similar conduct, and the purpose of imposing a penalty may be to punish the offender, but the procedure by which the offender is sanctioned is based on civil court process.⁸⁰
- 18.88 There is growing support for the use of civil penalties when dealing with many violations of the law. As one well-placed commentator noted, 'a modern complex society with limited judicial resources and an economic need for efficiency must necessarily seek mechanisms for the enforcement of its rules additional to traditional criminal processes'.⁸¹
- 18.89 In 2007, the Commonwealth Attorney-General's Department stated that civil penalties are most likely to be appropriate and effective where:
- criminal punishment is not merited (for example, offences involving harm to a person or a serious danger to public safety should always result in a criminal punishment)
 - the penalty is sufficient to justify court proceedings
 - there is corporate wrongdoing.⁸²
- 18.90 A number of federal oversight bodies have the power to bring civil penalty proceedings, including the Australian Competition and Consumer Commission,⁸³ the Australian Securities and Investments Commission⁸⁴ and the Environment Protection Authority.⁸⁵ Civil penalty orders are available under numerous other pieces of Commonwealth legislation.⁸⁶
- 18.91 In Victoria, there has also been growing use of civil penalties. For example, the Essential Services Commission is responsible for bringing civil penalty proceedings under a number of Acts including the *Essential Services Commission Act 2001* (Vic),⁸⁷ the *Rail Corporations Act 1996* (Vic),⁸⁸ and the *Victorian Renewable Energy Act 2006* (Vic).⁸⁹ The courts may make a civil penalty order under the *Outworkers (Improved Protection) Act 2003* (Vic)⁹⁰ and the *Long Service Leave Act 1992* (Vic).⁹¹ VCAT may make a civil penalty order under the *Owners Corporation Act 2006* (Vic).⁹²
- 18.92 Civil penalty proceedings are conducted according to civil procedure rules and the standard of proof is the civil rather than the criminal standard.⁹³

Responsibility for initiating proceedings

- 18.93 The G&A Act currently provides the Public Advocate with the power to 'investigate any complaint or allegation that a person is ... being exploited or abused or in need

⁸⁰ Ibid 73.

⁸¹ Eamonn Moran, 'Enforcement Mechanisms (including Alternatives to Criminal Penalties)' (2009) 2 *The Loophole* 12.

⁸² Australian Government, Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007) 63–4.

⁸³ Under the *Competition and Consumer Act 2010* (Cth), previously named *Trade Practices Act 1974* (Cth) (change effected 1 January 2011).

⁸⁴ Under the *Corporations Act 2001* (Cth).

⁸⁵ Under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

⁸⁶ Including the *Banking Act 1959* (Cth) and the *Fair Work (Registered Organisations Act) 2009* (Cth).

⁸⁷ *Essential Services Commission Act 2001* (Vic) s 54A.

⁸⁸ *Rail Corporations Act 1996* (Vic) ss 68–69.

⁸⁹ *Victorian Renewable Energy Act 2006* (Vic) s 71.

⁹⁰ *Outworkers (Improved Protection) Act 2003* (Vic) s 47.

⁹¹ *Long Service Leave Act 1992* (Vic) s 88.

⁹² *Owners Corporation Act 2006* (Vic) s 166.

⁹³ *Principled Regulation*, above n 79, 72–3.

of guardianship'.⁹⁴ The Commission believes that the Public Advocate's investigative powers should extend to conduct that could constitute abuse, neglect or exploitation of a person with impaired decision-making ability because of a disability. Evidence gathered by the Public Advocate when exercising these powers should be available for use by a new public official with responsibility for taking civil penalty proceedings against alleged wrongdoers. The Commission's recommendations about new investigative powers for the Public Advocate are discussed in Chapter 20.

- 18.94 While it is appropriate to extend the Public Advocate's investigative role and powers to include conduct that might be in breach of the proposed new public wrong, the Commission does not believe that the Public Advocate should be responsible for initiating and conducting civil penalty proceedings. In most other areas of the law, a body with regulatory responsibilities, such as the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission, accepts responsibility for civil penalty proceedings.
- 18.95 The Public Advocate does not wish to assume 'prosecutorial' responsibilities under new guardianship legislation, as she believes this may conflict with her role as guardian and provide her with functions that are 'too diffuse'.⁹⁵
- 18.96 The Commission respects this view and acknowledges that, as the Public Advocate has responsibility to care for many people with impaired decision-making ability due to a disability, she is someone who could face proceedings, in theory at least, for abuse, neglect or exploitation. It is desirable, therefore, that another public official have responsibility for initiating and conducting the proposed civil penalty proceedings. The Commission was unable to identify any existing public official who could assume this role.
- 18.97 The Commission recommends that a new statutory official have responsibility for initiating civil penalty proceedings in the Magistrates' Court for 'abuse, neglect and exploitation'. The Commission is mindful of the resource implications of this recommendation but suggests that costs are likely to be modest because the Public Advocate would be responsible for investigations and gathering evidence in support of any proceedings. Many of the new statutory officer's infrastructure costs could be minimised by co-locating that person with the Public Advocate.
- 18.98 The Public Advocate would have a range of options after investigating a complaint that a person with impaired decision-making ability because of a disability is being abused, neglected or exploited. They are:
- No action is required.
 - The matter is referred to the police for consideration of criminal charges.
 - A guardianship application is made by the Public Advocate.
 - The matter is pursued as an advocacy case by the Public Advocate.
 - The matter is referred to the new statutory officer for consideration of civil penalty proceedings.
- 18.99 It would be desirable for the Public Advocate, the Chief Commissioner of Police and the new statutory officer to develop protocols concerning their overlapping responsibilities and the means by which they would work together to ensure the most appropriate outcome in each case.

⁹⁴ *Guardianship and Administration Act 1986* (Vic) s 16(1)(h).

⁹⁵ Submission CP 19 (Office of the Public Advocate).



18.100 The Commission recommends that there be a new public wrong, punishable by civil penalty, in the terms set out below. Proceedings should ordinarily be conducted in the Magistrates' Court. The size and range of penalties is a matter for the Attorney-General, after consulting with the Sentencing Advisory Council.

RECOMMENDATIONS

Civil penalties for a new public wrong

305. New guardianship legislation should provide that it is unlawful for a person with responsibility to care for a person with impaired decision-making ability because of a disability to abuse, neglect or exploit that person.
306. A person who is found to have committed this wrong should be liable to a civil penalty.
307. The Attorney-General should determine the level of civil penalties for this wrong after consulting with the Sentencing Advisory Council.
308. The legislation should contain non-exhaustive descriptions of the prohibited conduct.
309. The term 'abuse' could be defined to mean any intentional conduct involving injury to or maltreatment of a person with impaired decision-making ability and can include:
- (a) physical abuse, such as causing physical harm to the person
 - (b) sexual abuse, such as engaging in sexual activity with the person without their valid consent
 - (c) financial abuse, such as taking the person's money without their valid consent.
310. The term 'neglect' could be defined to mean any intentional or negligent conduct that amounts to failure to perform duties owed to the person and can include:
- (a) physical neglect, such as not providing the person with adequate food or attention to physical needs
 - (b) financial or property neglect, such as not taking adequate care of the person's finances or property.
311. The term 'exploitation' could be defined to mean taking advantage of the person for one's own benefit or gain, and can include:
- (a) financial exploitation, such as the use of another person's finances principally for one's own benefit
 - (b) sexual exploitation, such as allowing a person, or images of a person, to be used in a sexual manner for one's own financial gain or benefit.
312. There should be a new statutory officer with responsibility for initiating and conducting civil penalty proceedings for this new public wrong.
313. Proceedings for this new public wrong should ordinarily be conducted in the Magistrates' Court of Victoria.

314. The Public Advocate, the Chief Commissioner of Police and the new statutory officer should develop protocols dealing with their overlapping responsibilities and means of working together in those instances where it is alleged that a person with responsibility to care for a person with impaired decision-making ability because of a disability has abused, neglected or exploited that person.

OTHER ACCOUNTABILITY MECHANISMS

18.101 The Commission has decided not to recommend adoption of a number of accountability mechanisms that were discussed in the consultation paper. The Commission's overarching objective was to propose effective accountability mechanisms that promote responsible use of substitute decision-making powers but which do not operate to deter willing and able people from accepting appointments because they regard these mechanisms as being too onerous.

Appointment of monitors

18.102 In Chapter 10, the Commission discussed the Victorian Parliament Law Reform Committee's recommendation that a principal should be able to appoint personal monitors when creating an enduring power of attorney (financial) and an enduring power of attorney (guardianship).⁹⁶ While people who make personal appointments should be permitted to impose reasonable conditions or limits upon the powers exercised by a substitute decision maker, the Commission questions the benefit of permitting VCAT to appoint monitors. VCAT has and should continue to have appropriate powers to supervise the exercise of powers by a particular substitute decision maker if it holds concerns about a person it appoints to this role.

Periodic reporting by private guardians and attorneys

18.103 The Commission believes that current legislation provides adequate reporting requirements for administrators and enduring attorneys. We recommend that these arrangements continue subject to the introduction of 'short form' financial statements for small estates in the circumstances discussed earlier in the chapter. New legislation should also make it clear that a principal should be permitted to stipulate when appointing an enduring financial administrator that this person must submit annual financial accounts to an accountant once the powers are exercised. In these circumstances, the estate of the represented person would accept responsibility for the fees associated with preparing and examining financial statements.

18.104 While there was support for periodic reporting by private and enduring personal guardians and financial administrators, the Commission agrees with the Public Advocate's comment that these reports are unlikely to promote good decision making by guardians. The cost of perusing reports is better invested in training guardians to perform their functions well.

Periodic declarations of compliance

18.105 The Commission does not believe that periodic declarations of compliance by substitute decision makers will promote good decision making. Undertakings by substitute decision makers at the commencement of an appointment are a more useful and less burdensome mechanism of ensuring that guardians and attorneys are aware of, and reflect upon, their role and responsibilities.

⁹⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 197–200.

18

Chapter 18

Accountability



Random investigation and auditing of substitute decision makers

18.106 The Commission does not believe that random investigation and auditing of substitute decision makers would be a useful or cost-effective means of encouraging people to fulfil this challenging role effectively. The trust and confidence necessary for an appointment to operate successfully could be undermined if substitute decision makers feel under suspicion of exercising their powers inappropriately.

18.107 The Commission believes that it is better to encourage good appointments of substitute decision makers and to provide these people with high quality training and support about the role.



Chapter 19

Merits review

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Merits review

INTRODUCTION

19.1 This chapter considers the Commission's proposal that new guardianship legislation include a right to review the merits of individual guardianship and administration decisions made by the Public Advocate and professional financial administrators. The terms of reference directed the Commission to consider means of reviewing decisions by guardians and administrators.

CURRENT LAW

19.2 The *Guardianship and Administration Act 1986* (Vic) (G&A Act) does not currently allow for merits review of individual decisions of guardians and administrators. In other words, it is impossible for a represented person, or any other interested person, to challenge the merits of an individual decision by a guardian or an administrator in a court or tribunal if they believe the decision is wrong.

19.3 It is possible to mount indirect challenges to the merits of an individual decision. Guardianship and administration orders can be reassessed on the Victorian Civil and Administrative Tribunal (VCAT)'s initiative or 'upon the application of any person'.¹ Guardians and administrators may seek advice from VCAT about the exercise of their powers.² In addition, VCAT may on its own initiative direct or give an advisory opinion to an administrator concerning any matter.³ Certain interested people can also apply to VCAT in relation to any matter arising out of the administration, and VCAT has the power to make 'such order in relation to the application as the circumstances of the case may require'.⁴

19.4 A person with a 'special interest' in the affairs of a patient may also apply to VCAT for review of a matter relating to medical or dental treatment for a patient who cannot consent.⁵ This might include review of a medical or dental decision made by a guardian, enduring guardian, medical agent or another 'person responsible' under guardianship laws. We discuss medical and dental treatment for people who are unable to consent in more detail in Chapter 13.

19.5 Where the Public Advocate or State Trustees is appointed as a guardian or administrator, there are some existing options available for complaints to be made. Both of these bodies have internal complaints processes that allow for internal review of decisions they make.⁶ It is also possible for a complaint to be made to the Victorian Ombudsman about either of these bodies. The Ombudsman has advised the Commission that in 2010, he received 47 complaints in relation to the Public Advocate and 230 complaints in relation to State Trustees.⁷

OTHER JURISDICTIONS

NEW SOUTH WALES

19.6 New South Wales is the only Australian jurisdiction that allows merits review of individual decisions of some guardians and administrators. Since 2003, the New South Wales Administrative Decisions Tribunal (ADT) has had jurisdiction to review guardianship decisions made by the New South Wales Public Guardian (similar to the Victorian Public Advocate), and financial management decisions made by the New

1 *Guardianship and Administration Act* (Vic) s 61(3).

2 *Ibid* ss 30, 55(1)–(4). The person responsible may also seek advice from VCAT: at ss 42I, 42W.

3 *Guardianship and Administration Act* (Vic) s 55(4A).

4 *Ibid* s 56. People who can seek application are any person interested as a creditor, beneficiary, next of kin, guardian, nearest relative, primary carer, the Public Advocate or any person interested in any estate administered by an administrator.

5 *Guardianship and Administration Act* (Vic) s 42(N).

6 For further details see Office of the Public Advocate (Victoria), *Complaints* (2011) <<http://www.publicadvocate.vic.gov.au/about-us/258/>>; State Trustees, *Resolving Concerns* <<http://www.statetrustees.com.au/uploads/static/36-resolving-concerns-17.3.11.pdf>>.

7 Submission CP 15 (Ombudsman Victoria).

South Wales Trustee and Guardian (which has a broadly similar role to State Trustees in relation to administration).⁸ The ADT has a specialised 'Guardianship and Protected Estates List' that conducts the reviews. However, the ADT is unable to review decisions of private guardians and financial managers. The ADT is separate to the New South Wales Guardianship Tribunal. The Guardianship Tribunal is the New South Wales equivalent of VCAT's Guardianship List.

- 19.7 All decisions made by the Public Guardian 'in connection with the exercise of the Public Guardian's functions' are reviewable.⁹ Review of a Public Guardian's decision can be sought by the person to whom the decision relates, their spouse, their carer, or any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.¹⁰
- 19.8 In relation to financial management (the New South Wales equivalent of administration), review may be sought for all decisions made by the New South Wales Trustee and Guardian about the management of a represented person's estate.¹¹
- 19.9 Review of financial management decisions may be sought by:
- the represented person about whose estate the decision was made
 - their spouse, or
 - any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.¹²
- 19.10 ADT review is usually available only after internal review with the New South Wales Public Guardian or the New South Wales Trustee and Guardian has been sought and finalised.¹³
- 19.11 The ADT is required 'to decide what the correct and preferable decision is having regard to the material then before it'.¹⁴ The ADT has the power to:
- affirm the decision
 - vary the decision completely or in part
 - substitute a new decision for the original decision, or
 - order the Public Guardian or the New South Wales Trustee and Guardian to reconsider the decision with directions or recommendations.¹⁵
- 19.12 In 2008–09, there were eight review applications lodged in relation to decisions of the Public Guardian, and nine review applications lodged in relation to decisions of the Office of the Protective Commissioner (as the New South Wales Trustee and Guardian was then known).¹⁶ In 2009–10 there were only 10 review applications lodged in total.¹⁷
- 19.13 These review applications have produced a useful body of case law about the operations of the New South Wales legislation. These decisions are available to the public on the ADT's website and Austlii.¹⁸

8 *Guardianship and Protected Estates Legislation Amendment Act 2002* (NSW).

9 *Guardianship Act 1987* (NSW) s 80A(1); *Guardianship Regulations 2010* (NSW) s 17.

10 *Guardianship Act 1987* (NSW) s 80A(2).

11 *NSW Trustee and Guardian Act 2009* (NSW) s 62(1); *NSW Trustee and Guardian Regulations 2008* (NSW) s 43. The powers of the NSW Trustee and Guardian in relation to the estates of managed people committed to its management are outlined in ss 56–61 of the *NSW Trustee and Guardian Act 2009* (NSW).

12 *NSW Trustee and Guardian Act 2009* (NSW) s 62(3).

13 *Administrative Decisions Tribunal Act 1997* (NSW) s 55(1)(b).

14 *Ibid* s 63(1).

15 *Ibid* s 63(3).

16 *Administrative Decisions Tribunal, Annual Report 2008/2009* (2009) 17.

17 *Administrative Decisions Tribunal, Annual Report 2009/2010* (2010) 18.

18 For more information see ADT's website <<http://www.lawlink.nsw.gov.au/adt>> and Austlii <<http://www.austlii.edu.au/>>.

Merits review

QUEENSLAND

19.14 The Queensland Law Reform Commission (QLRC) recently recommended that decisions of the Queensland Adult Guardian (which has a similar role to the Victorian Public Advocate) and the Public Trustee of Queensland (which has a broadly similar role to State Trustees) should be reviewable by the Queensland Civil and Administrative Tribunal as part of its merits review jurisdiction.¹⁹ The Queensland Government's initial response to the recommendations has been to reject this proposal, preferring instead to

look at improving the current review and accountability mechanisms such as the ability of the Queensland Civil and Administrative Tribunal to give directions or advice to substitute decision-makers; and ability to review appointments.²⁰

19.15 We discuss some of the QLRC's recommendations in more detail later in this chapter.

NEW ZEALAND

19.16 New Zealand has a system of merits review in its *Protection of Personal and Property Rights Act 1988* (NZ), which applies to any person acting as 'welfare guardian' or 'property manager'.²¹

COMMUNITY RESPONSES

19.17 In the consultation paper, the Commission identified three options for consideration in relation to merits review of individual decisions by guardians and administrators.²² The first was to leave the current law unchanged and not allow any form of merits review. The second option, which the Commission preferred, was to permit review of the decisions of the Public Advocate and State Trustees. The final proposal was allowing merits review of the decisions of all guardians and administrators.

19.18 The Commission also asked a range of detailed questions about aspects of the merits review proposal. We sought community views about:

- who should be able to apply for such review
- what should constitute a 'reviewable decision'
- whether extra procedural requirements are necessary to dismiss trivial, vexatious or repeated applications
- whether administrators' decisions should be treated differently to decisions of guardians
- which body should conduct merits review.

INTRODUCTION OF MERITS REVIEW

19.19 There was broad community support for merits review of decisions by guardians and administrators. As the submission by Victoria Legal Aid noted:

In VLA's experience, people are often not so much perturbed by the appointment of a guardian and/or administrator to assist them, but feel the particular decisions being made by that guardian and/or administrator are not appropriate decisions, and would like an independent, impartial review of the decision making process to have their views properly aired and considered in the process. This may not result

19 See Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 4, 191–226, 272–98 ('*A Review of Queensland's Guardianship Laws*').

20 Department of Justice and Attorney General, *Queensland Government Initial Response to the Queensland Law Reform Commission's Report: A Review of Queensland's Guardianship Laws* (2011), 48–9 <<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2011/5311T5556.pdf>>

21 *Protection of Personal and Property Rights Act 1988* (NZ) s 89.

22 See Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 355–361.

in a change of the original decision, but allows for a fair and proper process in relation to decisions that can substantially affect an individual's life. It also provides an additional layer of scrutiny to minimise the chances of a decision maker acting outside the decision making principles.²³

- 19.20 However, most responses disagreed with the proposal that only decisions of the Public Advocate and State Trustees be reviewable, arguing that review should also extend to the decisions of private guardians and administrators.²⁴
- 19.21 The Public Advocate supported merits review of both its own decisions and the decisions of State Trustees 'once internal complaints processes have been completed'.²⁵ The Public Advocate also favoured extending merits review to the decisions of private guardians and administrators.²⁶
- 19.22 Neither State Trustees nor the Catholic Archdiocese of Melbourne favoured introducing merits review. The Archdiocese regarded the current system of review of guardian or administrator appointments as one that both permits challenges based on the person's 'best interests' and is less onerous than merits review of individual decisions.²⁷ The Archdiocese emphasised that new accountability mechanisms should not be so onerous that individuals are discouraged from acting as guardians or administrators.²⁸
- 19.23 State Trustees repeated the concerns it expressed in the first round of consultations that '[a]part from potential added expense and delay in an administration, a key concern is the creation of uncertainty for third parties in their financial dealings with the administrator'.²⁹ State Trustees added that any merits review should:
- apply to all administrators (but not personally appointed attorneys)
 - not encompass decisions that affect the legal position of third parties
 - be linked to a monetary threshold, below which there should be no review.³⁰

FORUM FOR MERITS REVIEW

- 19.24 VCAT was widely considered the appropriate forum for conducting merits review.³¹ Submissions favoured reviews by either the Guardianship List itself,³² or a specialised guardianship review list within VCAT.³³

REVIEW OF BOTH GUARDIANSHIP AND ADMINISTRATION DECISIONS

- 19.25 There was support for the proposal that it should be possible to seek merits review of administration as well as guardianship decisions.³⁴ While supportive of merits review of Public Advocate decisions, VCAT indicated that it had some concerns about review of State Trustees decisions because of the potential for review to undermine third party certainty and of the danger of raising expectations that all decisions can be undone.³⁵

23 Submission CP 73 (Victoria Legal Aid).

24 For eg, Submissions CP 21 (Action for More Independence & Dignity in Accommodation), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

25 Submission CP 19 (Office of the Public Advocate).

26 Ibid.

27 Submission CP 27 (Catholic Archdiocese of Melbourne).

28 Submission CP 27 (Catholic Archdiocese of Melbourne).

29 Submission CP 70 (State Trustees Limited).

30 Ibid.

31 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 73 (Victoria Legal Aid).

32 Submissions CP 19 (Office of the Public Advocate) and CP 22 (Alzheimer's Australia Vic).

33 Submissions CP 29 (STAR Victoria), CP 35 (Ursula Smith) and CP 71 (Seniors Rights Victoria).

34 Submissions CP 29 (STAR Victoria), CP 35 (Ursula Smith), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

35 Submission CP 80 (Victorian Civil and Administrative Tribunal).



TRIVIAL AND VEXATIOUS APPLICATIONS FOR REVIEW

19.26 Victoria Legal Aid and the Federation of Community Legal Centres did not believe that VCAT requires additional powers beyond those already contained in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) to respond to applications that are trivial or vexatious.³⁶ Victoria Legal Aid recommended, however, that VCAT provide written reasons for dismissing applications, to avoid worsening an applicant's 'grievance', given the generally low level of understanding by most parties of the role of VCAT and the Public Advocate.³⁷

REQUIREMENT OF INTERNAL REVIEW AS A FIRST STEP

19.27 The Law Institute of Victoria and State Trustees argued that, if merits review is introduced, there should be a requirement that internal review processes must be exhausted first.³⁸ Seniors Rights Victoria noted that, as in New South Wales, the requirement for internal review before making an application to the tribunal is likely to result in VCAT undertaking only a few merits review cases.³⁹

NEW SOUTH WALES EXPERIENCE OF MERITS REVIEW

19.28 The Commission has consulted with key New South Wales organisations affected by the right to seek merits review of decisions of the Public Guardian and the New South Wales Trustee and Guardian. The Public Guardian stated that merits review has been constructive and has led to greater transparency in decision making.⁴⁰ The New South Wales Trustee and Guardian also supported merits review of its decisions, arguing that the process works well, is accessible to its client base, and contributes to greater oversight and discipline in decision making.⁴¹ The New South Wales Guardianship Tribunal has also indicated its support for merits review of the decisions of guardians and administrators.⁴²

THE COMMISSION'S VIEWS AND CONCLUSIONS

A RIGHT TO MERITS REVIEW

- 19.29 Merits review of decisions of public officials by specialist tribunals has been a right available to Australians for many years.⁴³ Almost every Australian jurisdiction now has a 'generalist' tribunal that is able to review numerous decisions of public officials on their merits.⁴⁴
- 19.30 As the former President of the Commonwealth Administrative Appeals Tribunal said, '[t]he notion that administrative decisions affecting people's interests should, in general, be subject to external merits review is now accepted'.⁴⁵ This is also the view of the Administrative Review Council in its report, *What Decisions Should be Subject to Merit Review?*⁴⁶ The trend in Australia has been to extend the number and range of decisions to which merits review can apply⁴⁷ and, while generally merits review applies

36 Submissions CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)). The relevant powers are in section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

37 Submissions CP 73 (Victoria Legal Aid).

38 Submission CP 77 (Law Institute of Victoria); State Trustees, *Further Technical Comments to VLRC Guardianship Review* (31 October 2011) 5.

39 Submission CP 71 (Seniors Rights Victoria).

40 Consultation with Graeme Smith—Public Guardian, New South Wales (16 March 2011).

41 Submission CP 79 (NSW Trustee and Guardian).

42 Submission IP 32 (NSW Guardianship Tribunal).

43 Robin Creyke, 'Better Decisions and Federal Tribunals in Australia' (2004) 84 *Reform* 10, 10.

44 Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (2005) 120–6.

45 The Honourable Justice Deidre O'Connor, 'Lessons from the Past/Challenges for the Future: Merits Review in the New Millennium' (Paper presented at the 2000 National Administrative Law Forum—Sunrise or Sunset? Administrative Law in the New Millennium, June 2000) <<http://www.aat.gov.au/Publications/SpeechesAndPapers/Oconnor/lessons.htm>>.

46 Administrative Review Council, *What Decisions Should be Subject to Merit Review?* (1999), [2.1] <http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#intro>.

47 For example in its 2010–2011 Annual Report, the Commonwealth Administrative Appeals Tribunal stated that it has 'jurisdiction to review decisions made under more than 400 Acts and legislative instruments': Administrative Appeals Tribunal, *Annual Report 2010–2011* (2011) 8.

to decisions of public officials within bureaucracies, it can apply to other bodies that perform 'public' functions.⁴⁸

- 19.31 As Robin Creyke points out, 'merits review is simpler, cheaper and faster than going to court and is generally what people want'.⁴⁹ Another advantage is that because it makes officials more aware of the legal rules they must apply, they tend to make better and more consistent decisions.⁵⁰ Merits review also enhances the accountability of public bodies to those people affected by their decisions.⁵¹
- 19.32 The Administrative Review Council, in highlighting the central purpose of merits review as being to reach 'correct and preferable decisions', wrote that this
- also means that all persons who might benefit from merits review are informed of their right to seek review and are in a position to exercise those rights, and that the overall quality of agency decision making is improved. This overall objective therefore incorporates elements of fairness, accessibility, timeliness and informality of decision making, and requires effective mechanisms for ensuring that the effect of tribunal decisions is fed back into agency decision-making processes.⁵²
- 19.33 The Administrative Review Council was of the view that the federal system of merits review had met these goals well in some respects but not in others. The Commission believes that these objectives are particularly important in the context of guardianship and administration in Victoria, where agency decisions affect the lives of a large number of vulnerable individuals in very significant ways.
- 19.34 The Commission believes that new guardianship legislation should contain a right to review the merits of decisions made by the Public Advocate and State Trustees when they are acting in the capacity of a personal guardian or financial administrator⁵³ for a person who is unable to make their own decisions. The Commission also believes that it should be possible to review the merits of decisions made by any other financial administrator who receives payment for their services. We discuss the reasons why merits review should be limited to decisions made in these circumstances below.

RECOMMENDATIONS

A right to merits review

315. It should be possible to apply to VCAT for review of a decision of the Public Advocate when acting as the personal guardian or health decision maker of a person.

316. It should be possible to apply to VCAT for review of a decision of State Trustees, or any other person or organisation receiving remuneration for this role, when acting as the financial administrator of a person.

317. A 'decision' is reviewable if it is one made in connection with the powers and responsibilities of the Public Advocate, State Trustees or any other person or organisation receiving remuneration for this role pursuant to new guardianship legislation and the decision is final or operative and determinative of a matter requiring resolution by the substitute decision maker.

48 Thus, discussing the jurisdiction of the AAT, Justice Deidre O'Connor wrote in 2000 that 'a range of companies have been authorised under the *Air Navigation Regulations 1947* to make decisions in relation to the issue of security identification cards for use in airports. Decisions made by these issuing bodies are subject to merits review': 'Lessons from the Past/Challenges for the Future', above n 45.

49 Robin Creyke, 'Better Decisions and Federal Tribunals in Australia' (2004) 84 *Reform* 10, 10.

50 The Honourable Justice Deidre O'Connor, above n 45.

51 Ibid.

52 Robin Creyke, above n 43, 16–17.

53 In Chapter 5, the Commission recommends replacing the term 'guardian' with 'personal guardian' and the term 'administrator' with 'financial administrator'.

Merits review

STANDING TO SEEK REVIEW

- 19.35 The Commission believes that there should be a broad standing provision that the represented person and anybody else who, in the opinion of the tribunal, has a special interest in the affairs of that person should have a right to seek merits review of a decision made by the Public Advocate or State Trustees.

RECOMMENDATION

Standing to seek review

318. Standing to seek merits review of any relevant decision made by the Public Advocate or State Trustees or any other professional financial administrator should be available to the represented person and to any other person who satisfies VCAT that they have a special interest in the affairs of the represented person.

REVIEWABLE DECISIONS

- 19.36 New guardianship legislation should follow the approach taken in New South Wales and provide that a 'decision' is reviewable if it is one made 'in connection' with the powers and responsibilities of the Public Advocate or State Trustees (or other remunerated administrators) as substitute decision makers.⁵⁴
- 19.37 In the High Court case of *Australian Broadcasting Tribunal v Bond*, Chief Justice Mason held that the legal meaning of a 'decision' for the purposes of a review will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.⁵⁵
- 19.38 This means that anticipated decisions, or decisions that are 'steps along the way' prior to a final decision, would not be reviewable. An example of a decision that is not 'final and operative or determinative' would be an administrator agreeing to settle legal proceedings on behalf of a client in circumstances where the final terms of the settlement must be approved by a court.⁵⁶

Personal and financial decisions should be equally reviewable

- 19.39 The Commission does not think that new guardianship legislation should treat financial and property decisions by remunerated administrators any differently to guardianship decisions made by the Public Advocate for the purposes of merits review.
- 19.40 We address concerns that merits review of the decisions of State Trustees and other professional financial administrators might adversely affect the legal and financial position of third parties below.

⁵⁴ *Guardianship Act 1987* (NSW) s 80A(1)(a).

⁵⁵ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337.

⁵⁶ See eg, *JX v Protective Commission* [2004] NSWADT 20, [38] where the NSW Administrative Decisions Tribunal held that the decision of a judge to approve the settlement terms of litigation, rather than the decision of the administrator to approve those terms, was the 'decision'.

Outcome of merits review

- 19.41 The Commission recommends that in all cases involving merits review of decisions by substitute decision makers, VCAT must decide the correct or preferable decision in the circumstances, having regard to both the material before it and the applicable law at the time of the decision.⁵⁷
- 19.42 Inevitably, in some cases it will be very difficult, or impossible, to set aside a decision that has already been made and substitute it with another decision because the rights of innocent third parties would be irreparably damaged or because of sheer inability to 'turn back the clock'. The Commission recommends that to avoid doubt about the reach of its powers, VCAT should be required to consider the impact that any decision may have on the legal rights or financial interests of third parties when determining the correct or preferable decision in the circumstances of the case before it.

RECOMMENDATION

Outcome of merits review

319. When reviewing a relevant decision of the Public Advocate, State Trustees and any other financial administrator whose decisions are subject to merits review, VCAT must decide what is the correct or preferable decision in the circumstances having regard to the material then before it and after applying the law that is applicable at the time of this decision. VCAT must seek to consider the impact that any decision may have on the legal rights or financial interests of third parties when determining the correct or preferable decision in the circumstances of the case before it.

INTERNAL REVIEW SHOULD BE REQUIRED FIRST

- 19.43 The Commission proposes that applicants must seek internal review of the contested decision before making an application to VCAT. A requirement to seek internal review within the Public Advocate and State Trustees (and the offices of remunerated administrators) should address concerns about an excessive number of merits review applications coming before VCAT. It would also promote the development of internal processes within these organisations that seek to encourage high quality and consistent decision making.
- 19.44 Some may regard the requirement for internal review before merits review as unfair. The Commission notes that a different and more senior person to the original decision maker would undertake the internal review, which should overcome some of the concerns of the person seeking review.

⁵⁷ While the words 'correct or preferable' are not found in the *Administrative Appeals Tribunal Act 1975* (Cth), courts have held that, when reviewing a decision, a tribunal must decide 'the correct or preferable one on the material before the Tribunal': *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419. Section 63 of the *Administrative Decisions Tribunal Act 1997* (NSW) uses the term 'correct and preferable'. Courts and tribunals at the Commonwealth level do not use the term 'correct or preferable' consistently and some prefer the wording in the NSW provision. Creyke and McMillan seem to favour 'correct or preferable' and argue that the ruling in *Drake* means that '[i]n some instances only one decision is open on the facts or the law: in such a case the tribunal decides if the correct decision was made. In other instances there is a discretion—a choice open to the decision maker—as to which decision to make: there it is for the tribunal to decide which is the preferable decision': Creyke and McMillan, *Control of Government Action*, above n 44, 141. Where there exists the same discretion mentioned by Creyke and McMillan under the 'correct and preferable' phraseology, 'the role of the tribunal is to determine which decision is the preferable decision and so the correct and preferable decision': *Re De Brett Investments Pty Ltd and Australian Fisheries Management Authority and 4 Seas Pty Ltd (part joined)* (2004) 82 ALD 163, 121.

Merits review



- 19.45 There are other important policy reasons that favour requiring a person to seek internal review of a contested decision by a substitute decision maker before being able to apply to VCAT for review of the merits of that decision. First, individuals are part of a broader system that must meet the needs of many people. Internal review has the advantage of improving future decision making for everyone and means there is less need to invoke tribunal processes. Secondly, internal review does not disadvantage an applicant financially because the process is free. Finally, as in New South Wales, internal reviews should be completed within a reasonable period⁵⁸ and VCAT should have the power to review a decision in the absence of internal review in exceptional circumstances.⁵⁹

RECOMMENDATION

Internal review should be required first

320. Where a person seeks merits review of a relevant decision by the Public Advocate or State Trustees, that person should be required to seek internal review of that decision before making an application to VCAT for review of the matter, unless VCAT decides that an urgent review is necessary to protect the represented person's interests.

MERITS REVIEW SHOULD BE CONDUCTED BY A SPECIAL LIST OF VCAT

- 19.46 The Commission believes that a specialist list within VCAT is the most appropriate forum in which to review the merits of individual decisions of the Public Advocate and remunerated financial administrators. The creation of a new list should ensure some separation from the VCAT members in the Guardianship List who appoint guardians and administrators.

DECISIONS OF PRIVATE PERSONAL GUARDIANS AND FINANCIAL ADMINISTRATORS

- 19.47 The Commission acknowledges that many people and organisations suggested that it should be possible to review the merits of the decisions of all guardians and administrators. The Commission does not support this step.
- 19.48 The Commission remains of the view, expressed in the consultation paper, that the New South Wales model—which limits the availability of review to the two major publicly funded substitute decision-making bodies—is appropriate for adoption in Victoria. As many Victorians have their estates managed by professional administrators other than State Trustees, the Commission believes it is appropriate to extend the availability of merits review to all administrators acting on a remunerated basis in this 'public' role. This proposal would include FTL Judge and Papaleo Pty Ltd, the trustee companies, and other professionals who accept appointments on a remunerated basis, within the scope of merits review.
- 19.49 The Commission believes this approach strikes the right balance between several competing considerations. It ensures that individuals who have a guardian or administrator of last resort enjoy a right to merits review. It also does not overly intrude into the private sphere, given that most private guardians and administrators are likely to have a personal connection with those that they represent.

⁵⁸ *Administrative Decisions Tribunal Act 1998* (NSW) s 53(6).

⁵⁹ *Ibid* s 55(3).

- 19.50 While the G&A Act does not describe State Trustees as the administrator of last resort, it fulfils this practical role together with FTL Judge and Papaleo Pty Ltd.⁶⁰ These two organisations frequently provide services for individuals who are solely dependent on government benefits and who do not have appropriate people in their lives to act as private administrators.⁶¹ Thus, in many cases a represented person has no option but to have their financial affairs managed by State Trustees or other professional administrators. It is because there is often no alternative to the appointment of a professional guardian or administrator that the Commission feels that the need for merits review of these appointments is particularly compelling.
- 19.51 Furthermore, while it is sound practice for statutory authorities and state corporations to have processes for reviewing their own decisions in an effort to be responsive and improve accountability, there are problems in having private personal guardians and financial administrators respond to merits review. Private appointees undertake their role on a voluntary basis and are likely to find the tribunal merits review process far more burdensome than professional guardians and administrators, who are remunerated for their services and generally have internal systems in place for reviewing complaints internally. This is particularly the case when those challenging their decisions may not be the represented person but a third party who can demonstrate a relevant interest. Extending merits review to the decisions of private personal guardians and financial administrators would probably discourage a reasonable number of people from accepting appointment to this challenging and unpaid role.
- 19.52 Merits review of decisions of private personal guardians and financial administrators would also not provide the 'systemic' benefits for decision making that both the New South Wales Public Guardian and New South Wales Trustee and Guardian have argued that merits review has brought to their organisations.⁶² The Commission believes that a better way to improve decision making by private personal guardians and financial administrators is through appropriate support and education. We discuss this in Chapter 5.
- 19.53 It is open to Parliament to extend merits review to private guardians and administrators at some time in the future. Once the system of merits review of decisions of the Public Advocate and remunerated administrators has been operating for some time, policy makers may regard it as a useful means of improving the quality of all substitute decision making. The Commission urges the Public Advocate, State Trustees and VCAT to keep this matter under active review and to advise the Attorney-General if they see benefit in extending the merits review jurisdiction to the decisions of all personal guardians and financial administrators.

THE PUBLIC ADVOCATE AS HEALTH DECISION MAKER

- 19.54 The Commission believes that it should be possible to seek merits review of individual decisions of the Public Advocate, not only when she is acting as a personal guardian but also in her proposed role as a health decision maker of last resort.

60 See *Guardianship and Administration Act 1986* (Vic) s 47. This is in contrast to section 23(4) which does prescribe the Public Advocate as guardian of last resort if no other suitable person is available.

61 A large number of State Trustees clients have a very limited income, and its administration services for these people are subsidised by the Minister for Community Services as part of the Minister's obligations under part 4 of the *State Trustees (State Owned Company) Act 1994* (Vic). Of the 10,197 clients State Trustees provided administration services to during 2009–10, 8978 received a component of subsidy under this agreement. This figure includes represented persons whose order was revoked, or for whom a new administrator was appointed, or who died prior to the end of the financial year: email from State Trustees to Victorian Law Reform Commission, 4 November 2010, 4.

62 Consultation with Graeme Smith—Public Guardian, New South Wales (16 March 2011); Submission CP 79 (NSW Trustee and Guardian).



- 19.55 At present, any person with a ‘special interest’ in the affairs of a patient who is unable to consent to medical treatment can apply to VCAT for review of any matter arising from this treatment. VCAT has broad powers to make orders in relation to such applications.⁶³ The Commission believes this power should continue, and that it should also be possible for a person with a ‘special interest’ to seek merits review of medical or dental treatment decisions made by the Public Advocate.
- 19.56 In many cases, there may be no opportunity for review where the Public Advocate makes a decision and a medical practitioner performs the treatment in a short space of time. However, for many significant treatments that are not emergencies, there will be time for the Public Advocate to review a decision internally and to apply to VCAT if the internal review is unsatisfactory. Given the serious nature of many treatment decisions for the represented person, merits review (preceded by internal review) will enhance accountability and thus contribute to higher quality decisions.
- 19.57 The Commission is mindful that individuals with a health decision maker who is not the Public Advocate will not have the same right to merits review of individual treatment decisions. However, we believe that this distinction is justifiable for the same reasons we recommend against permitting merits review of decisions of private personal guardians and financial administrators—the Public Advocate will be the health decision maker of last resort and she is a public official who should be subject to external review.

IMPACT OF MERITS REVIEW ON THIRD PARTIES

- 19.58 It is important to consider whether permitting merits review of the decisions of State Trustees and other professional financial administrators might adversely affect the legal and financial position of third parties who enter into transactions with those organisations or represented people.
- 19.59 While State Trustees expressed significant concerns that third parties will be reluctant to deal with administrators, or deal with them on financial terms detrimental to the represented person because of the potential uncertainty caused by merits review, the Commission is not convinced that concern is likely to be realised. The experience of review of New South Wales Trustee and Guardian decisions suggests that it is possible for a tribunal to consider the impact of its decisions on affected third parties and represented persons. The Commission has not been alerted to any New South Wales cases where an ADT review of an earlier decision by the New South Wales Trustee and Guardian has adversely affected the interests of a third party or the represented person. Indeed, the New South Wales experience suggests that the prerequisite of internal review prior to an application for merits review provides further oversight and consistency within the office of the New South Wales State Trustee and Guardian.⁶⁴ This is probably one of the reasons why there have been very few applications for ADT review.⁶⁵

⁶³ *Guardianship and Administration Act 1986 (Vic)* s 42N.

⁶⁴ Submission CP 79 (NSW Trustee and Guardian).

⁶⁵ After making its own enquiries with the NSW Trustee and Guardian, State Trustees advised the Commission that over the past three years there have been 148 internal reviews of decisions made by the NSW Trustee and Guardian and 90 review applications to the Administrative Decisions Tribunal: State Trustees, *Further technical comments to VLRC Guardianship review* (31 October 2011) 5. While not insignificant, the Commission does not consider these numbers to be alarming given that the NSW Trustee and Guardian acts as financial manager for approximately 9000 clients over this period (which is a comparable number of clients to State Trustees): see NSW Trustee and Guardian, *Annual Report 2010–11* (2011) 10.

- 19.60 Merits review has operated successfully in New South Wales. There is nothing distinguishing the two jurisdictions when considering whether concern about permitting merits review of decisions by the Public Advocate and professional administrators is warranted. Introducing merits review in Victoria will help ensure that professional guardians and administrators are accountable and make high quality decisions.
- 19.61 Finally, concerns about third party rights can be ameliorated by the inclusion of an express provision that directs VCAT to consider the impact that any decision may have on the legal rights or financial interests of third parties when determining the correct or preferable decision in the circumstances of the case before it.

PROCEDURAL MATTERS

- 19.62 The Commission believes that the procedural provisions in sections 45–50 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should apply when decisions of the Public Advocate and professional administrators are reviewed. Section 50 of the Act provides that an application for a review does not stay the decision—or the implementation of a decision—for which an applicant seeks review, unless VCAT so orders.
- 19.63 Pursuant to section 46 of the Act, a decision maker must provide a person who is entitled to a review of a decision with written reasons for a decision ‘as soon as practicable but no later than 28 days’ after receiving the request. VCAT’s review jurisdiction under section 48 is established ‘under an enabling enactment’ (that is, separate legislation) and does not provide that an applicant must be notified of their right to a review. New guardianship legislation should provide that a decision maker must inform the represented person (or other person with a special interest in their affairs) of their right to seek internal review, and later VCAT review, of a decision if they so wish.
- 19.64 In its recent review of Queensland’s guardianship laws, the QLRC considered the provision in the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) that requires a decision maker to notify a person in writing of a decision and their review rights.⁶⁶ The QLRC proposed that the Adult Guardian and Public Trustee be exempted from such a requirement because of the ‘ongoing decision-making role’ of both agencies and the fact that it would not be feasible to notify all of those people who might be entitled to notice of their review rights.⁶⁷
- 19.65 The *Administrative Decisions Tribunal Act 1997* (NSW) says that administrators must ‘take such steps as are reasonable in the circumstances’ to provide reasons for decisions and explain the represented person’s entitlement to review in writing.⁶⁸ Administrators are relieved from this requirement in certain circumstances.⁶⁹ The Act also provides that an interested person can request reasons for the decision and that these should be produced ‘as soon as practicable’ and no later than 28 days after the request.⁷⁰

66 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 157.

67 *A Review of Queensland’s Guardianship Laws*, above n 19, 292–3.

68 *Administrative Decisions Tribunal Act 1997* (NSW) s 48(1).

69 See *ibid* s 48(2).

70 *Ibid* s 49(2).

Merits review



- 19.66 The Commission agrees that it may be difficult for the Public Advocate and professional administrators to provide written notification to the represented person, and others with a special interest in their affairs, regarding their entitlement to a review following each decision. However, notice of the decision and an individual's review rights is clearly necessary in some form; without it, the right to review would be illusory. In their submission, the New South Wales Trustee and Guardian suggested that they provide reasons for each decision to their clients in writing.⁷¹ Their submission did not question this requirement.
- 19.67 The Commission recommends that Victoria follow the New South Wales approach that splits the requirement to provide written notification of the decision and the individual's review rights from a request for fuller reasons.

RECOMMENDATIONS

Procedural matters

321. When reviewing a relevant decision of the Public Advocate, State Trustees or any other financial administrator whose decisions are subject to merits review, the tribunal should have the powers set out in sections 45–50 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).
322. When reviewing a relevant decision of the Public Advocate, State Trustees or any other financial administrator whose decisions are subject to merits review, the tribunal should have the powers set out in section 51 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

⁷¹ Submission CP 79 (NSW Trustee and Guardian).



Chapter 20

The Public Advocate

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INTRODUCTION

- 20.1 This chapter deals with ‘the functions, powers and duties of the Public Advocate’.¹
- 20.2 The Public Advocate is an independent statutory official with a broad role to promote and safeguard the rights and interests of people with disabilities. The Public Advocate is one of the most important and successful innovations to emerge from Victoria’s changes to disability legislation in the mid-1980s.²
- 20.3 The Commission believes that the Public Advocate should continue to perform most of her³ existing functions and that she be given a range of additional responsibilities with appropriate increases in funding.
- 20.4 Both the federal and state governments are direct or indirect providers of many services to people with impaired decision-making ability. It is essential, therefore, that there be an independent statutory officer—linked to the disability community—who is responsible for highlighting areas of need and working with government and the broader community ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’.⁴

CREATION OF THE PUBLIC ADVOCATE

The Cocks Committee report

- 20.5 As discussed in earlier chapters, the *Guardianship and Administration Act 1986* (Vic) (G&A Act) emerged from the recommendations of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee).⁵ The Cocks Committee was asked to develop proposals in relation to guardianship of people with intellectual disabilities and, if appropriate, of a ‘wider class of persons’.⁶ It reported to the Victorian Government in 1982.
- 20.6 The proposal for a Public Advocate, who would combine the roles of being a guardian of last resort and an official watchdog for the rights of people with disabilities, was a relatively late step in the development of the original Act. The Cocks Committee had initially proposed that these roles should be performed by two separate statutory officers—a Public Guardian and an Official Representative. However, in its final report, the Committee recommended that both of these functions be given to the Public Advocate to avoid a ‘proliferation of government bureaucracies’.⁷ The Cocks Committee’s report described five key functions for the proposed Public Advocate:
- guardianship
 - promoting community involvement in decision making
 - investigation of abuse or exploitation
 - advising the Minister
 - general advocacy.⁸

The Public Advocate currently undertakes all of these roles.

1 Victorian Law Reform Commission, *Guardianship Review Terms of Reference* (May 2009) 3(f).

2 The three Acts passed in that year were the *Guardianship and Administration Act 1986* (Vic); the *Mental Health Act 1986* (Vic); and the *Disabled Persons’ Services Act 1986* (Vic).

3 Ms Colleen Pearce is the current Public Advocate.

4 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1.

5 This Committee was established in 1980 by the then Hamer Government Minister of Health, William Borthwick MLA, and reported in 1982 to his Cain Government successor, Tom Roper MP.

6 As noted in Chapter 2, the question of whether the issues examined by the Committee were also relevant to a broader range of people beyond those with an intellectual disability was added to the Committee’s terms of reference only very late in its deliberations, and was not a major focus of the Committee’s discussions throughout most of its lifespan.

7 Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 53.

8 *Ibid* 53–4.

CURRENT LAW

THE G&A ACT

- 20.7 The Public Advocate is established under section 14 of the G&A Act. Schedule 3 of the Act sets out various provisions concerning the position of the Public Advocate, including important steps to secure independence:
- The Governor in Council appoints the Public Advocate for a period of seven years.⁹
 - The Public Advocate can only be removed from office by resolution of both Houses of Parliament.¹⁰
- 20.8 The Commission believes that these important provisions should be retained in new guardianship legislation. The Victorian community has been well-served by the four people who have held the office of Public Advocate since 1986.¹¹
- 20.9 The Public Advocate employed 94 staff at 30 June 2011.¹² Roles include advocates/guardians, policy and education staff, people responsible for various community-based and volunteer programs, legal officers and a range of corporate and administrative support staff.¹³ The total revenue for the Public Advocate's office in 2010–11 was just over \$9.4 million.¹⁴ The organisation is commonly referred to as the Office of the Public Advocate (OPA). The functions, powers and duties of the Public Advocate are set out in sections 15 and 16 of the G&A Act. The major functions set out in section 15 are:
- promoting the development of accessible and rights-enhancing services for people with disabilities by the government and the community¹⁵
 - supporting the establishment of organisations that will provide advocacy programs, community education and promote family and community guardianship for people with disabilities¹⁶
 - promoting informed public awareness of the Act and of other issues concerning the protection of the rights of people with disabilities¹⁷
 - reporting to the Minister on any matter the Minister refers to the Public Advocate.¹⁸
- 20.10 Section 16 of the G&A Act outlines the powers and duties of the Public Advocate, including:
- acting as guardian or alternative guardian when appointed by the Victorian Civil and Administrative Tribunal (VCAT)
 - making applications to VCAT for a guardian or administrator to be appointed, or for an existing order to be reheard or reassessed
 - submitting a report to VCAT on any matter VCAT refers to the Public Advocate
 - seeking assistance for a person with a disability from any department, institution, welfare organisation or service provider.

⁹ *Guardianship and Administration Act 1986* (Vic) sch 3 cl 1(1).

¹⁰ *Ibid* sch 3 cl 1(5).

¹¹ The four Public Advocates have been Ben Bodna; David Green; Julian Gardner; and Colleen Pearce. See Dr Mark Feigan, *The Victorian Office of the Public Advocate: a First History 1986-2007* (PhD, La Trobe University, 2011).

¹² Office of the Public Advocate (Victoria), *Annual Report 2010–2011* (2011) 35 ('OPA, *Annual Report 2010–2011*').

¹³ *Ibid* 37.

¹⁴ *Ibid* 36.

¹⁵ *Guardianship and Administration Act 1986* (Vic) s 15(a).

¹⁶ *Ibid* s 15(b).

¹⁷ *Ibid* s 15(c).

¹⁸ *Ibid* s 15(d).

- making representations on behalf of, or acting for, a person with a disability
- giving advice on any aspect of the Act
- investigating complaints or allegations of abuse or exploitation of people with disabilities, or any need for, or inappropriate use of, guardianship
- requiring a person or organisation to provide the Public Advocate with information as part of an investigation
- providing information for proposed guardians
- assisting VCAT in proceedings under the *Equal Opportunity Act 2010* (Vic) concerning any person with a disability
- making recommendations to VCAT about consent to special medical procedures and other medical and dental treatment matters.

GUARDIANSHIP

- 20.11 The Public Advocate acts as guardian of last resort when VCAT determines that a person needs a guardian and no other suitable person is available.¹⁹ In practice, the Public Advocate delegates most day-to-day decision-making responsibility to members of her staff or to community volunteers through a community guardianship program.²⁰
- 20.12 In 2010–11, the Public Advocate acted as guardian in 1730 cases.²¹ Fifty-six of these were temporary orders, and 849 were new orders.²² As at 30 June 2011, the Public Advocate was guardian for 905 people.²³
- 20.13 In its submission to the information paper, the Public Advocate noted that its guardianship role is significant and resource-intensive. The Public Advocate commented on the growing demands of this role:

OPA would also point out that guardianship cases are becoming increasingly more complex. In addition to rising rates of dementia, people with profound cognitive disabilities are living for longer. They are also less and less likely to be residing in institutions. As a result, the decisions which guardians are required to make are becoming more complex. Added to this, and consistent with developments in supported decision making, it is expected that guardians will be required to involve represented persons and significant others more and more in determining courses of action, which will add to the complex and time-intensive nature of the role of guardian.²⁴

INVESTIGATIONS

- 20.14 The Public Advocate investigates matters at the request of VCAT²⁵ or in response to a complaint that a person is under inappropriate guardianship, is being exploited or abused, or is in need of guardianship.²⁶
- 20.15 In 2010–11, the Public Advocate conducted 563 investigations at the request of VCAT.²⁷ Fifty-four per cent of these related to people aged 65 and over.²⁸

19 Ibid ss 16(1)(a), 23(4).

20 Ibid s 18(2) enables the delegation of the Public Advocate's powers and duties as guardian to another individual or organisation with the approval of VCAT.

21 OPA, *Annual Report 2010–2011*, above n 12, 6.

22 Ibid.

23 A total of 825 orders were closed during 2010–11, the same number as during the previous year. The Public Advocate notes that closure rates have decreased slightly to 48% (50% in 2009–10) due to the increased number of orders appointing the Public Advocate as guardian: *ibid*.

24 Submission IP 8 (Office of the Public Advocate).

25 *Guardianship and Administration Act 1986* (Vic) s 16(1)(d).

26 Ibid s 16(1)(h).

27 OPA, *Annual Report 2010–2011*, above n 12, 11.

28 This figure has not changed from 2009–10: *ibid*.

- 20.16 The Public Advocate has two distinct investigatory roles under the G&A Act. First, section 16(1)(d) gives the Public Advocate the power to report to VCAT on any matter VCAT refers to her. Secondly, section 16(1)(h) gives the Public Advocate the power to ‘investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship’.
- 20.17 While these provisions are expressed broadly, they are limited in their application to circumstances where a guardianship or administration order might be appropriate. Further, the Public Advocate does not have a comprehensive range of powers to carry out these functions.
- 20.18 The Public Advocate’s powers when conducting investigations are unclear.²⁹ While the G&A Act allows the Public Advocate to require people and organisations to provide her with information for the purposes either of an investigation carried out under section 16(1)(h) of the Act, or when providing a report to VCAT,³⁰ the manner in which the information must be provided is not stipulated.
- 20.19 Section 18A of the G&A Act gives the Public Advocate the power to enter and inspect some premises. At present, this power is limited to inspection of premises where services are provided under the *Disability Act 2006* (Vic), the *Health Services Act 1988* (Vic) and the *Mental Health Act 1986* (Vic).³¹

ADVICE

- 20.20 The Public Advocate gives advice to any person about the operation of the G&A Act and in relation to applications for guardianship and administration.³²
- 20.21 In 2010–11, the Public Advocate’s Telephone Advice Service received 13,243 calls.³³ The most common areas in which callers seek advice are guardianship and administration (36 per cent), and enduring powers of attorney and enduring guardianship (24 per cent).³⁴

ADVOCACY

- 20.22 The Public Advocate acts as an advocate, and generally supports advocacy, for people with disabilities.³⁵
- 20.23 The Public Advocate engages in both individual and systemic advocacy. These terms tend to be used in different ways throughout the community. Advocacy can, however, be understood in broad terms as ‘essentially the very ordinary process of standing up for the rights of people who are being treated unfairly’.³⁶ The Public Advocate describes its advocacy work as a ‘last resort’ service that ‘focuses on the best interests of the person with a disability who is at risk of abuse, exploitation or neglect’.³⁷
- 20.24 In practice, individual advocacy may involve staff of the Public Advocate making phone calls, writing letters, or arranging meetings. In some circumstances, it might help with making formal complaints, mediation or legal cases.³⁸

29 Set out in *Guardianship and Administration Act 1986* (Vic) ss 16(1)(ha), 18A.

30 VCAT’s own legislation allows it to refer to the Public Advocate any matter relating to a proceeding under the G&A Act, the *Instruments Act 1958* (Vic) or s 5C of the *Medical Treatment Act 1988* (Vic): see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cls 35, 42, 48.

31 *Guardianship and Administration Act 1986* (Vic) s 18A(5).

32 *Ibid* s 16(1)(g).

33 OPA, *Annual Report 2010–2011*, above n 12, 21.

34 *Ibid*.

35 As noted earlier this role is not particularly clear in the legislation but is generally deduced from *Guardianship and Administration Act 1986* (Vic) ss 15(a)–(b), 16(1)(e)–(f).

36 Ian Parsons, *Oliver Twist Has Asked for More* (Villamanta Publishing, 1994) 10.

37 Office of the Public Advocate (Victoria), *Advocacy* (29 November 2011) <<http://www.publicadvocate.vic.gov.au/services/103>>.

38 *Ibid*.



- 20.25 The Public Advocate's systemic advocacy activities often flow from its policy work, which aims to generate research that can be used to improve the lives of people with disabilities.³⁹
- 20.26 Advocate Guardians, who each have an average caseload of around 30 cases, carry out the Public Advocate's advocacy role. About five per cent of an Advocate Guardian's time is spent on advocacy, with guardianship being by far the major focus of their work (typically around 80 per cent of an Advocate Guardian's time).⁴⁰
- 20.27 The Advocate Guardian program is a statewide service divided into two regions, East and West, and four smaller sub-regions.⁴¹ An Intake and Response Team, which triages and assesses matters, has recently been established.⁴²
- 20.28 The Public Advocate also produces a range of reports and submissions on issues affecting people with disabilities which are an important component of her systemic advocacy work.⁴³

COMMUNITY EDUCATION

- 20.29 The Public Advocate engages in community education and public awareness activities about the G&A Act and the rights of people with disabilities.⁴⁴
- 20.30 Community education takes the form of:
- targeted information sessions for people throughout Victoria who have an interest in guardianship issues, including people with disabilities, families and disability service providers
 - support to people using the system, including private guardians and administrators and people holding power of attorney
 - information to professionals who are likely to engage with the system as third parties, such as medical practitioners and financial service providers
 - information to the broader community
 - supporting the development of other community education initiatives delivered by other agencies throughout the community.
- 20.31 In 2010–11, staff of the Public Advocate delivered 182 community education sessions. The majority of participants were professionals working in health and community services and tertiary students. Carers and people with disabilities were also major participants.⁴⁵
- 20.32 The Public Advocate also publishes a large range of fact sheets on various aspects of the legislation and her office's work.⁴⁶

39 Office of the Public Advocate (Victoria), *Services* (6 September 2010) <<http://www.publicadvocate.vic.gov.au/services>>.

40 The remaining time might be spent on carrying out investigations, community education and the advice service: email from the Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.

41 OPA, *Annual Report 2010–2011*, above n 12, 5.

42 Ibid.

43 Office of the Public Advocate (Victoria), *Research* (27 October 2011) <<http://www.publicadvocate.vic.gov.au/research/>>.

44 *Guardianship and Administration Act 1986* (Vic) s15(c).

45 OPA, *Annual Report 2010–2011*, above n 12, 23.

46 Office of the Public Advocate (Victoria), *Publications* (3 November 2011) <<http://www.publicadvocate.vic.gov.au/publications/124>>.

COMMUNITY PROGRAMS

20.33 The Public Advocate is also responsible for coordinating programs for the benefit of people with a disability that operate outside of the G&A Act, such as the Community Visitors Program⁴⁷ and the Independent Third Person Program.⁴⁸

OTHER JURISDICTIONS

PUBLIC ADVOCATES IN OTHER STATES AND TERRITORIES

20.34 All Australian jurisdictions, other than the Northern Territory and New South Wales,⁴⁹ have statutory officers with similar powers and functions to those of the Public Advocate. Some notable differences in other jurisdictions are:

- In Queensland, the public advocacy and public guardianship roles are performed by two different statutory officers.⁵⁰
- In South Australia, the Public Advocate has a broader range of functions than the Victorian Public Advocate in relation to individual and systemic advocacy for people with disabilities and carers.⁵¹
- In Queensland, the Adult Guardian is the statutory health attorney of last resort who is able to make health care decisions for people who do not have the capacity to make the decision themselves and no other person is available to make the decision.⁵²

20.35 The Queensland Law Reform Commission has recommended stronger powers for the Adult Guardian in its systemic advocacy functions, particularly in relation to its investigative powers to require information and to access documents. The Queensland Law Reform Commission recommended that the Adult Guardian should have the power to obtain documents or information from an agency or individual, and that there should be civil penalties for non-compliance.⁵³

COMMUNITY RESPONSES

20.36 There was widespread support for the Public Advocate retaining her current functions. However, this support was sometimes qualified by reference to the Public Advocate's inability to carry out its role effectively because of limited resources. For example:

Action for Community Living supports the current functions and role of the Public Advocate as outlined in the information paper. However OPA needs increased resources to carry out their role in a timely and effective manner.⁵⁴

47 Set up under the *Mental Health Act 1986* (Vic) pt 6 div 5; *Health Services Act 1988* (Vic) pt 5; *Disability Act 2006* (Vic) pt 3 div 6. The Community Visitors Program recruits, trains and coordinates volunteers to regularly visit and inspect various residential services for people with mental illnesses and disabilities. The program reports annually to the Victorian Parliament.

48 Victoria Police, *Victoria Police Manual*, February 2–April 5 2009 VPM Instruction 112–13. The Independent Third Person Program recruits, trains and coordinates volunteers to help people with a cognitive disability or mental illness when they are being interviewed by police, as an alleged offender, victim or witness of a crime.

49 However, New South Wales has a statutory official called the Public Guardian who acts as guardian of last resort and undertakes advocacy for those people for whom the Public Guardian is guardian. Thus, the advocacy role of the office is more constrained. In 2010, the New South Wales Legislative Council Standing Committee on Social Issues recommended (among other things) changing the Guardianship Act 1987 to remove the requirement for the Public Guardian to be appointed guardian before they can support people through advocacy and access to services. It also proposed exploring the creation of an Office of the Public Advocate, including whether the guardianship and advocacy roles should be combined or undertaken by different office holders: Standing Committee on Social Issues, NSW Legislative Council, *Substitute Decision-making for People Lacking Capacity*, Report No 43 (2010) 171, 177.

50 *Guardianship and Administration Act 2000* (Qld) chs 8, 9.

51 *Guardianship and Administration Act 1993* (SA) ss 21(1)(c)–(e).

52 *Powers of Attorney Act 1998* (Qld) s 63.

53 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 4, 256–7, 259 [24.5]–[24.7]. The Queensland Government published an initial response to the Queensland Law Reform Commission's recommendations, supporting in principle the proposals to give the Adult Guardian the power to obtain documents but not supporting the recommendation relating to the civil penalty because 'data is usually collected using a collaborative approach': Department of Justice and Attorney-General, *Queensland Government Initial Response to the Queensland Law Reform Commission's Report: A Review of Queensland's Guardianship Laws* (2011) 53.

54 For eg, Submission IP 50 (Action for Community Living).

20.37 Some people suggested that the Public Advocate's resources are stretched too thinly,⁵⁵ while others thought that some of the Public Advocate's roles might be in conflict with one another.⁵⁶

INVESTIGATIONS

20.38 In the consultation paper, the Commission proposed that new guardianship legislation could clarify and broaden the Public Advocate's investigatory role. The Commission asked whether new investigatory powers:

- should extend beyond cases concerning guardianship and administration
- should be clarified so that the Public Advocate can require people and organisations to provide her with documents and attend her offices to answer questions
- should allow the Public Advocate to enter premises with a warrant when there are reasonable grounds for suspecting that a person with a disability who has been neglected, exploited or abused is on those premises.

20.39 The Public Advocate supported the Commission's proposals and argued that:

The utilization by OPA of an enhanced investigation power would lead to a number of outcomes, which would include: applications for guardianship; advocacy with service providers (including arranging for emergency alternative accommodation); referrals to outside agencies such as the Ombudsman and Victoria Police; and the referral for action over breaches of the guardianship legislation.⁵⁷

20.40 There was broad support for the Commission's proposals for stronger and more enforceable investigative powers for the Public Advocate. Some of the points made were that:

- A larger investigation role would allow the Public Advocate to travel to people to obtain information from them personally.⁵⁸
- Investigation can be an important part of defending and advocating for people where there is a belief that they may be being neglected or exploited.⁵⁹
- While it might be desirable to establish a new separate investigatory and law enforcement agency dealing with matters relating to the abuse of people with a disability, expanding the Public Advocate's functions may be the most practical solution.⁶⁰
- There should be clear lines of responsibility concerning investigation of abuse of people with disabilities to ensure that potential police investigations are not compromised or contaminated.⁶¹

CIVIL PENALTY PROCEEDINGS

20.41 While section 80 of the G&A Act makes it an offence for a person to contravene any provision of the Act—such as failing to provide the Public Advocate with information she has requested—most of the circumstances under which such an offence might be committed remain unclear.

55 For eg, consultations with Royal District Nursing Service (9 March 2011), Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society (23 March 2011) and Australian & New Zealand Society for Geriatric Medicine (7 April 2011).

56 For eg, consultations with metropolitan carers (in partnership with Carers Victoria) (24 March 2011), Carers Victoria (15 April 2011) and Seniors Rights Victoria (2 May 2011).

57 Submission CP 19 (Office of the Public Advocate).

58 Roundtable with service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (22 March 2011).

59 Submission CP 27 (Catholic Archdiocese of Melbourne).

60 Submission CP 71 (Seniors Rights Victoria).

61 Submission CP 16 (Victoria Police).

- 20.42 Victoria Police is the only organisation that has the capacity to conduct a prosecution. The Commission is unaware of any prosecutions under the G&A Act since 1986.
- 20.43 In the consultation paper, the Commission proposed that the Public Advocate be given new powers to initiate civil penalty proceedings to ensure that the misuse of responsibilities under guardianship laws and abuse of people with impaired decision-making ability due to disability is recognised as a public wrong. This proposed new public wrong is discussed in Chapter 18.
- 20.44 While the proposal for a new public wrong was broadly supported,⁶² some people expressed reservations about the Public Advocate’s proposed role. The Public Advocate agreed with the Commission’s suggestion that it might adversely affect public attitudes to the Public Advocate were her office to become a law enforcement agency as well as an advocate for people with a disability.⁶³ Others supported this view.⁶⁴

ADVOCACY

- 20.45 Many people and organisations referred to the Public Advocate’s advocacy role, with some arguing that the role needs to be strengthened or performed more forcefully.⁶⁵ Others suggested that the advocacy function is neglected in favour of the Public Advocate’s responsibilities as guardian of last resort.⁶⁶
- 20.46 In the consultation paper, the Commission asked whether new guardianship legislation should clarify and strengthen the Public Advocate’s advocacy role by empowering her to advocate for:
- people with a disability who are at risk of abuse, neglect, exploitation or harm, especially where the disability has limited their autonomy or their capacity to assert their own rights
 - reforms that will help address systemic and social disadvantage for people with disabilities.
- 20.47 The Commission suggested that reforms of this nature would clarify the Public Advocate’s advocacy role. These proposals were broadly supported in submissions,⁶⁷ although the Catholic Archdiocese argued that the law’s current provisions in relation the Public Advocate’s advocacy functions are adequate and do not need to be changed.⁶⁸
- 20.48 The Public Advocate observed that her advocacy functions need greater legislative clarity and suggested that:
- new guardianship legislation should contain the provision of a clear systemic advocacy role for the Public Advocate on behalf of all people with a disability (which is not restricted to the narrower subset of people whose decision-making impairment satisfies one of the criteria for the making of a guardianship or administration order).⁶⁹

62 For eg, Submissions CP 8 (Leonie Chirgwin), CP 22 (Alzheimer’s Australia Vic), CP 24 (Autism Victoria), CP 29 (STAR Victoria), CP 33 (Eastern Health), CP 35 (Ursula Smith), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University) and CP 59 (Carers Victoria).

63 Submission CP 19 (Office of the Public Advocate).

64 Submissions CP 65 (Council on the Ageing Victoria), CP 73 (Victoria Legal Aid), CP 78 (Mental Health Legal Centre) and CP 75 (Federation of Community Legal Centres (Victoria)).

65 For eg, consultations with Fiona Smith (18 March 2010), carers, people with disabilities and service providers in Ballarat (in partnership with Grampians Disability Advocacy) (15 April 2010) and Margaret Ryan and Max Jackson (4 May 2010).

66 Consultations with Disability Advocacy Resource Unit (5 May 2010) and metropolitan carers (in partnership with Carers Victoria) (6 May 2010).

67 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer’s Australia Vic), CP 29 (STAR Victoria), CP 59 (Carers Victoria), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 71 (Seniors Rights Victoria) and CP 73 (Victoria Legal Aid).

68 Submission CP 27 (Catholic Archdiocese of Melbourne).

69 Submission IP 8 (Office of the Public Advocate).



- 20.49 The G&A Act does not provide the Public Advocate with any guidance about the principles or desired outcomes that should guide her advocacy role. In the consultation paper, the Commission suggested that principles such as those set out in the United Nations *Convention on the Rights of Persons with Disabilities* might provide a clear and modern basis for the Public Advocate's advocacy work.
- 20.50 The Public Advocate supported the proposal but offered some principles for consideration, particularly in relation to individual advocacy:
- Advocacy by the Public Advocate must be provided in a way that promotes the personal and social wellbeing of the person.
 - Advocacy must give effect, wherever possible, to the wishes of the person.
 - Advocacy must be carried out, wherever possible, in consultation with the person.
 - Advocacy must be provided in a manner that is least restrictive of the person's freedom of decision and action as is possible in the circumstances.
 - Advocacy must assist the person to live in safety and security and free from abuse, exploitation and neglect.
 - Advocacy must allow the person to participate in and contribute to the community to the maximum extent possible in the circumstances.⁷⁰

SUBSTITUTE DECISION MAKING

The Public Advocate's role as substitute decision maker

- 20.51 In the consultation paper, the Commission suggested that the Public Advocate should remain the guardian of last resort. It was also suggested that new guardianship legislation should allow the Public Advocate to delegate any of her powers as a guardian without requiring VCAT's approval. There was no opposition to these proposals.

The Public Advocate's role in monitoring private guardians and enduring guardians

- 20.52 In the consultation paper, the Commission proposed that the Public Advocate could play a greater role in monitoring VCAT-appointed and personally appointed guardians. This proposal received mixed responses. While there was broad support for an increased monitoring role for the Public Advocate,⁷¹ some reservations were expressed. The Public Advocate suggested that routine monitoring, particularly of VCAT-appointed guardians, should be undertaken by VCAT and that the Public Advocate's role should be focused on investigations rather than monitoring.⁷²
- 20.53 Victoria Legal Aid suggested that the Public Advocate's role should focus on supporting and educating private guardians, rather than monitoring them.⁷³ Alzheimer's Victoria expressed concerns about a conflict for the Public Advocate if it was both a supporter and a monitor of private guardians.⁷⁴

COMMUNITY EDUCATION

- 20.54 The G&A Act gives the Public Advocate the function of educating the community about guardianship issues.⁷⁵

⁷⁰ Submission CP 19 (Office of the Public Advocate).

⁷¹ Submissions CP 24 (Autism Victoria), CP 29 (STAR Victoria), CP 33 (Eastern Health), CP 35 (Ursula Smith), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University) and CP 71 (Seniors Rights Victoria).

⁷² Submission CP 19 (Office of the Public Advocate).

⁷³ Submission CP 73 (Victoria Legal Aid).

⁷⁴ Submission CP 22 (Alzheimer's Australia Vic).

⁷⁵ *Guardianship and Administration Act 1986* (Vic) s 15(c).

- 20.55 Many people suggested that the Public Advocate’s community education role should be better resourced⁷⁶ and expanded so that it is more accessible.⁷⁷
- 20.56 In the consultation paper, the Commission suggested that the Commission’s educational and training role could be extended, as public awareness of guardianship laws appears low.
- 20.57 It was suggested that the Public Advocate’s education role could be strengthened to include:
- more training for third parties, particularly health professionals, who interact with represented people about how the guardianship system operates, including the role of automatic appointees and the relationship between the medical treatment provisions of the G&A Act and the *Medical Treatment Act 1988 (Vic)*
 - more training for substitute decision makers, including private guardians, administrators and personal appointees, about their roles and responsibilities
 - more community education for people with disabilities, families and disability service providers, especially in regional Victoria, about the legislation and about how to plan for the future.

REPORTING TO PARLIAMENT

- 20.58 Unlike most statutory officers, the Public Advocate is not required to report annually to Parliament. Her reporting requirements are limited to reporting to the Minister ‘on any aspect of the operation of this Act referred to the Public Advocate by the Minister’.⁷⁸
- 20.59 In the consultation paper, the Commission suggested that new guardianship legislation could require the Public Advocate to report annually to Parliament about her activities. It was suggested that this step could promote both accountability and independence. This proposal was widely supported.⁷⁹

OTHER COMMENTS

- 20.60 Some people had reservations about various aspects of the Public Advocate’s operations and expressed concerns about:
- negative experiences with the Public Advocate in particular cases⁸⁰
 - the lack of expertise in working with people with a mental illness⁸¹
 - the lack of a properly focused or supported community guardianship program.⁸²

THE COMMISSION’S VIEWS AND CONCLUSIONS

- 20.61 There is strong support within the community for the work the Public Advocate undertakes as a guardian of last resort, advocate for people with disabilities and promoter of a community awareness of guardianship laws. The Commission believes that the Public Advocate should continue to exercise these functions and that she should be given a new range of responsibilities that are designed to advance the interests of people with a disability.

⁷⁶ For eg, Submissions IP 9 (Royal District Nursing Service) and IP 16 (Mark Feigan).

⁷⁷ Submission IP 30 (Victorian Aboriginal Legal Service).

⁷⁸ *Guardianship and Administration Act 1986 (Vic)* s 15(d).

⁷⁹ For eg, Submissions CP 9 (Stephen Lake), CP 19 (Office of the Public Advocate), CP 22 (Alzheimer’s Australia Vic), CP 24 (Autism Victoria), CP 27 (Catholic Archdiocese of Melbourne), CP 29 (STAR Victoria), CP 33 (Eastern Health), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 57 (Aged Care Assessment Service in Victoria), CP 59 (Carers Victoria), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

⁸⁰ For eg, consultations with Lois Quick (3 May 2011) and Robyn Browne (3 May 2011); Submission CP 42b (Helen Siomos).

⁸¹ Roundtable with mental health consumers (in partnership with Mental Health Legal Centre and Victorian Mental Illness Awareness Council) (5 April 2011).

⁸² Consultation with Royal District Nursing Service (9 March 2011); Submission CP 10a (Bruce Levy).

THE PUBLIC ADVOCATE'S INDEPENDENCE

20.62 As noted earlier, it is important that the Public Advocate continue to be a statutory official who enjoys a high level of independence from the executive branch of government. Schedule 3 of the current G&A Act requires that the Public Advocate holds office for a period of seven years and can only be removed from office following a resolution of both Houses of Parliament or on specific grounds.⁸³ These requirements effectively secure the Public Advocate's independence and should be retained.

RECOMMENDATIONS**The Public Advocate's independence**

323. The Public Advocate should continue to exist as an independent statutory official with a broad charter to promote the rights and interests of all Victorians with a disability, especially those people with impaired decision-making ability due to a disability.

324. New guardianship legislation should contain provisions designed to secure the independence of the Public Advocate based on the provisions in schedule 3 of the *Guardianship and Administration Act 1986 (Vic)*.

SUBSTITUTE DECISION MAKING

20.63 The Commission believes the Public Advocate should continue to perform both guardianship and advocacy roles. The Commission acknowledges that a tension can exist between being, on the one hand, a champion of the human rights and freedoms of people with disabilities while, on the other hand, a statutory body appointed to act as a substitute decision maker for people who might not always agree with the decisions the Public Advocate makes for them. However, the Commission believes that the Public Advocate appears to perform both roles well and that it is appropriate for her to retain substitute decision-making and advocacy functions.

20.64 The manner in which guardianship and advocacy responsibilities are performed within the office—through separation or integration of these functions—is an internal management issue for the Public Advocate that requires regular review.

20.65 The Commission believes that the Public Advocate should continue to play a significant role in:

- promoting and supporting guardianship within represented persons' families and personal networks
- supporting private guardians
- supporting a viable community guardianship program.

Medical treatment and medical research

20.66 As noted in Chapter 13 and Chapter 14, the Commission proposes that the Public Advocate should have responsibility to act as the substitute decision maker of last resort for significant medical treatment and medical research procedures.

⁸³ Clause 1(6) of schedule 3 to the *Guardianship and Administration Act 1986 (Vic)* contains a list of matters including bankruptcy and conviction for an indictable offence that cause the office of Public Advocate to become vacant.

RECOMMENDATIONS

Substitute decision making

325. The Public Advocate should continue to act as the personal guardian of last resort under new guardianship legislation.
326. The Public Advocate should continue to have responsibility for recruiting, training and supporting volunteer personal guardians and volunteer financial administrators, and for training and supporting private personal guardians and private financial administrators appointed by VCAT.
327. New guardianship legislation should provide that the Public Advocate is the substitute decision maker of last resort for a significant medical treatment or medical research procedure when a person is unable to make their own decision about the matter and there is no personal guardian or health decision maker available to make the decision.

SUPPORTERS AND CO-DECISION MAKERS

- 20.67 As discussed in Chapters 8 and 9, because of the need for a close personal relationship between a co-decision maker or a supporter and the represented person, the Commission does not believe that these are appropriate roles for the Public Advocate. Only a person who spends a considerable amount of time with the represented person can successfully ensure that the decision-making process is properly supported or shared. It would be unrealistic to expect the Public Advocate to act in this fashion.
- 20.68 The Commission believes that the Public Advocate can play an important role in the recruitment, training and support of community volunteers who may be appointed as decision-making supporters for people who do not have family members or friends to take on the role. In Chapter 9, we suggest that the Public Advocate consider whether a volunteer co-decision-maker program should be implemented when there is more evidence of its need and practicality.

MONITORING PRIVATE AND ENDURING APPOINTMENTS THROUGH A COMPLAINTS FUNCTION

- 20.69 The consultation paper contained a number of options concerning a role for the Public Advocate in monitoring the activities of the private individuals who exercise responsibilities under guardianship legislation.
- 20.70 The Commission accepts the arguments made by the Public Advocate that a function to audit people exercising powers under guardianship legislation could be unhelpful and would be an inefficient use of the office's resources. We discuss this further in Chapter 18.
- 20.71 The Commission proposes that investigating complaints and own-motion investigations should be the primary means by which the Public Advocate monitors the activities of private guardians, supporters and co-decision makers. Investigation should be possible when there is concern that a person undertaking any of these roles might be misusing their powers or acting inappropriately by abusing, neglecting or exploiting a person with impaired decision-making ability due to a disability.⁸⁴

⁸⁴ In Chapter 18, the Commission recommends a new public wrong punishable by civil penalty for abusing, neglecting or exploiting a person with impaired decision-making ability due to a disability.



RECOMMENDATIONS

Complaints function

328. Under new guardianship legislation, the Public Advocate should have the function of receiving and investigating complaints in relation to:
- (a) the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability
 - (b) the misuse of powers by private individuals or organisations appointed to substitute decision-making, co-decision-making and supporter roles.
329. New guardianship legislation should provide that where the Public Advocate believes that an investigation is warranted she should be able to conduct an investigation on her own motion in relation to:
- (a) the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability
 - (b) the misuse of powers by private individuals or organisations appointed to substitute decision-making, co-decision-making and supporter roles.

INVESTIGATIVE POWERS

- 20.72 In addition to broadening the circumstances in which the Public Advocate can investigate a complaint the Commission also believes that new guardianship legislation should clearly describe the range of powers open to the Public Advocate when conducting investigations. It is unhelpful to have a power such as that set out in section 16(1)(ha) of the G&A Act, which permits the Public Advocate to 'require' various people and organisations 'to provide information'. Most Commonwealth and Victorian statutes that permit public officials to conduct investigations about possible breaches of protective laws give those public officials, as well as the people who are being investigated, clear guidance about the nature and extent of the investigative powers.
- 20.73 Public officials investigating possible breaches of protective legislation are commonly given powers to require people to:
- provide documents and other written information
 - answer questions
 - attend compulsory conferences
 - allow entry to premises with judicial permission in limited circumstances.
- 20.74 The Commission believes that the powers provided to the President of the Human Rights Commission under the *Australian Human Rights Commission Act 1986* (Cth) to obtain information and direct attendance at compulsory conferences when investigating possible breaches of Commonwealth anti-discrimination legislation could be used as a model for describing the content of the Public Advocate's investigative powers.

20.75 The Australian Human Rights Commission Act gives the President of the Australian Human Rights Commission clear investigative powers when dealing with a complaint of unlawful discrimination. The President can require any person to answer written questions or provide specified documents that are relevant to an inquiry.⁸⁵ The President can also require a person to attend a compulsory conference about a complaint.⁸⁶ It is an offence to fail to comply with any of these directions by the President. The Commission believes that under new guardianship legislation, the Public Advocate should have similar powers when conducting investigations.

Entry of premises

20.76 The Public Advocate currently has limited powers to enter and inspect premises. The Public Advocate can enter and inspect a range of 'institutions' that provide health and residential services to people with disabilities for whom the Victorian Government has responsibilities.⁸⁷ These powers do not extend to private premises or to 'institutions' carrying out Commonwealth Government functions, such as providing aged care services.

20.77 The Commission believes that the Public Advocate should have the power to enter any premises with a warrant given by a judicial officer when there are reasonable grounds for suspecting that a person with impaired decision-making ability due to disability, who has been neglected, exploited or abused, is on those premises. The Public Advocate should apply to VCAT for appointment as the person's personal guardian or for some other interim order if she concludes after entering the premises that the person should be moved to a safe place. The Public Advocate should consider establishing protocols with the President of VCAT to set up procedures for quick access to VCAT in cases of this nature.

20.78 It appears appropriate for an entry warrant of this nature to be issued by either VCAT or the Magistrates' Court of Victoria. The Magistrates' Court now provides a comprehensive 'after-hours' service for various types of warrants and emergency orders, so it would be well-placed to deal with these applications. The Public Advocate should also consider establishing protocols with the Chief Commissioner of Police that deal with the procedures to be followed when the Public Advocate requires help from Victoria Police in entering premises and gaining access to a person who might require assistance.

Access to information on the register

20.79 In Chapter 16, the Commission recommends establishing an online register of all substitute decision-making, co-decision-making and supporter appointments. The Public Advocate may need to access this register as part of an investigation, particularly when there is an allegation that a substitute decision maker, co-decision maker, or supporter is misusing their powers under the Act. In these circumstances, the Public Advocate should have a clear right of access to the register.

20.80 The Commission also recommends a major role for the Public Advocate in determining access to the proposed new online register of personal appointments and VCAT orders.

⁸⁵ *Australian Human Rights Commission Act 1986* (Cth) s 46PI.

⁸⁶ *Ibid* ss 46PJ–46PK.

⁸⁷ *Guardianship and Administration Act 1986* (Vic) s 18A(1).



RECOMMENDATIONS

Expanded investigation powers

330. The Public Advocate should be able to exercise the following powers when conducting an investigation:
- (a) serve a written notice on a person requiring them to give the Public Advocate specified documents or other materials relevant to an investigation being undertaken by the Public Advocate
 - (b) serve a written notice on a person requiring them to give written answers to questions
 - (c) require a person to attend a conference for the purposes of seeking to resolve a matter being investigated by the Public Advocate
 - (d) access the proposed online register as necessary.
331. Under new guardianship legislation, it should be an offence for a person to refuse or fail to provide information, or to attend a conference or interview, when directed by the Public Advocate to do so.
332. The Public Advocate's powers of entry and inspection under section 18A of the *Guardianship and Administration Act 1986* (Vic) should be retained in new guardianship legislation.
333. The Public Advocate should be permitted to apply to VCAT or to the Magistrates' Court of Victoria for a warrant authorising entry to any premises when she believes that a person with impaired decision-making ability due to a disability who is on the premises is being abused, exploited or neglected.
334. VCAT or the Magistrates' Court of Victoria should be permitted to issue a warrant authorising entry to any premises in these circumstances if they are satisfied that it is appropriate to do so.

CONFIDENTIALITY

- 20.81 When conducting investigations, the Public Advocate and her staff have access to much confidential information. The secrecy provisions of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) apply when the Public Advocate undertakes investigations at the request of VCAT. The provisions apply to information acquired in the course of the performance of duties under the Act by any member or staff of VCAT, or any person acting under VCAT's authority.⁸⁸ They prohibit the recording or disclosure of any private information other than when this is necessary as part of the performance of functions under the Act.
- 20.82 The Commission believes that similar provisions should govern any confidential information that the Public Advocate and her staff obtain in the course of carrying out their duties. The Australian Human Rights Commission Act contains nondisclosure requirements that could provide useful guidance when devising a suitable provision for the Public Advocate in new guardianship legislation.⁸⁹

⁸⁸ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34.

⁸⁹ *Australian Human Rights Commission Act 1986* (Cth) s 49.

RECOMMENDATION

Confidentiality

335. New guardianship legislation should contain provisions that prohibit disclosure of confidential information obtained by the Public Advocate and her staff in the course of performing their roles, other than when it is necessary for them to do so to perform their functions and duties.

SUPPORTING CIVIL PENALTY PROCEEDINGS

- 20.83 In Chapter 18, the Commission recommended that new guardianship legislation should make it unlawful for a person with responsibility to care for a person with impaired decision-making ability because of a disability to abuse, neglect or exploit that person. The Commission also proposed that a person who commits this wrong should be liable to a civil penalty.
- 20.84 For reasons discussed in Chapter 18, the Commission does not believe that the Public Advocate should be responsible for initiating and conducting civil penalty proceedings. The Commission recommended that a new statutory officer should have these responsibilities.
- 20.85 The Commission believes it is appropriate for this new statutory officer to rely upon evidence gathered by the Public Advocate during her investigations when conducting proceedings for this proposed new public wrong. The Public Advocate should be authorised to give the new statutory officer access to evidence gathered during her investigations. The Public Advocate should also be authorised to give the Chief Commissioner of Police access to evidence gathered during her investigations when she believes that a criminal prosecution might be appropriate.
- 20.86 The Public Advocate could be involved in investigating matters associated with civil penalty proceedings in two ways:
- After investigating a complaint that a person with a decision-making disability is being abused, neglected or exploited, or after conducting such an investigation on her own motion, the Public Advocate may conclude that she should refer the matter to the new statutory officer to decide whether proceedings should be instituted against an alleged wrongdoer.
 - Following a referral from another agency, such as the Chief Commissioner of Police or the Director of Public Prosecutions, the new statutory officer may ask the Public Advocate to conduct further investigations in order to assist in determining whether proceedings should be instituted against an alleged wrongdoer.
- 20.87 It would be highly desirable for the Public Advocate, the Chief Commissioner of Police and the new statutory officer to establish protocols that clearly describe their respective roles and the procedures to be followed in dealing with cases of this nature. Because a member of the Public Advocate's staff could commit this new wrong when performing functions as a personal guardian, the protocol should establish procedures for dealing with cases involving a complaint against the Public Advocate.

RECOMMENDATIONS**Supporting civil penalties**

336. New guardianship legislation should permit the Public Advocate to give the new statutory officer a report concerning any investigations she conducts and allow the new statutory officer to have access to any evidence gathered during the Public Advocate's investigations if she believes the new statutory officer should consider initiating civil penalty proceedings against an alleged wrongdoer.
337. New guardianship legislation should permit the Public Advocate to give the Chief Commissioner of Police a report concerning any investigations she conducts and allow the Chief Commissioner to have access to any evidence gathered during the Public Advocate's investigations if she believes that the Chief Commissioner should consider initiating criminal proceedings against an alleged wrongdoer.

ADVOCACY

- 20.88 The Public Advocate has played an important role in advocating for individuals and for groups of people with a disability. The Commission believes that this role should continue and that new guardianship legislation should clearly indicate that the Public Advocate has the function and the power to engage in both individual and systemic advocacy.

Principles to underpin advocacy

- 20.89 While the manner in which both forms of advocacy are undertaken is clearly a matter for the Public Advocate, there is value in providing legislative guidance about the principles the Public Advocate should bear in mind when acting as an advocate for people with a disability.
- 20.90 As with any drive for social change, there are diverse views throughout the community about the best way to engage in advocacy for people with disabilities. The Commission believes that it is appropriate for the Public Advocate to receive guidance from the proposed general principles that should inform new guardianship legislation (see Chapter 6) when undertaking her advocacy functions.

The breadth of the Public Advocate's advocacy role

- 20.91 While the G&A Act gives the Public Advocate an advocacy role in relation to 'persons with a disability', the Act does not clearly indicate which people fall within this description. For example, it is unclear whether the term includes children with a disability and whether the Public Advocate has an advocacy function in relation to all people with a disability or only in relation to a narrower group, such as people with impaired decision-making ability due to a disability.
- 20.92 The breadth of the Public Advocate's advocacy function arose recently when a Family Court judge questioned the power of the Public Advocate to play a role as *amicus curiae* in proceedings involving a child with a disability.⁹⁰
- 20.93 The Commission believes that it is desirable to indicate in broad terms those people for whom the Public Advocate may advocate. As the Commission said in Recommendation 323 above, the Public Advocate should have a broad charter to promote the rights and interests of all Victorians with a disability, especially those people with impaired decision-making ability due to a disability. This is an appropriate description of those people for whom the Public Advocate should be permitted to advocate.

⁹⁰ *Re: Baby D (No 2)* [2011] 176 FamCA 314.

20.94 Whether the Public Advocate is permitted to intervene in proceedings involving a person with a disability is a matter to be determined by the law governing the particular court or tribunal in which those proceedings are heard. New guardianship legislation should remove any doubt, however, about the Public Advocate's power to advocate for a person of any age with any disability. It should also clearly indicate that the function of advocacy includes seeking leave to intervene in any court or tribunal proceedings when the rights and interests of a person with a disability are in question.

RECOMMENDATIONS

Advocacy

338. New guardianship legislation should provide that the Public Advocate has the function and power to advocate for the rights and interests of all Victorians with a disability, especially those people with impaired decision-making ability due to a disability. The Public Advocate should also have the power to engage in both individual and systemic advocacy.

339. The Public Advocate should be guided by the principles in new guardianship legislation when performing her advocacy functions.

Intervention in court proceedings

340. To avoid doubt, new guardianship legislation should provide that the Public Advocate's advocacy powers include seeking leave in any court or tribunal proceedings when the rights and interests of a person with a disability are in question.

COMMUNITY EDUCATION

20.95 In Chapter 5, the Commission makes a number of recommendations concerning the need for additional community education about guardianship laws.

20.96 The Commission believes that the Public Advocate should continue to have a central role in community education about guardianship laws. This role is closely aligned with the Public Advocate's function of promoting the rights and interests of people with disabilities throughout Victoria.

20.97 The manner in which the Victorian community receives information about guardianship laws is a matter for the Public Advocate in consultation with relevant ministers and their departments.

RECOMMENDATION

Community education

341. The Public Advocate should have primary responsibility for educating the Victorian community about guardianship laws.

REPORTING TO PARLIAMENT

20.98 The Public Advocate was originally required to report to Parliament annually about the operations of the office.⁹¹ While this annual reporting requirement was removed from the legislation in 1994,⁹² the Public Advocate continues to provide the Attorney-General with annual reports that are tabled in Parliament.

91 *Guardianship and Administration Board Act 1986 (Vic)* s 78.

92 *Financial Management (Consequential Amendments) Act 1994 (Vic)* s 4.



20.99 It is unusual for a statutory official with the range of functions and the level of expenditure of the Public Advocate not to have a statutory right and obligation to report to Parliament annually. The Commission believes that this important accountability and transparency mechanism should be revived.

RECOMMENDATIONS

Reporting to Parliament

342. New guardianship legislation should require the Public Advocate to report to the Minister annually on the performance of her functions during the year.
343. The Minister must table this report in both Houses of Parliament.

SKILLS AND RESOURCES

20.100 To implement some of the Commission's recommendations, the Public Advocate will need to engage additional staff with specialised skills. For example, the Public Advocate will need to engage people with:

- investigative and evidence-gathering skills to investigate allegations of abuse, exploitation and neglect of people with decision-making disabilities
- health sector expertise to enable the Public Advocate to act as the health decision maker of last resort for people who are unable to make their own decisions about significant medical treatment or a significant medical research procedure matters to prepare the guidelines referred in Chapters 13 and 14.

20.101 These new functions, together with the recommendations proposed throughout this chapter concerning an expanded role for the Public Advocate in advocacy, community education and support for private personal guardians, financial administrators, co-decision makers and supporters, will have significant resource implications for the Public Advocate.

20.102 The Commission recommends that the Public Advocate receive additional resources to carry out these important functions.

RECOMMENDATION

Skills and resources

344. The Public Advocate should receive additional resources to carry out the proposed new functions.

DELEGATION OF THE PUBLIC ADVOCATE'S POWERS

20.103 The Public Advocate's powers of delegation should be modernised. While the Public Advocate has a statutory power to delegate any of her statutory functions, powers and duties (other than the power of delegation) to any member of her staff,⁹³ the Public Advocate may only delegate her powers and duties as a guardian for a person with VCAT's approval.⁹⁴

⁹³ *Guardianship and Administration Act 1986* (Vic) s 18(1).

⁹⁴ *Ibid* s 18(2).

- 20.104 As the Public Advocate is now the guardian for more than 900 people, it is unrealistic to expect her to perform the powers and duties of a guardian without delegating day-to-day responsibility for this function to members of her staff. The need for VCAT approval of the Public Advocate's powers and duties as a guardian is unnecessary.
- 20.105 The Commission understands that the Public Advocate is sometimes asked to accept appointment as an enduring guardian or as an agent under the Medical Treatment Act for a person who does not have a family member or close friend who is able to accept an appointment. The Commission also understands that the Public Advocate has been reluctant to accept these appointments because of her inability to delegate any of the powers and duties to a member of her staff.
- 20.106 The Commission believes that while it is ultimately a matter for the Public Advocate whether she wishes to accept appointments of this nature, she should not be effectively prevented from doing so because of an inability to delegate her powers and duties. The Public Advocate should be permitted to delegate the powers and duties exercisable under any appointment she accepts in her capacity as the Public Advocate to any member of her staff.

RECOMMENDATIONS

Delegation of the Public Advocate's powers

345. New guardianship legislation should give the Public Advocate the power to delegate any of her statutory functions, powers and duties (other than her power of delegation) and any of her powers and duties as a personal guardian to any member of her staff.
346. The Public Advocate should also have the power to delegate any of her powers and duties as an enduring personal guardian to any member of her staff when she accepts an appointment as an enduring guardian in her capacity as the Public Advocate.



Chapter 21

VCAT

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INTRODUCTION

- 21.1 The Victorian Civil and Administrative Tribunal (VCAT) plays a central role in Victorian guardianship law. Its primary function is to decide whether guardians or administrators should be appointed for people who are unable to make their own decisions.
- 21.2 VCAT is a very large 'super tribunal' that deals with many different legal matters ranging from tenancy disputes to disciplinary and licensing matters for various professions and businesses. Before the establishment of VCAT in 1998, a separate tribunal—the Guardianship and Administration Board—dealt with guardianship and administration matters.¹ Nearly all Victorian tribunals were brought within the VCAT structure in 1998.²
- 21.3 VCAT has three divisions: civil, administrative and human rights. Each division has a number of sections called 'lists' that specialise in hearing particular types of cases. The Guardianship List is part of the Human Rights Division.
- 21.4 The Commission has been asked to consider:
- The role and powers of the Victorian Civil and Administrative Tribunal in relation to guardians and administrators and the efficacy of its processes for the appointment of guardians and administrators under the Act and the *Victorian Civil and Administrative Tribunal Act 1998* and Rules.³
- 21.5 VCAT is undergoing internal review and reorganisation. The VCAT President's review, released in November 2009, contained a range of proposed reforms.⁴ Many of these proposed reforms formed the basis of the recent three-year strategic plan released by VCAT's President, Justice Iain Ross, in 2010. This strategic plan is known as *Transforming VCAT*.⁵
- 21.6 The Commission has also been asked to consider whether Victoria's guardianship laws adequately deal with the issue of confidentiality.⁶ Striking an appropriate balance between confidentiality and transparency is a matter that sometimes arises in guardianship matters at VCAT.
- 21.7 This chapter, which deals with VCAT processes, contains recommendations in relation to:
- pre-hearing processes
 - attendance and representation at hearings
 - reviews and appeals
 - confidentiality.

CURRENT LAW

ROLE AND POWERS OF VCAT

- 21.8 VCAT's general powers and procedures are governed by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic)⁷ (VCAT Act) and the *Victorian Civil and Administrative Tribunal Rules 2008* (Vic).⁸ The *Guardianship and Administration Act 1986* (Vic) (G&A Act) also deals with some procedures in guardianship matters.

1 This Board was established under pt 2 of the *Guardianship and Administration Board Act 1986* (Vic), as repealed by *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) s 117.

2 There are similar 'super tribunals' in Western Australia, Queensland and the Australian Capital Territory.

3 Victorian Law Reform Commission, *Guardianship Review Terms of Reference* (May 2009) 3(g) ('*Guardianship Review Terms of Reference*').

4 Justice Kevin Bell, *One VCAT: President's Review of VCAT* (2009).

5 Justice Iain Ross, *Transforming VCAT Three Year Strategic Plan 2010/11–2012/13* (2010).

6 *Guardianship Review Terms of Reference*, above n 3, 3(k).

7 *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

8 *Victorian Civil and Administrative Tribunal Rules 2008* (Vic).

- 21.9 In 2010–11, VCAT had over 200 members who dealt with nearly 87,000 applications.⁹ The President of VCAT must be a justice of the Supreme Court of Victoria.¹⁰ VCAT has several Vice Presidents who must be judges of the County Court of Victoria.¹¹ VCAT also has Deputy Presidents¹² who are responsible for managing one of VCAT’s three divisions, or one of the lists within these divisions.¹³
- 21.10 The main functions of the Guardianship List are:
- deciding whether guardians should be appointed, appointing guardians and reassessing guardianship orders
 - deciding whether administrators should be appointed, appointing administrators and reassessing administration orders
 - providing advice to guardians, administrators and the person responsible about how they exercise their powers¹⁴
 - deciding whether to revoke an attorney’s appointment, or varying, suspending or making another order in relation to an enduring power of attorney (financial) under the *Instruments Act 1958 (Vic)*
 - deciding whether to revoke or suspend an enduring power of attorney (medical treatment) under the *Medical Treatment Act 1988 (Vic)*
 - deciding whether to consent to a ‘special procedure’ in relation to medical treatment.
- 21.11 VCAT is also responsible for hearing applications in relation to various matters governed by the *Disability Act 2006 (Vic)*.¹⁵ These applications do not directly relate to the Commission’s review of the G&A Act, but the relationship between the G&A Act and the Disability Act is considered in Chapter 23.
- 21.12 In 2010–11, the Guardianship List finalised 12,258 matters and heard 10,893 initiations, making it one of the busiest lists at VCAT.¹⁶ Of these matters, 29 per cent were originating applications and 71 per cent reassessment applications.¹⁷ In 2009–10, 10,771 matters were commenced and 12,493 matters were finalised in the Guardianship List.¹⁸
- 21.13 While most Guardianship List hearings occur at VCAT’s premises in the city of Melbourne, hearings also occur at a number of suburban and regional locations throughout Victoria. Guardianship List hearings are also sometimes held away from VCAT venues, such as at hospitals.

9 Victorian Civil and Administrative Tribunal, *Annual Report 2010/11* (2011) 5 (‘VCAT, *Annual Report 2010/11*’).

10 *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* s 10.

11 *Ibid* s 11.

12 *Ibid* s 12.

13 VCAT, *Annual Report 2010/11*, above n 9, 4. The Guardianship List is part of the Human Rights Division.

14 VCAT may provide advice to enduring guardians, the person responsible and administrators either by request or on its own initiative: *Guardianship and Administration Act 1986 (Vic)* ss 35E, 42I, 42W, 55. While VCAT provides advice to guardians under on request under s 30, there is no provision in the legislation for VCAT providing advice to guardians on its own initiative. However, VCAT may order a reassessment of a guardianship appointment on its own initiative at which it could provide advice to guardians: at ss 61(2), 63.

15 These matters include applications to VCAT under the *Disability Act 2006 (Vic)* to: review decisions by the Secretary to the Department of Human Services to admit a person with an intellectual disability to a residential institution: at s 88; review decisions about ‘restrictive interventions’ (that is, the restraint or seclusion of a person with a disability): at s 146; make orders about residential treatment facilities, including a resident’s treatment plans and leave of absence: at ss 154–7; make orders about ‘security residents’ (people with an intellectual disability transferred from prison to another facility), including security residents’ treatment plans and leave of absence: at ss 168–71; make and review supervised treatment orders for people with an intellectual disability if satisfied that, among other things, the person must be detained to prevent serious harm to another person: at ss 189, 191–9.

16 VCAT, *Annual Report 2010/11*, above n 9, 43.

17 *Ibid*.

18 Victorian Civil and Administrative Tribunal, *Annual Report 2009/10* (2010) 46.



- 21.14 The Guardianship List members may be full-time or sessional, and may work in other VCAT lists as well as the Guardianship List. Although many Guardianship List members are lawyers, this is not essential for most matters.¹⁹ Members receive ongoing training and professional development at VCAT and the Judicial College of Victoria.
- 21.15 Because VCAT is a tribunal rather a court, its members do not have the same tenure as judges and magistrates, and its procedures are designed to be less formal than those followed in courts. For example, VCAT is not bound by the rules of evidence.²⁰ The VCAT Act directs that hearings must be conducted with ‘as little formality and technicality’ and ‘as much speed’ as the law and a proper consideration of the matter allows.²¹ However, VCAT is bound by the rules of natural justice.²² This means that the parties must be given a fair hearing and have their case determined by an impartial decision maker.²³ VCAT’s vision is to be ‘an innovative, flexible and accountable organisation which is accessible and delivers a fair and efficient dispute resolution service’.²⁴
- 21.16 Unlike most Australian courts, VCAT seeks to operate as an ‘inquisitorial’ body that takes an active role in determining the facts of a matter before the tribunal, usually by asking questions and sometimes by directing the Public Advocate to conduct investigations.²⁵ In 2010–11, the Public Advocate conducted 563 investigations for VCAT.²⁶
- 21.17 There is no automatic right to legal representation in most guardianship matters—the consent of VCAT or all the parties is required for a person to be represented by a professional advocate at a hearing.²⁷ Interpreters are provided free of charge at VCAT hearings upon request.

Procedures in Guardianship List matters

- 21.18 Any person can apply to VCAT for a guardianship or administration order in relation to another person.²⁸ There is no application fee. In practice, most applications are made by a member of the proposed represented person’s family, or by a social worker. Applicants must fill out an application form, including contact details for the proposed represented person, any primary carer, and any known relatives and/or other interested parties.²⁹ The form must also include details of the disability of the proposed represented person, including supporting evidence such as current medical records.³⁰
- 21.19 The applicant is asked to send a copy of the completed form to the proposed represented person and all other interested persons, including any primary carer, the nearest relative and any existing or proposed guardian or administrator before lodging the form.³¹ Consequently, the applicant determines who is initially notified of an application for a guardianship or administration order.

19 *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* sch 1 cl 31(1).

20 *Ibid* s 98(1)(b).

21 *Ibid* s 98(1)(d).

22 *Ibid* ss 97, 98(1)(a).

23 Roger Douglas, *Douglas and Jones’s Administrative Law* (Federation Press, 5th ed, 2006) 480.

24 VCAT, *Annual Report 2010/11*, above n 9, 2.

25 VCAT may request investigations by the Public Advocate pursuant to *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* sch 1 cl 35.

26 Office of the Public Advocate (Victoria), *Annual Report 2010/11* (2010) 11.

27 *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* s 62.

28 *Guardianship and Administration Act 1986 (Vic)* ss 19(1), 43(1).

29 See Victorian Civil and Administrative Tribunal, *Application to Appoint an Administrator, Guardian or to Make Orders Regarding Enduring Powers of Attorney/Guardianship* (21 December 2011), 2–3 <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin-Applications-Forms++Guides?OpenDocument&1=60-Guardianship+and+Admin~&2=10-Applications~&3=10-Forms+and+Guides~>> (*‘Application to Appoint an Administrator, Guardian or to Make Orders’*).

30 *Ibid* 2.

31 *Ibid* 1.

Parties and people entitled to notice

- 21.20 The legislation distinguishes between people who are parties to proceedings and those who are entitled to notice of the proceedings. The VCAT Act and the G&A Act provide some guidance about who is to be a party in a guardianship or administration matter. Under the VCAT Act, parties include the applicant, the proposed represented person, and any person joined as a party by VCAT or specified under the G&A Act.³² The G&A Act identifies the proposed represented person and the proposed guardian or administrator as automatic parties to a proceeding.³³
- 21.21 The G&A Act also lists people who are entitled to be notified when a person has made an application for a guardianship or administration order, of the date of the hearing, and of any order made by VCAT relating to the application. These people are described as 'persons entitled to notice'.³⁴
- 21.22 People entitled to notice of an application for a guardianship order are the nearest relative (other than the applicant, or the proposed guardian or an administrator), the primary carer, the Public Advocate and any administrator appointed for the person.³⁵ People entitled to notice of an application for an administration order are the nearest relative, the primary carer, the Public Advocate, any guardian appointed, and 'any person who had advised the Tribunal of an interest in the person in respect of whom the application is made or in his or her estate'.³⁶
- 21.23 Parties to any VCAT proceedings have the right to inspect documents held by VCAT relating to a proceeding, including VCAT's register of the proceeding, free of charge.³⁷ Other people, including those entitled to notice, may inspect or obtain a copy of any part of the file or register for a prescribed fee, subject to certain conditions.³⁸

Pre-hearing procedures

- 21.24 The VCAT Registry screens applications when they are lodged. The Commission understands that the registry confirms whether appropriate medical or other expert reports have been provided and are current, follows up relevant information with the applicant and other relevant people, and ensures that appropriate arrangements are made for the hearing—for example, ensuring the location is appropriate, and that interpreters are arranged where necessary.
- 21.25 More complex matters are referred to the Public Advocate's VCAT Duty Officer for examination and advice.³⁹ The Commission understands that the VCAT Duty Officer may contact the applicant or proposed represented person to explain the hearing process or to make further enquiries. In some cases, the matter may be referred back to VCAT for priority listing. If a matter is particularly complicated, or requires in-depth investigation, the Public Advocate may conduct a formal investigation into the matter before the hearing. If a proposed represented person is unable to attend the hearing, the Public Advocate's investigation report may indicate their views about the application.

32 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 59(1)(a).

33 See *Guardianship and Administration Act 1986* (Vic) ss 19(2), 43(3), 61(4).

34 See *ibid* ss 20, 44.

35 *Guardianship and Administration Act 1986* (Vic) s 20.

36 *Ibid* s 44.

37 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 144(3) 146(2).

38 *Guardianship and Administration Act 1986* (Vic) ss 144(4), 146(3).

39 Examples of more complex matters may include applications for temporary orders, a revocation of an enduring power of attorney (financial) and appointment of administrator, 'special procedures', applications that indicate significant concerns about the person's welfare, applications where medical reports as to competence are unclear or inadequate, matters where there is uncertainty about jurisdiction, or matters where the Public Advocate has already been involved.



- 21.26 VCAT does not have an investigative arm. It relies largely on material presented to it by the applicant, or by the Public Advocate in those cases in which it is involved. Evidence usually consists of reports, which may come from medical professionals, social workers, the Public Advocate and others, as well as oral evidence from people such as the proposed represented person or members of their family.
- 21.27 VCAT is required to list guardianship and administration matters for hearing within 30 days of receiving the application.⁴⁰ More urgent matters are given priority. VCAT sends notices of hearing dates to those people who are entitled to notice under the G&A Act.⁴¹
- 21.28 One VCAT member sitting alone hears most Guardianship List cases.⁴² The Commission understands that while a typical initial guardianship or administration hearing may take somewhere between 45 and 75 minutes, more complicated matters may take several hours or, in some exceptional cases, days.
- 21.29 While it is clearly desirable that the proposed represented person is present at the hearing, this practice, which is not expressly required by the G&A Act, does not occur in many cases.⁴³ It appears that there are many reasons for non-attendance of the proposed represented person—sometimes the person may not want to attend, the person may be physically unable to attend, or attendance may be unduly distressing for the person. VCAT sometimes sits at nursing homes, hospitals or other health care settings so that the proposed represented person can attend the hearing.

Special powers in relation to a person with a disability

- 21.30 If a person who is the subject of a guardianship application is being detained unlawfully or is at serious risk of harm, VCAT may empower the Public Advocate or another person to visit the person in the presence of a police officer in order to prepare a report for VCAT.⁴⁴ Following this report, VCAT may order that the person be taken to another place until the guardianship application is heard.⁴⁵

Supervision of personal appointments

- 21.31 While personal appointments of substitute decision makers, such as ‘attorneys’ appointed under the *Instruments Act 1958* (Vic), ‘agents’ appointed under the *Medical Treatment Act 1988* (Vic) and enduring guardians appointed under the G&A Act, are not directly supervised by VCAT, it does have some powers to set aside or alter appointments that are not operating well. VCAT has the power to hear applications to revoke the appointment of an enduring guardian,⁴⁶ suspend or revoke the authority of an agent⁴⁷ and revoke, vary or suspend the power of an enduring attorney.⁴⁸

40 *Guardianship and Administration Act 1986* (Vic) ss 21, 45.

41 *Ibid* ss 20, 44.

42 Originally, the Guardianship and Administration Board sat in ‘divisions’ of three or five members; see *Guardianship and Administration Board Act 1986* (Vic) sch 2 cl 2, as repealed by *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) s 129(3)(j). Prior to the replacement of the Board with VCAT, the requirement to have either three or five members sitting on each division was replaced in 1989 by a new requirement that divisions of the Board be composed of divisions of one or three members, with the size of the division to be determined by the President: see *Guardianship and Administration Board Act 1986* (Vic) sch 2 cl 2, as amended by *Guardianship and Administration Board (Amendment) Act 1989* (Vic) s 8.

43 VCAT does not collect data in relation to the attendance of represented people at hearings: email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010. However, the Commission has been told by a number of interested groups that non-attendance is common: For eg, consultations with Villamanta Disability Rights Legal Service (19 April 2010), Mental Health Legal Centre (28 April 2011), Seniors Rights Victoria (2 May 2011), roundtable with seniors (in partnership with Council on the Ageing) (5 May 2011); Submission IP 23 (Mental Illness Fellowship Victoria).

44 *Guardianship and Administration Act 1986* (Vic) s 27(1).

45 *Ibid* ss 27(2).

46 *Ibid* s 35D(1).

47 *Medical Treatment Act 1988* (Vic) s 5C.

48 *Instruments Act 1958* (Vic) ss 125V, 125X–125ZB.

Medical treatment

- 21.32 In addition to its power to suspend or revoke the authority of a medical agent, VCAT has the power to:
- hear applications in relation to medical and dental treatment decisions for people who are unable to consent to treatment, and make orders about who should make a decision, as well as provide direction, declarations and advice around these decisions⁴⁹
 - consent to the carrying out of 'special medical procedures', which are permanent sterilisations, abortions, and donation of tissue to another person⁵⁰
 - provide advice or direction to the person responsible, either on request or upon its own motion.⁵¹
- 21.33 VCAT can hear applications and make a range of orders in relation to issues and disputes in connection with medical research procedures.⁵² We discuss medical and dental treatment for people who cannot consent in more detail in Chapter 13, and medical research procedures involving people who cannot consent in Chapter 14.

Duration of orders and rehearings

- 21.34 The G&A Act does not impose any limits on the duration of guardianship and administration orders. It is necessary, however, for VCAT to reassess an order within 12 months of first making it (unless it orders otherwise) and thereafter at least once every three years (unless it orders otherwise).⁵³ In practice, guardianship orders are usually reassessed annually and administration orders are usually reassessed every three years, but this can vary depending on the circumstances of the case.⁵⁴ When an order is reassessed, it can be continued, changed, replaced or revoked as VCAT sees fit.⁵⁵ As with previous years reassessments of administration orders account for the vast majority of hearings on the guardianship list at VCAT.⁵⁶ Data provided to the Commission by VCAT revealed there were 1103 guardianship reassessments and 5865 administration reassessments in 2009–10.⁵⁷
- 21.35 VCAT may also make a 'self-executing order', which expires after a designated period, unless an application is made to extend the order. These are more common for guardianship than administration orders.⁵⁸

49 *Guardianship and Administration Act 1986* (Vic) s 42N.

50 *Ibid* ss 3, 42E.

51 *Ibid* ss 42I, 42W.

52 *Ibid* s 42V.

53 *Ibid* s 61(1).

54 Anstat, *Victorian Civil and Administrative Tribunal: Guardianship and Administration* (pt 6–6 at September 2008) [61.01]. State Trustees reports that the vast majority of orders appointing it as administrator are made for a three-year period, and the average duration of appointments (including those currently in force) is 6.72 years: email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

55 *Guardianship and Administration Act 1986* (Vic) s 63(1).

56 Reassessment applications accounted for 71% of applications to the Guardianship List: VCAT, *Annual Report 2010/11*, above n 9, 42.

57 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.

58 Anstat, *Victorian Civil and Administrative Tribunal: Guardianship and Administration* (September 2008) pt 6–6 [61.01].

21.36 In most cases, a party to a hearing, or a person entitled to notice of a guardianship or administration application, may apply for a rehearing of an application within 28 days of the order being made.⁵⁹ At a rehearing, VCAT considers the application for guardianship or administration again, usually before a more senior member of VCAT.⁶⁰ VCAT may agree with the original decision, it may change parts of it, or it may make a different decision.⁶¹ There were 59 rehearings in 2009–10.⁶²

Appeal

21.37 A party to a guardianship or administration proceeding may appeal to the Supreme Court of Victoria against any order made by VCAT on the ground that VCAT made an error of law.⁶³ It is not possible to appeal on the ground that the decision was simply wrong and that another decision should have been made. There were 11 appeals in 2009–10.⁶⁴ Though appeals are rare, some Supreme Court judgments have played an important role in the development of guardianship laws.⁶⁵

Reasons for decisions

21.38 VCAT must give reasons for its decisions. Usually this is done orally at the hearing but VCAT must give written reasons for any order it makes (other than an interim order) if requested by a party to the hearing.⁶⁶ Very few written reasons for decisions in Guardianship List cases are published.

CONFIDENTIALITY

Information disclosed in the course of a hearing

- 21.39 While the VCAT Act provides that its hearings must be conducted in public, section 101 of the Act allows VCAT to direct that a hearing, or part of a hearing, be held in private.⁶⁷
- 21.40 Section 101 of the Act also permits VCAT to order that any information provided at a hearing must not be published except in a manner specified by the tribunal.⁶⁸ In deciding whether to prohibit the disclosure or publication of information relevant to a proceeding, VCAT must consider if it is necessary to do so 'in the interests of justice'.⁶⁹
- 21.41 The publication or broadcast of any report of a guardianship hearing that could reasonably lead to the identification of the parties is also prohibited, unless VCAT orders that it is in the public interest for this information to be reported.⁷⁰ Even if it makes such an order, VCAT must specify that no pictures be taken of any party.⁷¹

59 *Guardianship and Administration Act 1986* (Vic) s 60A. It is impossible to apply for a rehearing of an order if it was made by the President of VCAT, an interim or temporary order, or an order for a rehearing or for permission from VCAT to apply for a rehearing. A rehearing is also impossible in relation to some medical and dental treatment and medical research applications: at s 60A(1)(6).

60 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 31(3).

61 *Guardianship and Administration Act 1986* (Vic) s 60C.

62 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.

63 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.

64 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.

65 See, eg, *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006).

66 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 117. Where oral reasons are provided, a party may request written reasons from VCAT within 14 days, and VCAT ordinarily has 45 days to comply with such a request. A 'party' to a guardianship or administration proceeding includes the person about whom the application is made and the person proposed as guardian or administrator: see *Guardianship and Administration Act 1986* (Vic) ss 19(2), 43(3). It also includes the person who made the application to the tribunal, and any other person joined as a party to the proceeding by VCAT: see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 59(1)(a).

67 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 101(1)–(2). Applications for private hearings can be made by a party to the proceeding or by VCAT itself.

68 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3).

69 *Ibid* s 101(4).

70 *Ibid* sch 1 cls 37(1)–(2).

71 *Ibid* sch 1 cl 37(3).

Information kept on file at VCAT

21.42 VCAT is required to maintain a register of proceedings⁷² and keep a file of all documents lodged in a proceeding.⁷³ Parties to a proceeding may inspect the file or the part of the register that relates to the proceeding without charge.⁷⁴ Any other person may inspect or obtain a copy of any part of the file or register for a prescribed fee,⁷⁵ but subject to:

- any conditions specified in the rules⁷⁶
- any direction of the tribunal to the contrary⁷⁷
- any order of the tribunal under section 101 of the VCAT Act (which allows VCAT to order material not to be made public, as noted above)⁷⁸
- any certificate under sections 53 and 54 of the VCAT Act (relating to Cabinet documents or matters subject to Crown privilege).⁷⁹

21.43 In practice, VCAT exercises discretion in allowing or restricting access by members of the public to VCAT files, and, in doing so, considers whether the contents of the requested documents will adversely affect people's interests.⁸⁰

TRANSFORMING VCAT

21.44 In 2010, VCAT's President published a three-year strategic plan called *Transforming VCAT*.⁸¹ Reforms that sought to improve VCAT's accessibility to the Victorian community included:

- developing and improving procedures and practices for members when dealing with self-represented parties
- working with pro bono legal services to improve the delivery of these services
- regionalisation of VCAT through the establishment of metropolitan hubs, increased VCAT staffing in regional areas, and the allocation of members to key regional areas
- upgrading the VCAT website and improving the material VCAT provides to the community

72 Ibid s 144. In relation to guardianship proceedings, the register of proceedings contains the following: (a) the number identifying the proceeding; (b) the date of commencement; (c) the names of the parties; (d) if the proceeding is withdrawn, the date of the withdrawal: *Victorian Civil and Administrative Tribunal Rules 2008* (Vic) O 6 pt 5 r 6.16.

73 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146. A file of documents lodged in a proceeding must be kept for five years after the determination.

74 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 144(3), 146(2).

75 Ibid ss 144(4), 146(3).

76 Ibid ss 144(5)(a), 146(4)(a). However, the power granted to the Rules Committee of VCAT to make rules is limited to the regulation of 'practice and procedure': at s 157(1). The Supreme Court has found that rules which deny a statutory right to access files are not rules of 'practice and procedure', and are therefore beyond the power of the Rules Committee: *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* (2005) 11 VR 422, 427 (Bongiorno J). In this case, the Court found that several rules that the VCAT Rules Committee made which limited access to files were made *ultra vires* and were therefore of no effect: at 429.

77 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(4)(b). This provision only applies to gaining access to or copies of a file of documents lodged in a proceeding. In considering this provision, the Victorian Supreme Court of Appeal has upheld VCAT's power to make directions in relation to access to files. However, in doing so, VCAT is obliged to provide natural justice to the party seeking access to the file: *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2006] VSCA 7 (9 February 2006) [26]–[42] (Maxwell P, with whom Nettle JA and Eames JA agreed). The Court of Appeal stated that the content of natural justice cannot be prescribed in advance, and varies with every circumstance, however 'in the ordinary case under s 146(4)(b) ... it should be sufficient for the Tribunal to give written notice to the person seeking access that it proposed to give a contrary direction, the effect of which would be to deny access, and to invite the access-seeker to advance argument (in writing) as to why such a direction should not be made': at [41].

78 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 144(5)(b), 146(4)(c).

79 Ibid ss 144(5)(c), 146(4)(d). Section 53 provides that disclosure of information or a matter contained in a document may be certified by the Premier as being contrary to the public interest because it would involve disclosure of Cabinet deliberations. Section 54 makes provision for similar certification by the Attorney-General in relation to Crown privilege. The tribunal must ensure that information to which such a certificate applies is not disclosed to any person other than a tribunal member: at ss 53(2), 54(2).

80 Consultation with VCAT members (2 June 2010).

81 Ross, above n 5, 4.



- the use of twilight hearings, and hearings in non-traditional settings such as shopping centres and community centres
 - further consultation with culturally and linguistically diverse communities and Indigenous communities about barriers that face them at VCAT
 - recording all hearings, and providing access to transcripts for a small fee
 - a more responsive and effective complaints mechanism.⁸²
- 21.45 Some of the reforms that have been implemented that are relevant to the Guardianship List include:
- a review of all forms and notices in the Guardianship List, and the development of an information sheet to accompany hearing notices
 - the development of 'VCAT in a Box' to assist members to conduct hearings in the community
 - consultations specifically related to the Guardianship List
 - the introduction of a Fair Hearing Obligation Practice Note (discussed later in this chapter).⁸³
- 21.46 VCAT is currently considering the desirability of legislative reforms, including:
- introducing 'objects' into the VCAT Act, such as community legal education, access to justice, and applying therapeutic approaches to the administration of justice
 - allowing members to refer questions of law to VCAT's President, and allowing VCAT to deliver guideline judgments
 - the introduction of an internal appeals tribunal
 - rules requiring VCAT to ensure that all parties to a matter (including unrepresented parties) understand what is going on and are provided with assistance
 - allowing VCAT orders to be enforced without being filed in a court
 - an upgraded role for alternative dispute resolution in VCAT legislation.⁸⁴
- 21.47 Recently, VCAT has allowed Guardianship List applications to be lodged online, and has also sought to make the annual 'Account by Administrator' process more accessible by allowing administrators to complete this form online.⁸⁵
- 21.48 VCAT is also currently working to improve its alternative dispute resolution processes,⁸⁶ develop processes to better manage and assist litigants in person,⁸⁷ and build its capacity to deal with the anticipated growth in the number of guardianship and administration cases in the future.⁸⁸

82 Ibid 22–33.

83 Victorian Civil and Administrative Tribunal, *Transforming VCAT: Report Card April* (2011) 2.

84 Ross, above n 5, 50–2.

85 Victorian Civil and Administrative Tribunal, *Guardianship and Administration: Forms - Guides* (21 December 2011) <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin-Applications-Forms+-+Guides?OpenDocument&1=60-Guardianship+and+Admin~&2=10-Applications~&3=10-Forms+-+Guides->>>.

86 Victorian Civil and Administrative Tribunal, *Transforming VCAT: Promoting Excellence* (2011) 20 (*'Transforming VCAT: Promoting Excellence'*).

87 Ibid 16.

88 Ibid 28.

OTHER JURISDICTIONS

21.49 Victoria was the first Australian state to create a ‘super tribunal’, amalgamating a range of administrative and civil tribunals into the one tribunal. Since this time, Western Australia, the Australian Capital Territory and Queensland have also established ‘super tribunals’ that have jurisdiction in guardianship and administration matters.⁸⁹ South Australia, New South Wales and Tasmania still have specialist guardianship tribunals.⁹⁰ In the Northern Territory, guardianship matters are heard in the local court, which is advised by a guardianship panel.⁹¹

NEW SOUTH WALES GUARDIANSHIP TRIBUNAL

21.50 The New South Wales Guardianship Tribunal differs from the VCAT Guardianship List in a number of important ways. Some of these differences include:

- a pre-hearing investigative arm known as the ‘Case Management Unit’
- multi-member panels for initial hearings
- tribunal appointments of ‘separate representatives’ for some people
- the venues used for hearings.

Case Management Unit

21.51 The Case Management Unit (formerly known as the ‘Coordination and Investigation Unit’) assists with the preparation of Guardianship Tribunal hearings. The Unit comprises an Information Triage Team, three Application Management Teams and a Hearing Support Team.⁹²

21.52 The Information Triage Team provides information to applicants and the community, and assesses all new applications based on the immediacy and severity of risk to the person.⁹³ The Application Management teams assist the person who is the subject of the application to understand the tribunal’s procedures. They liaise with the applicant and other parties prior to the hearing, explain tribunal processes, gather information relevant to the hearing (particularly in relation to the capacity and decision-making needs of the person) and prepare a report for the tribunal.⁹⁴ In some cases, staff may also assist with the informal resolution of matters prior to hearings.⁹⁵ The Hearing Support Team liaises with tribunal members and is responsible for scheduling matters, preparing for and providing support for hearings, and distributing orders and reasons for decisions.⁹⁶ Case Management Unit staff come from a range of backgrounds, including disability advocates, lawyers, psychiatrists and social workers.⁹⁷

89 These are the State Administrative Tribunal in Western Australia, established by the *State Administrative Tribunal Act 2004* (WA); the ACT Civil and Administrative Tribunal, established by the *ACT Civil and Administrative Tribunal Act 2008* (ACT); the Queensland Civil and Administrative Tribunal, established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

90 These are the Guardianship Board of South Australia, established under the *Guardianship and Administration Act 1993* (SA) pt 2 div 1–2; the New South Wales Guardianship Tribunal, established under the *Guardianship Act 1987* (NSW) pt 6; the Guardianship and Administration Board in Tasmania, established under the *Guardianship and Administration Act 1995* (Tas) pt 6. The NSW Legislative Council Standing Committee on Law and Justice is currently undertaking an Inquiry into Opportunities to Consolidate Tribunals in New South Wales, and is due to report on 29 February 2012. One of several options identified by the Ministerial Issues Paper which accompanied the Terms of Reference of the Review is the consolidation of various NSW Tribunals—including the NSW Guardianship Tribunal—into a comprehensive ‘NCAT’ Tribunal. See NSW Minister for Finance and Services, NSW Attorney-General, NSW Minister for Fair Trading, *Issues Paper: Review of Tribunals in New South Wales* (2011) 9–10, <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/26F389FCA46D6134CA25792F007FF407?op=en&refnavid=CO3_1>.

91 *Adult Guardianship Act* (NT) ss 9, 11–12.

92 New South Wales Guardianship Tribunal, *Annual Report 2010–2011* (2011) 10 (‘NSW Guardianship Tribunal, *Annual Report 2010–11*’).

93 *Ibid*; consultation with Malcolm Schyvens—President and Esther Cho—Legal Officer, New South Wales Guardianship Tribunal (16 March 2011).

94 Consultation with New South Wales Guardianship Tribunal (24 August 2010).

95 NSW Guardianship Tribunal, *Annual Report 2010–2011*, above n 92, 10.

96 *Ibid*.

97 Consultation with New South Wales Guardianship Tribunal (24 August 2010).



Multi-member panels

21.53 A three-member panel hears all initial guardianship and financial management applications.⁹⁸ The panel comprises one legally qualified member, one professional member (such as a doctor, psychologist or social worker with experience in disability) and one community member with personal or professional experience in disability.⁹⁹ While most reviews of orders are heard before a single member, more complex reviews may be referred to a multi-member panel.¹⁰⁰

Separate representative

21.54 The leave of the tribunal is required before lawyers may appear for any of the parties in the New South Wales Guardianship Tribunal.¹⁰¹ However, the tribunal may order the appointment of a 'separate representative' for someone who is the subject of an application or review if 'it appears to the Tribunal that the person ought to be separately represented'.¹⁰²

21.55 Separate representatives are usually lawyers. Their role is not to act on the instructions of the person, but rather to seek and present the views of the person, and make representations that are in the person's best interests.¹⁰³

21.56 In 2009–10, 6.4 per cent of hearings involved legal representation and 152 separate representatives were appointed.¹⁰⁴

Hearing venues

21.57 Like VCAT, the New South Wales Guardianship Tribunal holds some hearings in suburban and regional areas outside of its main tribunal building in Sydney.¹⁰⁵ However, unlike Victoria, where hearings sometimes occur in regional court venues, the New South Wales Guardianship Tribunal does not hear cases in courtrooms.¹⁰⁶ This practice is the result of a very deliberate attempt by the Tribunal to avoid association with court processes and courtroom environments.¹⁰⁷ At times, the Tribunal uses video-link technology to conduct hearings in some regional areas.

REVIEW JURISDICTION OF NEW SOUTH WALES ADMINISTRATIVE DECISIONS TRIBUNAL

21.58 The New South Wales Administrative Decisions Tribunal (ADT) hears some guardianship cases. The ADT hears appeals from decisions made by the Guardianship Tribunal.¹⁰⁸ It also reviews decisions made by the New South Wales Public Guardian (similar to the Victorian Public Advocate) and the New South Wales Trustee and Guardian (which has a broadly similar role to State Trustees in relation to administration).¹⁰⁹ We discuss this jurisdiction in more detail in Chapter 19.

98 *Guardianship Act 1987* (NSW) s 51(1). Reviews of orders and matters relating to consent to medical treatment may be heard before one or two members: at s 51A(1).

99 *Guardianship Act 1987* (NSW) s 51(1).

100 Consultation with Malcolm Schyvens—Deputy President and Esther Cho—Legal Officer, New South Wales Guardianship Tribunal (16 March 2011).

101 *Guardianship Act 1987* (NSW) s 58(1). In 2009–10, there were 224 applications for leave for legal representation, 165 of which were granted: consultation with Malcolm Schyvens—Deputy President and Esther Cho—Legal Officer, New South Wales Guardianship Tribunal (16 March 2011).

102 *Guardianship Act 1987* (NSW) s 58(3). There is a Practice Note that deals with the circumstances in which a separate representation order might be made: New South Wales Guardianship Tribunal, *Practice Note No 1 of 2009—Legal Practitioners and Guardianship Proceedings* (2009) 6.

103 New South Wales Guardianship Tribunal, *Practice Note No 1 of 2009—Legal Practitioners and Guardianship Proceedings* (2009) 6.

104 Consultation with Malcolm Schyvens—Deputy President and Esther Cho—Legal Officer, New South Wales Guardianship Tribunal (16 March 2011).

105 However the Guardianship List in Victoria uses significantly more hearing venues than the New South Wales Guardianship Tribunal, which uses between 10–14 venues state-wide. This reflects the fact that VCAT utilises Victoria's existing regional court infrastructure to conduct hearings, whereas the New South Wales Guardianship Tribunal does not: consultation with Malcolm Schyvens—Deputy President and Esther Cho—Legal Officer, New South Wales Guardianship Tribunal (16 March 2011).

106 Consultation with Malcolm Schyvens—Deputy President and Esther Cho—Legal Officer, New South Wales Guardianship Tribunal (16 March 2011).

107 Consultation with New South Wales Guardianship Tribunal (24 August 2010).

108 *Guardianship Act 1987* (NSW) s 67A.

109 *Ibid* s 80A; *NSW Trustee and Guardian Act 1997* (NSW) s 62.

Appeal from decisions made by the New South Wales Guardianship Tribunal

- 21.59 It is possible to appeal from many decisions of the Guardianship Tribunal to the ADT. These include the making of guardianship or financial management orders, and the review of these orders.¹¹⁰ In 2010–11, there were 13 appeals lodged with the ADT from decisions of the New South Wales Guardianship Tribunal.¹¹¹ It is also possible to appeal to the Supreme Court of New South Wales from decisions of the Guardianship Tribunal as of right on questions of law, and on any other grounds with the leave of the Supreme Court.¹¹²
- 21.60 The New South Wales Guardianship Tribunal advised the Commission that it considers the ADT's capacity to review its decisions to be of great assistance to its work by providing greater focus and guidance, particularly in relation to complex issues of procedural fairness.¹¹³

COMMUNITY RESPONSES

VCAT PRE-HEARING PROCESSES

- 21.61 In the consultation paper, the Commission proposed that applications in the Guardianship List be prepared more thoroughly prior to hearing, and cited the New South Wales Guardianship Tribunal's Coordination and Investigation Unit (now known as the Case Management Unit) as an example of how this could be done.¹¹⁴
- 21.62 There was widespread support for more thorough pre-hearing preparation. The Aged Care Assessment Service (ACAS) said:
- ACAS support a comprehensive preparation of matters presenting to VCAT. Though this is resource intense, it may reduce unnecessary hearings, and support the proposed represented person in preparing for the hearing.¹¹⁵
- 21.63 There was broad support for more thorough pre-hearing processes in a number of areas, including:
- triaging of applications, including referrals to appropriate alternative dispute resolution processes where appropriate¹¹⁶
 - investigations, to avoid hearings being conducted with little information, or being adjourned in order to obtain extra information¹¹⁷
 - preparation of parties, and particularly the proposed represented person, for the hearing.¹¹⁸
- 21.64 State Trustees saw value in placing an Investigation Unit within VCAT:
- The engagement of an Investigation Unit would more often than not ensure that VCAT was better informed about those matters presented for consideration. We understand such a unit can also assist in better 'triaging' of cases, so that urgent matters are expedited. It is also arguable that a unit that is (unlike [the Public Advocate]) not a candidate for appointment under the legislation can take a more considered and objective stance on particular matters requiring VCAT's attention.¹¹⁹

110 For a full list of reviewable decisions, see *Guardianship Act 1987* (NSW) s 67A.

111 Administrative Decisions Tribunal (NSW), *Annual Report 2010/2011* (2011) 16.

112 *Guardianship Act 1987* (NSW) s 67(1). However, appeal to the New South Wales Supreme Court is not available if an appeal regarding the same decision has already been made to the Administrative Decisions Tribunal: at s 67(1A).

113 Consultation with Malcolm Schyvens—Deputy President and Esther Cho—Legal Officer, New South Wales Guardianship Tribunal (16 March 2011).

114 Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 400–1, 403–4.

115 Submission CP 57 (Aged Care Assessment Service in Victoria).

116 For eg, consultation with Women with Disabilities Victoria (11 March 2011).

117 For eg, consultation with Royal District Nursing Service (9 March 2011).

118 For eg, consultation with Mental Health Legal Centre (28 April 2011).

119 Submission CP 70 (State Trustees Limited).



PLANNING CONFERENCES

21.65 While the Commission did not have a specific proposal for planning conferences in the consultation paper, the concept was raised in the submission from Carers Victoria.¹²⁰ Carers Victoria proposed that these conferences, which they called family meetings, should be convened by a representative of the Public Advocate and should focus on a range of issues about what sorts of arrangements should be set up to assist the person with the disability in relation to their future decision making. The convenor would then submit a report of the conference's outcomes to VCAT, which could ratify them as a formal order.¹²¹

LOCATION OF HEARINGS

21.66 Some concerns were expressed about the location of hearings, particularly in regional Victoria where courthouses are often used. Some of the submissions stressed the need for more informal, user-friendly hearing locations.¹²²

PARTICIPATION AT HEARINGS

21.67 In the consultation paper the Commission sought suggestions about how to achieve better attendance of the represented (or proposed represented) person at hearings. Some of the suggestions put to the Commission included:

- Require the attendance of the represented person.¹²³
- Provide more advice and support to the person from VCAT before the hearing.¹²⁴
- Provide clearer pre-hearing information, including information about available legal assistance, in more accessible formats.¹²⁵
- Provide more mobile hearings, and use of remote technology, such as internet conferencing.¹²⁶
- Provide more flexible hearing processes and times, including after-hours hearings so that carers can attend when the person needs support to participate in the hearing.¹²⁷
- Provide more on-site hearings, particularly at residential services¹²⁸ and including in people's own homes.¹²⁹

REPRESENTATION AT HEARINGS

21.68 In the consultation paper, the Commission raised four options dealing with the issue of advocacy for the represented (or proposed represented) person at hearings. They were:

- Provide all proposed represented persons with information and referrals around advocacy service before hearings.
- Amend section 62 of the VCAT Act to give a represented person or a proposed represented person a right to legal representation in all Guardianship List matters.

¹²⁰ Submission CP 59 (Carers Victoria).

¹²¹ Ibid.

¹²² For eg, roundtable with service providers (in partnership with National Disability Services (Victoria)) (28 March 2011) and Gippsland Carers Association (19 April 2011).

¹²³ Submission CP 56 (Disability Discrimination Legal Service).

¹²⁴ Submission CP 19 (Office of the Public Advocate) and CP 45 (Scope Vic).

¹²⁵ Submission CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria).

¹²⁶ Submission CP 22 (Alzheimer's Australia Vic).

¹²⁷ Submission CP 24 (Autism Victoria).

¹²⁸ Submission CP 33 (Eastern Health) and CP 70 (State Trustees Limited).

¹²⁹ Submission CP 57 (Aged Care Assessment Service in Victoria).

- Create a statutory power for VCAT to order that a person be provided with representation when VCAT believes this step is necessary.
- Establish a network of community volunteers to provide assistance at hearings.

21.69 The Public Advocate suggested that the first three options be combined:

Proposed represented people currently receive insufficient independent legal assistance and advocacy support. Combining Options A, B and C in this section of the Consultation Paper would provide the best remedy.¹³⁰

21.70 Others supported the proposal for a network of volunteer advocates, but stressed the importance of this assistance being provided by people who understand the disabilities of the people they are supporting:

Establish[ing] a network of community volunteers to provide assistance at VCAT hearings is good in principle however again these volunteers need to be well trained in understanding and communicating with people who have a neurological disability such as autism so the system proposed is effective. Otherwise there will still remain ‘gaps in service’ for people with this disability.¹³¹

21.71 Victoria Legal Aid expressed concerns about volunteer advocates, with particular reservations about the quality and consistency of the advocacy that would be provided.¹³²

21.72 VCAT supported a clearer right to legal representation for proposed represented persons at hearings, and noted that the VCAT Act already allows this, from a professional advocate, in relation to some hearings before the Residential Tenancies List.¹³³ VCAT also noted that while it has the power under section 62(6) of the VCAT Act to order that a person be legally represented, it is not funded to provide such legal services.¹³⁴

ENFORCEMENT OF ORDERS

21.73 Guardians and administrators informed the Commission that third parties sometimes fail to recognise and implement decisions.¹³⁵ The Public Advocate supported VCAT having the power to issue an enforcement order in these circumstances:

Guardians sometimes have difficulty in getting third parties to accept their decision-making authority. Allowing guardians and administrators to apply to VCAT for an order that a third party comply with their decision—with the third party being given notice of the enforcement application and an opportunity to be heard—would enhance the ability of guardians and administrators to enforce their decisions (as well as allowing a review of any objections). The enforcement order would only be available following an application to VCAT.¹³⁶

21.74 State Trustees also indicated that this can be an important issue for administrators:

State Trustees’ efforts to investigate and resolve complex issues can often be frustrated by non-compliance with requests for information from third parties. Sometimes the non-compliance is merely an agency’s restrictive interpretation of privacy legislation, but more often it is evidence of a third party’s perception that an administration order has no real ‘weight’ and that non-compliance does not attract any sanction.¹³⁷

130 Submission CP 19 (Office of the Public Advocate).

131 Submission CP 24 (Autism Victoria).

132 Submission CP 73 (Victoria Legal Aid).

133 Submission CP 80 (Victorian Civil and Administrative Tribunal).

134 Ibid.

135 For eg, roundtable with metropolitan carers (24 March 2011).

136 Submission CP 19 (Office of the Public Advocate).

137 Submission CP 70 (State Trustees Limited).



- 21.75 It was also argued, however, that such enforcement orders should not compel a third party to do anything that the represented person themselves would not be able to compel them to do.¹³⁸
- 21.76 Notwithstanding the benefits of allowing VCAT to issue enforcement orders, it was also noted that, wherever possible, alternative dispute resolution processes should be attempted first.¹³⁹
- 21.77 VCAT suggested that there are already avenues for enforcement of the decisions of guardians and administrators, and that a civil penalty regime would be inappropriate.¹⁴⁰

MULTI-MEMBER PANELS

- 21.78 There was a range of responses to the issue of whether multi-member panels should become standard practice for Guardianship List hearings.
- 21.79 Some respondents noted the potential of multi-member panels to give better decisions,¹⁴¹ while others noted that a larger panel can be intimidating.¹⁴²
- 21.80 ACAS supported multi-member panels:
- Multi member panels should be a standard practice especially for initial guardianship applications. Panels that have legal, professional and community representation may also improve the interface between VCAT and the community.¹⁴³
- 21.81 Autism Victoria suggested that the skills and training of VCAT members was the most important issue:
- Rather than going to the cost of multi-member panels it may be more cost effective to have individuals processing applications who specialise in a particular type of disability or be well trained in particularities of dementia, most common mental illnesses (schizophrenia etc), acquired brain injury, mild to severe autism, physical disability impacting communication of wishes of some people with Cerebral Palsy and such. Mental Illness disorders are often subject to fluctuating levels of capacity to make decisions so VCAT staff would really need to be well trained to understand such disorders and the implication of such on decision making capacity.¹⁴⁴
- 21.82 The Victorian Coalition of ABI Service Providers made a similar point in its submission.¹⁴⁵

REVIEW OF ORDERS

- 21.83 There was support for the Commission's proposal that a represented person should be required to opt out of, rather than opt into, a reassessment of a guardianship or administration order,¹⁴⁶ although State Trustees expressed some concern about the possible resourcing implications for VCAT.¹⁴⁷
- 21.84 There was also support for easier access to unscheduled reassessments (or reviews) for represented persons. Victoria Legal Aid noted:

¹³⁸ Submission CP 47 (Dr Michael Murray).

¹³⁹ Submissions CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

¹⁴⁰ Submission CP 80 (Victorian Civil and Administrative Tribunal).

¹⁴¹ Consultation with College of Clinical Neuropsychologists of the Australian Psychological Society (Victoria) (23 March 2011).

¹⁴² Consultation with John Billings (23 February 2011); Submission CP 45 (Scope Vic).

¹⁴³ Submission CP 57 (Aged Care Assessment Service in Victoria).

¹⁴⁴ Submission CP 24 (Autism Victoria).

¹⁴⁵ Submission CP 46 (Victorian Coalition of ABI Service Providers).

¹⁴⁶ For eg, Submissions CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

¹⁴⁷ Submission CP 70 (State Trustees Limited).

VLA believes that a represented person should be entitled to return to VCAT for reassessment of the order at any time during the operation of the order. Under the Mental Health Act, a person subject to an involuntary treatment order can appeal to the Mental Health Review Board for a review of the order at any time and without limit. VLA believes this approach should apply in relation to both guardianship and administration orders as it is a fundamental right to be able to seek review of orders that affect such key human rights as the ability to manage your own finances and make decisions about your lifestyle or medical treatment.¹⁴⁸

- 21.85 VCAT referred to the resource implications of having an ‘opt out’ rather than an ‘opt in’ approach to review hearings:

A large proportion of persons subject to orders are unable to participate in hearings in a meaningful way. The resource implications for VCAT holding hearings that are unattended are great. Were we funded to do so, our preference would be that one should have to opt out of a hearing and we should then endeavour to meet each person face to face. The ability to do this will be dependent on adequate resourcing.¹⁴⁹

REHEARINGS OF VCAT ORDERS

- 21.86 Most submissions supported the proposal to extend the period within which a rehearing can be sought after a Guardianship List order is made. For example, the PILCH Homeless Persons’ Legal Clinic suggested that:

the period in which an application for a rehearing can be made be extended beyond the current 28 day limit (to 60 days), and that VCAT should be required to inform parties of the right to seek a rehearing. VCAT should also be required to inform the person of the timeframe for applying for a rehearing and to provide them with a list of services that can provide relevant legal or non-legal support or advice.¹⁵⁰

- 21.87 VCAT submitted that the rehearing provisions in the G&A Act are unnecessary because section 120 of the VCAT Act allows for a rehearing in some instances and section 61 of the G&A Act allows for reassessment of an order at any time.¹⁵¹

CONFIDENTIALITY ISSUES

Material presented to VCAT for use in a hearing

- 21.88 Many people raised concerns about the difficulty of balancing competing interests when dealing with access to confidential information before, during and after VCAT hearings.
- 21.89 The New South Wales Guardianship Tribunal submitted that ‘procedural fairness is a right which should be afforded to all parties before a guardianship tribunal and this should include disclosure of documents being considered by the tribunal’.¹⁵² Others supported this view, arguing that transparency is of ‘paramount importance’,¹⁵³ particularly because the right to a fair hearing includes being able to respond to material presented to VCAT.¹⁵⁴

148 Submission CP 73 (Victoria Legal Aid).

149 Submission CP 80 (Victorian Civil and Administrative Tribunal).

150 Submission CP 74 (PILCH Homeless Persons’ Legal Clinic).

151 Submission CP 80 (Victorian Civil and Administrative Tribunal).

152 Submission IP 32 (NSW Guardianship Tribunal).

153 Submission IP 43 (Victoria Legal Aid).

154 Ibid. See also Submissions IP 5 (Southwest Advocacy Association) and IP 47 (Law Institute of Victoria). The right to a fair hearing is outlined in s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).



21.90 Some submissions expressed concerns about the extent of the disclosure of confidential information.¹⁵⁵ It was noted that people have a right to maintain the confidentiality of some information about them.¹⁵⁶ For example, the Disability Advocacy Resource Unit stated it was sometimes important for advocates to be able to provide information to VCAT on a confidential basis.¹⁵⁷ The Law Institute of Victoria said there may be cases where a person could fear reprisals if the information they give to VCAT is disclosed.¹⁵⁸ The Mental Health Legal Centre argued that any restrictions on procedural fairness should ‘only be imposed where reasonable, justified, proportionate and necessary, in accordance with article 7 of the Victorian Charter of Human Rights and Responsibilities’.¹⁵⁹

Closing guardianship matters to the public

21.91 In the consultation paper the Commission suggested that Guardianship List hearings could be closed to the public unless VCAT determines otherwise. The Commission also suggested that the right to inspect or obtain copies of files could be limited to the parties to a proceeding, with VCAT being permitted to limit a party’s access to materials in exceptional circumstances.

21.92 There was strong support for the suggestion that VCAT Guardianship List files be closed to the public unless VCAT determines otherwise.¹⁶⁰ VCAT supported legislative change. It stated that the current regime ‘fails to take account of the very sensitive personal nature of the material on the files of very vulnerable people’.¹⁶¹ VCAT was of the view that files should be closed with a right of access to ‘limited persons such as the applicant and represented or proposed represented party or their legal representatives and a right to others to apply for leave to inspect’.

21.93 State Trustees noted that closing the files is necessary due to the ‘very personal and private dimension of the matters heard by the Tribunal’.¹⁶² The Public Advocate had a similar view and suggested a series of considerations to be included in new legislation to assist VCAT members in making decisions about disclosure. Such considerations included the need:

- for transparency in tribunal hearings
- for fairness in allowing individuals to rebut allegations against them
- to protect reputations and to protect information relating to personal affairs
- to protect the confidentiality under which information may originally have been supplied
- not to cause serious harm to any person’s safety or health
- not to damage the personal relationships of represented persons/proposed represented persons.¹⁶³

¹⁵⁵ For example, Alfred Health raised concerns about one case in particular where material was released to everyone at the hearing, including a neighbour who had behaved in an aggressive manner towards hospital staff: Submission IP 26 (The Alfred).

¹⁵⁶ Consultation with Fiona Smith (18 March 2010); Submissions IP 5 (Southwest Advocacy Association), IP 32 (NSW Guardianship Tribunal) and IP 50 (Action for Community Living).

¹⁵⁷ Consultation with Disability Advocacy Resource Unit (5 May 2010).

¹⁵⁸ Submission IP 47 (Law Institute of Victoria).

¹⁵⁹ Submission IP 58 (Mental Health Legal Centre).

¹⁶⁰ For eg, consultation with metropolitan carers (in partnership with Carers Victoria) (24 March 2011); Submission CP 19 (Office of the Public Advocate), CP 22 (Alzheimer’s Australia Vic), Submission CP 24 (Autism Victoria), CP 27 (Catholic Archdiocese of Melbourne), CP 33 (Eastern health), CP 59 (Carers Victoria), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria), CP 75 (Federation of Community Legal Centres (Victoria)), CP 78 (Mental Health Legal Centre) and CP 80 (Victorian Civil and Administrative Tribunal).

¹⁶¹ Submission CP 80 (Victorian Civil and Administrative Tribunal).

¹⁶² Submission CP 70 (State Trustees Limited).

¹⁶³ Submissions IP 8 (Office of the Public Advocate) and CP 19 (Office of the Public Advocate).

Parties' access to confidential information

- 21.94 In the consultation paper, the Commission asked whether VCAT should be required to advise a person who provides them with confidential information, such as a medical report, that this material may be made available to the parties in a Guardianship List matter. There was widespread support for this proposal.¹⁶⁴ State Trustees and the Public Advocate noted that many people provide material to VCAT without considering whether other people might have access to that information.¹⁶⁵
- 21.95 Some organisations suggested that VCAT should retain some discretion about whether parties to a proceeding should be given access to all of the materials on a file.¹⁶⁶ Many organisations referred to the principles of procedural fairness, which provide that a person is entitled to know what is being said about them when their rights or interests may be affected by a decision.¹⁶⁷ There was widespread support for the suggestion that a person who wishes the information they provide to VCAT to be withheld from other parties should provide a justification for this request.¹⁶⁸

RIGHT TO A FAIR HEARING

Charter of Human Rights and Responsibilities Act 2006 (Vic)

- 21.96 Section 24 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Charter) provides that parties to civil proceedings (such as guardianship matters) have the right to have the proceeding decided by a 'competent, independent and impartial court or tribunal after a fair and public hearing'.¹⁶⁹ The Charter's fair hearing right is similar to VCAT's natural justice (or procedural fairness) obligations under both section 98(1)(a) of the VCAT Act and at common law.

VCAT Fair Hearing Practice Note

- 21.97 VCAT has recently released a Practice Note,¹⁷⁰ providing procedural guidance in relation to its fair hearing obligation under the Charter¹⁷¹ and the VCAT Act.¹⁷² This Practice Note outlines the obligations of members to:
- identify the difficulties experienced by any party, whether due to a lack of representation, literacy difficulties, ethnic origin, religion, disability or any other cause, and find ways to overcome those difficulties
 - in some cases intervene in proceedings to clarify uncertainty, identify relevant issues, ensure hearings are conducted efficiently and cost-effectively, ask questions to elicit relevant information and deal with inappropriate behaviour

164 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 33 (Eastern Health), CP 59 (Carers Victoria), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid) and CP 75 (Federation of Community Legal Centres (Victoria)).

165 Submissions CP 19 (Office of the Public Advocate) and CP 70 (State Trustees Limited).

166 Submissions CP 70 (State Trustees Limited), CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria).

167 For eg, Submission CP 22 (Alzheimer's Australia Vic), CP 73 (Victoria Legal Aid), CP 75 (Federation of Community Legal Centres (Victoria)), CP 78 (Mental Health Legal Centre) and CP 81 (The Elder Law and Succession Committee, Law Society of NSW).

168 For eg, Submission CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 59 (Carers Victoria), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 78 (Mental Health Legal Centre).

169 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 24(1). This right has been found to apply to civil matters that are both 'judicial' and 'administrative' in character, and VCAT has been found to be a 'competent independent and impartial tribunal': see *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [418], [447].

170 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 3 (Fair Hearing Obligation)* (1 October 2010) ('Practice Note PNVCAT 3').

171 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 24(1).

172 See *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* ss 97–102.



- depending on the circumstances, assist parties to ensure they are provided with a fair hearing—including through explaining the relevant law, identifying key issues, asking questions to elicit relevant information, and drawing attention to the difference between unsworn and sworn evidence—and adjourn hearings in circumstances where it would be unfair to proceed
- take particular responsibility when dealing with self-represented litigants to ensure they receive a fair hearing, especially in matters such as those in the Guardianship List, where a person’s freedom and autonomy is at stake.¹⁷³

21.98 The Practice Note makes it clear that when dealing with self-represented parties, the member cannot become an advocate for the party, and must balance the need to enable parties to participate fully with the need to preserve VCAT’s impartiality.¹⁷⁴

21.99 The Practice Note also outlines the obligations of parties and their representatives in hearings, including requirements to act courteously, honestly, cooperatively and promptly, minimise costs, and to use reasonable endeavours to resolve disputes where engaged in alternative dispute resolution.¹⁷⁵

International approaches to guardianship hearings

21.100 The Australian model of having a tribunal determine whether a person needs assistance with decision making is unusual. In comparable jurisdictions such as England, New Zealand, Canada and the United States, guardianship proceedings are conducted in courts. Though these courts often have specialist expertise,¹⁷⁶ they are unable to offer the accessibility and informality of Australia’s tribunal approach to guardianship matters. The Commission did not receive any suggestions about moving away from a tribunal-based approach to guardianship law matters.

THE COMMISSION’S VIEWS AND CONCLUSIONS

THE IMPORTANCE OF INFORMALITY AND ACCESSIBILITY

21.101 VCAT describes its purpose as being ‘to provide Victorians with a low cost, accessible, efficient and independent tribunal delivering high quality dispute resolution’.¹⁷⁷ VCAT is directed by its governing legislation to:

conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.¹⁷⁸

21.102 It is difficult to implement these aspirations in a tribunal that is bound by the rules of natural justice when it is dealing with issues in Guardianship List matters that ‘go to the heart of an individual’s human rights—to their autonomy and capacity to manage their lives’.¹⁷⁹

21.103 The issues faced by VCAT when conducting Guardianship List matters are particularly challenging because most cases do not fall within VCAT’s own description of its vision and purpose. When conducting a hearing to decide whether to appoint a guardian or administrator for a person, VCAT is not usually required to provide an ‘efficient dispute resolution service’ because there is no dispute between litigants to resolve.

¹⁷³ Practice Note PNVCAT 3, above n 170, 3–4.

¹⁷⁴ Ibid 4.

¹⁷⁵ Ibid 5.

¹⁷⁶ In England, for example, guardianship hearings are conducted in the ‘Court of Protection’. In New Zealand guardianship hearings are conducted in the Family Court of New Zealand.

¹⁷⁷ VCAT, *Annual Report 2010/11*, above n 9, 2.

¹⁷⁸ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d).

¹⁷⁹ Ross, above n 5, 13.

21.104 VCAT is being asked to act as the representative of the state in deciding whether a person is unable to make their own decisions because of a disability and whether another person should be appointed to make those decisions for them. This task is not well served by employing traditional—or even more modern—‘dispute resolution’ processes. The Commission believes that this task would be better served by acknowledging the unique nature of Guardianship List matters and by designing special processes for use in these cases that are as informal and accessible as possible.

21.105 While Australia’s tribunal-based approach to guardianship has been one of its strongest features and should continue,¹⁸⁰ it requires ongoing development, particularly during an era when guardianship matters will continue to be determined in Victoria by a ‘one stop shop’ tribunal¹⁸¹ with an understandable preference for efficiency in its various lists. As VCAT’s President recently wrote:

While a degree of structure and formality is required in all hearings we should repeatedly ask ourselves whether the needs of the Tribunal are taking priority over the needs of the people who appear before us.¹⁸²

21.106 While the Commission believes that VCAT should continue to exercise exclusive jurisdiction in statutory guardianship matters, we encourage VCAT to be innovative in confronting the challenges posed by the fact that most Guardianship List cases do not sit comfortably within a body that sees itself as providing a ‘dispute resolution service’.¹⁸³

RECOMMENDATION

VCAT’s jurisdiction

347. VCAT should continue to have exclusive jurisdiction in relation to the following matters:

- (a) hearing applications for the appointment of a personal guardian and a financial administrator
- (b) reassessing personal guardianship orders and financial administration orders
- (c) providing advice, either upon request or on its own motion in the course of any proceeding, to personal guardians and financial administrators and enduring appointees and health decision makers about how they should exercise their powers
- (d) revoking personal appointments of substitute decision makers
- (e) deciding whether to consent to a ‘special procedure’ in relation to medical treatment.

VCAT PRE-HEARING PROCESSES

21.107 As noted earlier in this chapter, many people feel that better pre-hearing processes could significantly enhance their experience of the Guardianship List at VCAT.

21.108 The Commission believes that the following pre-hearing processes would be beneficial:

- careful coordination and management of matters (triaging), including diversion to alternative processes such as mediation and family conferences

¹⁸⁰ Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 19–17.

¹⁸¹ This is how VCAT describes itself in its Annual Report: VCAT, *Annual Report 2010/11*, above n 9, 2.

¹⁸² Ross, above n 5, 12.

¹⁸³ VCAT, *Annual Report 2010/11*, above n 9, 2.



- early collection of relevant information to enable the tribunal to make decisions without needing to adjourn the hearing
- improved notification to parties of the details of the hearing, particularly to the proposed represented person, including information about what the hearing is about, what it will involve, what its possible outcomes may be, and the person's rights, including their right to advice and advocacy.

21.109 The Commission recognises that the VCAT registry already seeks to perform these functions, but as VCAT has itself acknowledged, it could do more if provided with additional resources.¹⁸⁴

21.110 The Commission believes that VCAT should be appropriately funded to undertake the following activities in Guardianship List matters:

- a thorough examination of the application to ensure that it is supported by material the tribunal needs to decide the matter
- an analysis of the application to determine whether it should proceed directly to hearing or be referred to an alternative process
- liaison with the parties, particularly the applicant and the proposed represented person, to ensure that they are properly prepared for the hearing or for any alternative processes that are recommended.

RECOMMENDATION

VCAT pre-hearing processes

348. VCAT's role in the preparation of Guardianship List matters should be expanded to ensure that in all cases:

- matters are properly prioritised, and urgent matters are dealt with as quickly as possible
- the appropriate mechanism for dealing with the matter is chosen
- the person who is the subject of the application is able to participate in the hearing process to the extent that they are able and wish to do so, and has access to independent advocacy where needed
- all parties are adequately informed of the nature and possible outcomes of VCAT hearings
- VCAT has adequate information upon which to base its decisions.

Notification of proceedings

21.111 Currently, the applicant advises other interested people of an application for orders under the G&A Act.¹⁸⁵ This raises a number of issues. First, the applicant, not VCAT, is responsible for determining who is an 'interested person' for the purposes of the application. Secondly, sending the completed form to all people whom the applicant considers 'interested people' may unnecessarily disclose personal information about the proposed represented person, as an application form may contain personal matters such as medical and financial information.

¹⁸⁴ Submission CP 80 (Victorian Civil and Administrative Tribunal).

¹⁸⁵ *Application to Appoint an Administrator, Guardian or to Make Orders*, above n 29, 1.

- 21.112 The Commission believes that the application form should first go to VCAT only to ensure the confidentiality of any personal information. Once the VCAT registry has received an application form, the registrar should make a preliminary determination of parties to the proceeding and people entitled to notice based on the information provided in the application. This level of involvement by the tribunal is appropriate in Guardianship List proceedings, which are far removed from traditional civil litigation where the plaintiff, or other moving party, is required to notify the other parties of the proceedings and provide them with information about the claims made and the outcomes sought in the case.
- 21.113 VCAT should be responsible for identifying and notifying parties and other people entitled to notice of an impending Guardianship List proceeding. This step could be taken by providing these people with a notice of the application and the hearing date, together with advice about how they can seek access to further information about the case.

RECOMMENDATIONS

Notification of VCAT proceedings

349. New guardianship legislation should provide that any person applying for a personal guardianship or financial administration order should be required to provide VCAT with details of any other people with a direct interest in the outcome of the application, such as family members and primary carers.
350. VCAT should make a preliminary determination of potential parties to the proceeding and people entitled to notice based on information provided in the application, and provide notice of the application to these people.
351. Notification to the parties should include:
- (a) the application and copies of any information filed in support unless disclosure of this information is or might be resisted on grounds of confidentiality
 - (b) a list of the other parties and people entitled to notice
 - (c) the hearing date
 - (d) their relevant rights.
352. Notification to people entitled to notice should include:
- (a) the application
 - (b) a list of the other parties and people entitled to notice
 - (c) the hearing date
 - (d) their rights, including the procedure for applying to VCAT to be made a party in the proceedings.

Parties and people entitled to notice

- 21.114 The parties to a guardianship proceeding should include the applicant, or the person who requested the review, the proposed or current represented person, the substitute decision maker and co-decision maker or supporter,¹⁸⁶ as well as any other person VCAT considers should be a party to the proceeding.

¹⁸⁶ To the extent that their role is relevant to the proceeding.



21.115 It is also important that other people with an interest in a matter, such as the domestic partner of the proposed represented person, be notified of impending proceedings and advised of their right to apply to VCAT to become a party.

RECOMMENDATIONS

Parties to proceedings

353. Under new guardianship legislation, the following people should be parties to any proceeding before VCAT concerning an application to make or review an order:

- (a) the applicant or the person who requested the review
- (b) the proposed or current represented person
- (c) the proposed or current substitute decision maker
- (d) the proposed or current co-decision maker or supporter, to the extent that their role is relevant to the proceeding
- (e) any other person who VCAT considers should be a party to the proceeding
- (f) any other person who VCAT considers has a sufficient interest in the matter.

People entitled to notice

354. The following people are entitled to notice of the date upon which an application or review will be heard:

- (a) all parties in the proceeding
- (b) the domestic partner of the proposed represented person, if in a close and continuing relationship
- (c) the primary carer of the proposed represented person
- (d) the nearest relative (other than the applicant, or the proposed substitute decision maker) if known
- (e) a co-decision maker or supporter if not a party
- (f) the Public Advocate.

Involving the parties

21.116 Ensuring that parties receive appropriate information about the hearing is an important part of the pre-hearing process, particularly in those cases where there is conflict between people.

21.117 The Commission believes that the work of the New South Wales Guardianship Tribunal's Case Management Unit is particularly impressive and should be studied closely by VCAT in order to ensure that Victorians receive as much assistance in preparing for Guardianship List hearings as people involved in similar cases in New South Wales.

RECOMMENDATIONS

Informing parties about the hearing

355. VCAT should have primary responsibility for notifying all parties of the application and the hearing date, including taking steps to ensure that the parties understand what the hearing is about, and what to expect on the day of the hearing, with a particular emphasis on ensuring that the proposed represented person is made aware of:

- (a) the scheduled time and place of the hearing
- (b) what the hearing involves
- (c) their rights in relation to that hearing, including their right to actively participate
- (d) the potential outcomes of the hearing
- (e) their options in relation to obtaining independent advice and advocacy.

356. VCAT should also seek to maximise opportunities for the proposed represented person's participation in the hearing to the extent they are able to and wish to do so.

Ensuring adequate information is included with the application

21.118 One of the most important tasks undertaken by the New South Wales Guardianship Tribunal's Case Management Unit is ensuring that the tribunal has sufficient information to determine an application without adjourning for further evidence. While the Public Advocate sometimes fulfils this task in complex cases, it is not routine. The Commission believes that much more could be done to provide VCAT with the information necessary to deal with Guardianship List matters.

RECOMMENDATIONS

Gathering information about the application

357. VCAT should ensure that adequate information is available to members to conduct a hearing, including relevant medical or other opinion in relation to the person's capacity and personal or financial circumstances.

358. Where the application appears to involve particularly complex matters, VCAT should refer the application to the Public Advocate for investigation.

Triaging

21.119 There was broad support for the Commission's proposal that there be more active triaging of applications before they are listed for hearing by VCAT. This practice will become even more important in the future if the Commission's recommendations for greater use of alternative mechanisms such as mediation, family conferencing and planning conferences are implemented.

21.120 The Commission proposes a stronger triaging role for VCAT registry staff, which involves a thorough assessment of an application before allocating it to one of a number of channels, including:

- urgent hearing by VCAT
- normal VCAT hearing

- further information gathering by the registry
- independent investigation by the Public Advocate
- alternative dispute resolution
- planning conference.

Disputes about services provided under the *Disability Act 2006* (Vic)

21.121 The Disability Services Commissioner has a statutory function in relation to handling complaints about services provided under the Disability Act.

21.122 Where guardianship applications arise because of disputes between carers and services providers under the Disability Act, the Commission believes that VCAT should consider referring matters of this nature to the Disability Services Commissioner for possible mediation before appointing a substitute decision maker. The Commission proposes that protocols be developed between VCAT and the Disability Services Commissioner to facilitate appropriate referrals between the two bodies.

RECOMMENDATIONS

Triaging

359. When processing an application, VCAT should seek to identify matters that:

- (a) are urgent, and in need of a hearing immediately
- (b) are relatively clear and unproblematic, and can proceed quickly to hearing with little or no further preparation by VCAT
- (c) are more complex and require further preparatory work to be undertaken by VCAT before proceeding to hearing
- (d) are more complex and need to be referred to the Public Advocate for independent investigation
- (e) involve conflict that might be resolvable if the matter was diverted to appropriate dispute resolution processes
- (f) would be more appropriately dealt with by consent at a planning conference.

Disputes in relation to services

360. VCAT should develop protocols with the Disability Services Commissioner to allow applications involving disputes about the provision of disability services to be diverted to the Disability Services Commissioner complaints processes, with the consent of the parties.

PLANNING CONFERENCES

21.123 Because most Guardianship List matters are not traditional civil disputes, the Commission believes that it is desirable to develop new informal mechanisms for dealing with some of these cases. One of these mechanisms is a planning conference.

21.124 We note that VCAT already adopts a number of informal mechanisms (including in the Guardianship List) and that these processes will likely form a considerable part of their future approach to resolving matters.¹⁸⁷ VCAT is training more members to conduct mediation, rolling out several initiatives, such as telephone mediation, and 'supporting Members to deliver "settlement talks" before hearing matters not subject to formal

¹⁸⁷ VCAT, *Annual Report 2010/2011*, above n 9, 20. See also the discussion of ADR in Ross, above n 5. In 2009, former President Justice Bell recommended that the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) be amended to afford greater prominence to ADR: at 85–7.

ADR processes'.¹⁸⁸ While VCAT members use mediation in the context of anticipated disputes, the skills members require to conduct it are relevant to employing other informal mechanisms where there is no dispute, such as the concept of a planning conference.

- 21.125 The planning conference recommended by the Commission is a modified version of a proposal devised by Carers Victoria.¹⁸⁹ This would be an informal meeting attended by the proposed represented person, members of their family and, often, carers and close friends. A member of VCAT staff would convene the meeting, sometimes in a residential facility or at the proposed represented person's home. In broad terms, these conferences would resemble family group conferences, which are becoming increasingly important in child protection matters.¹⁹⁰
- 21.126 A primary objective of the planning conference would be to see whether it is possible to achieve consensus about the assisted decision-making needs of the proposed represented person. If consensus is achieved, the outcomes of the conference could be presented to a member of the Guardianship List who could either decide to adopt the planning conference's recommendations without hearing and make the appropriate orders, or proceed to a hearing.
- 21.127 A planning conference should be conducted with the consent of the parties where VCAT believes that it would be a productive means of exploring the issues relevant to the application. In general, a planning conference is appropriate when:
- it seems likely that there will be broad consensus among the parties about the main issues that need to be considered
 - those involved could benefit from an informal exploration of possible outcomes.
- 21.128 The Commission suggests that planning conferences are likely to be a particularly suitable means of exploring issues where carers who are currently playing an informal substitute decision-making role are applying to have their role recognised formally because of future need.¹⁹¹

RECOMMENDATIONS

Planning conferences

361. New guardianship legislation should provide for an appropriate member of VCAT staff to convene a planning conference in relation to any application to VCAT for the appointment of a decision-making supporter, a co-decision maker, a personal guardian or a financial administrator.
362. A planning conference may be convened by VCAT on its own motion or at the request of the applicant or other interested person at any time prior to making orders disposing of an application.
363. The aim of a planning conference should be to ascertain whether it is possible to reach a consensus among all interested people about an outcome to the application that would best promote the personal and social wellbeing of the proposed represented person.

¹⁸⁸ VCAT, *Annual Report 2010/2011*, above n 9, 20.

¹⁸⁹ Submission CP 59 (Carers Victoria).

¹⁹⁰ The Commission considered family group conferences at length in a recent report: Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Final Report No 17 (2010) 236–267.

¹⁹¹ These recommendations are discussed in Chapter 12.



364. The planning conference should be attended by the proposed represented person and close family members, carers, friends or advocates who have a genuine interest in the represented person's personal and social wellbeing.
365. The planning conference should be held at a place and conducted in a manner that will enable the parties, particularly the proposed represented person, to participate and identify the outcome that will best promote the personal and social wellbeing of the proposed represented person.
366. The person who convenes should prepare a report for VCAT that identifies the major issues involved in the application and the consensus view (if any) that was reached regarding the preferred outcome of the application.
367. Upon receipt of the report, VCAT may:
- (a) make the orders sought by the people present at the planning conference, or
 - (b) proceed to determine the application following a hearing.

LOCATION AND TIMING OF HEARINGS

- 21.129 Many people expressed concerns to the Commission about the places in which VCAT holds Guardianship List hearings, particularly suburban and regional courthouses.
- 21.130 While court-like rooms might be appropriate venues within which to determine many civil and administrative disputes, they do not encourage the informality and accessibility required in most Guardianship List matters. The Commission notes the practice of the New South Wales Guardianship Tribunal in choosing not to conduct proceedings in court-like rooms other than in exceptional circumstances.
- 21.131 The Commission encourages VCAT to take further steps to conduct Guardianship List hearings in suitable rooms at its city premises and in suburban and regional locations. The Commission notes that VCAT is now making more use of hospitals and nursing homes as venues for hearings and supports the continuation of this practice.
- 21.132 The G&A Act requires VCAT to commence hearing a guardianship or an administration application within 30 days after the application is received at the tribunal. While there is great merit in requiring applications to be heard quickly, the Commission believes that VCAT should be given some flexibility about timing, because some Guardianship List matters should be referred to planning conferences while others would benefit from greater use of mediation and other similar mechanisms for seeking agreed outcomes.

RECOMMENDATIONS

Location of hearings

368. VCAT should continue to conduct Guardianship List hearings in appropriate settings other than courtrooms wherever possible.

Date of hearing

369. New guardianship legislation should continue to require VCAT to commence hearing a guardianship or an administration application within 30 days after the application is received at the tribunal, unless VCAT refers the application to a planning conference, mediation or some other mechanism for seeking an agreed outcome.

PARTICIPATION AT HEARINGS

- 21.133 There is widespread concern about the number of hearings that VCAT conducts without the proposed represented person being present.¹⁹²
- 21.134 While the Commission acknowledges the challenges associated with conducting hearings in the presence of a person with impaired capacity in some circumstances—such as when dealing with a person who is bedridden, or who is distressed or agitated—the Commission believes there should be a statutory presumption that all initial Guardianship List applications be heard in the presence of the proposed represented person. A presumption of this nature is appropriate because, as the President of VCAT has pointed out, Guardianship List hearings ‘go to the heart of an individual’s human rights’.¹⁹³ The Commission believes that legislation should declare that the represented person have the opportunity to be present when a decision will be made about their capacity to make their own personal or financial decisions.
- 21.135 It should be possible, however, for VCAT to depart from this presumption in cases where the presence of the proposed represented person is impractical or unreasonable, or the opportunity is declined. The concept of ‘presence’ should not require physical presence in the same room as the member or members comprising VCAT. It should be possible for a person to be present by telephone, video link or other electronic means of communication.

RECOMMENDATIONS

Participation in hearings

370. New guardianship legislation should provide that all initial applications in Guardianship List matters should be conducted in the presence of the proposed represented person unless VCAT is satisfied that the represented person does not wish to attend or that there is some other justifiable reason for the hearing to proceed in their absence.
371. VCAT should make reasonable arrangements to ensure that a proposed represented person who is unable to be physically present at the place where the hearing is held is able to be present through other means such as video link or telephone.

REPRESENTATION AT HEARINGS

- 21.136 At present, none of the parties in Guardianship List matters—including the proposed represented person—has a right to legal representation during the hearing. The consent of VCAT or the agreement of all the parties is required before a professional advocate can represent a person at a hearing.¹⁹⁴
- 21.137 The Commission believes that all parties to Guardianship List matters should have a right to representation by a legal practitioner and they should be entitled to be represented by any other professional advocate with the leave of VCAT.
- 21.138 While the Commission is unaware of any circumstances in which a legal practitioner has been refused leave to appear for a party in a Guardianship List matter, given the nature of the issues at stake it is highly desirable that the proposed represented person have a clear right to legal representation. There is no good reason why this right should not extend to other parties to the proceeding.

¹⁹² Roundtable with seniors (in partnership with Council on the Ageing) (5 May 2011); Submissions CP 71 (Seniors Rights Victoria) and CP 78 (Mental Health Legal Centre).

¹⁹³ Ross, above n 5, 13.

¹⁹⁴ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62.



- 21.139 The Commission notes that the VCAT Fair Hearing Practice Note refers to VCAT's duty to assist self-represented parties, and draws particular attention to the difficult balancing act involved. The Practice Note points out that this difficulty arises particularly in relation to the need to ensure procedural fairness to all parties while providing extra assistance to self-represented parties who may lose substantial freedoms and personal autonomy, such as in the Guardianship List.¹⁹⁵ The Commission acknowledges the difficulties in striking this balance and suggests that referral to external agencies for legal assistance may often be the most appropriate step.
- 21.140 VCAT's power under section 62(6) of the VCAT Act to appoint a representative for a person does not appear to be used very often in Guardianship List matters. While VCAT has submitted that it is not funded to pay for parties' representation, the Commission suggests that it consult Victoria Legal Aid and various other organisations that offer pro bono legal services in order to give some content to its power to appoint a representative for a party.

RECOMMENDATIONS

Representation at hearings

372. Section 62 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should be amended to provide that a represented person or a proposed represented person and any other party in a Guardianship List matter has a right to representation by a legal practitioner in those proceedings and may be represented by any other professional advocate with the leave of VCAT.
373. New guardianship legislation should require VCAT to provide the subject of a Guardianship List application with information about the availability of representation.

Power to appoint a legal representative

374. VCAT should seek to enter into arrangements with Victoria Legal Aid, community legal centres, the Law Institute of Victoria, the Victorian Bar Association, and providers of pro bono legal services to enable a representative to be appointed for a person under section 62(6) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) when required.

ENFORCEMENT OF ORDERS

- 21.141 As noted above, guardians and administrators sometimes experience difficulty having their decisions recognised and implemented by third parties. Court orders can be sought to enforce many of these decisions by relying on the common law and statutory rights of the represented person, which have become vested in or are exercisable by the substitute decision maker. But this process is an inefficient and uneconomical means of giving effect to legitimate decisions made by a guardian or an administrator.
- 21.142 While it is generally preferable to resolve these conflicts through informal processes, the Commission accepts that there will be some instances where a formal tribunal order will be necessary to compel a third party to comply with a valid decision of a substitute decision maker concerning the personal or financial affairs of the represented person.

¹⁹⁵ Practice Note PNVCAT 3, above n 170.

- 21.143 As a matter of fairness, the third party should be given notice of the application to VCAT for an enforcement order and should have an opportunity to be heard before any orders are made. Because it is highly likely that these matters can be resolved by agreement, VCAT should consider directing the use of alternative dispute mechanisms before listing an application of this nature for hearing.
- 21.144 If established, co-decision makers and supporters are also likely to experience enforcement difficulties, especially when seeking access to confidential information about the represented person. The Commission proposes that VCAT enforcement processes be available to co-decision makers and supporters as well as substitute decision makers.
- 21.145 While VCAT should have broad powers when making enforcement orders against third parties, it should not be permitted to make an order directing compliance with a decision that the represented or supported person would not have the power to enforce.
- 21.146 The Commission notes that failure to comply with an enforcement order would be an offence under section 133 of the VCAT Act, punishable by imprisonment or fine.

RECOMMENDATIONS

Enforcement of orders

375. A supporter, co-decision maker or substitute decision maker may apply to VCAT for an enforcement order against a third party who refuses to recognise or implement a valid decision made by the applicant about the personal or financial affairs of the represented person.
376. The third party should be given notice of the application for an enforcement order and an opportunity to be heard before any order is made.
377. VCAT should consider directing the use of alternative dispute mechanisms, such as mediation, before listing an application of this nature for hearing.
378. VCAT should make an enforcement order only if it is satisfied that the order would promote the personal and social wellbeing of the represented person.
379. VCAT should not be permitted to make an order enforcing a decision that the represented or supported person would not have the power to enforce.

MULTI-MEMBER GUARDIANSHIP LIST PANELS

- 21.147 In the consultation paper, the Commission asked whether multi-member panels, with members drawn from a range of backgrounds, should be the standard practice for initial guardianship and administration applications.
- 21.148 VCAT has a discretionary power to determine how many members will hear a particular case. Section 64 of the VCAT Act permits the President of VCAT to determine how many members of VCAT (between one and five) will comprise the tribunal for the purposes of a particular proceeding. Financial considerations probably influence many of these decisions about the number of VCAT members assigned to particular cases.
- 21.149 The Commission understands that VCAT usually assigns only one member to hear Guardianship List matters. In some other areas of VCAT's operations, such as professional disciplinary matters, three-member panels are often used.



21.150 In its submission to the Commission, VCAT described multi-member panels as ‘a gold standard’ and observed that it would prefer any additional funding to:

be directed to enhancing our intake process, with VCAT taking a more active role in the pre-hearing process and having the opportunity and resources, for example, to obtain specialist geriatrician or neuropsychological reports.¹⁹⁶

21.151 The Commission suggests that VCAT may wish to consider allocating a regular day, perhaps once a month, for multi-member hearings and listing some of the more complex matters for that day.

RECOMMENDATION

Multi-member panels

380. The President of VCAT should retain a discretionary power in relation to the composition of the tribunal for Guardianship List hearings. However, VCAT should consider making greater use of multi-member panels for more complex matters where a range of expertise would be beneficial.

MEMBER TRAINING

21.152 As noted earlier, the need for training of VCAT members was raised in the Commission’s consultation phase, particularly in response to the issue of multi-member panels. Some people highlighted the need for Guardianship List members to have a better understanding of the disabilities of the people appearing before them.

21.153 The Commission notes that VCAT acknowledges the importance of training its members.¹⁹⁷ The Commission suggests that the components of a training program for Guardianship List members should include information about:

- the various disabilities that affect decision-making capacity
- the experiences of people who appear before VCAT, and in particular people who are the subject of applications
- ‘capacity’, ‘capacity assessment’ and the options that exist to support people in the exercise of capacity
- the service and support networks that assist people with impaired decision-making ability
- the experience of family and carers of people with impaired decision-making ability
- cultural diversity, and the different ways in which Aboriginal, Torres Strait Islander and culturally and linguistically diverse communities support people with impaired decision-making ability.

RECOMMENDATION

Member training

381. VCAT Guardianship List members should have specialised knowledge of issues associated with impaired decision-making ability and, whenever possible, members with experience and expertise in relevant disability-related issues should conduct hearings. VCAT Guardianship List member training programs should consider a broad range of disability issues.

¹⁹⁶ Submission CP 80 (Victorian Civil and Administrative Tribunal).

¹⁹⁷ Victorian Civil and Administrative Tribunal, *Transforming VCAT: Report Card December* (2011) 6.

REVIEW OF ORDERS

Reassessments and rehearings

- 21.154 The G&A Act provides for reassessments and rehearings of orders made by the Guardianship List. The VCAT Act deals with appeals from any orders made by VCAT.
- 21.155 There is some overlap between reassessments and rehearings. Reassessments serve two purposes: they require VCAT to review the need for ongoing guardianship and administration orders and they allow the represented person (or any other interested person) to seek review of an order at any time. There appears to be an unstated statutory assumption that the represented person (or any other interested person) should only apply for a reassessment if the circumstances have changed since the order was made.
- 21.156 There is also some overlap between rehearings and appeals. Rehearings operate as internal de facto appeals. Any 'party or a person entitled to notice' may apply for a rehearing of an order made under the G&A Act (other than an interim or temporary order) within 28 days of the order being made. While not required by the G&A Act, the Commission understands that a more senior VCAT member than the member who originally made the order conducts the rehearing.
- 21.157 Two issues arise when considering reassessments. The first concerns the manner in which they are conducted and the second concerns the overlap between reassessments and rehearings.
- 21.158 As discussed earlier in the chapter, VCAT is required to regularly reassess all guardianship and administration orders that operate for more than 12 months.¹⁹⁸ The represented person or any other interested person can seek a reassessment of an order at any time.
- 21.159 The Commission believes that the process of making ongoing orders should continue and that VCAT should be required to review the continuing need for these orders on a regular basis. VCAT should continue to have a discretionary power, subject to some statutory guidance, about the intervals at which orders are reviewed.
- 21.160 Currently, most orders are reassessed without a formal VCAT hearing. Periodic reassessments are presently conducted on an 'opt in' basis—if the represented person does not indicate a wish to attend a hearing, the order is reassessed by a VCAT member 'on the papers' without any formal hearing. While the Commission acknowledges the challenges associated with the number of orders that VCAT must reassess—nearly 7000 cases in 2009–10—the Commission believes that more effort should be made in the future to encourage some involvement by the represented person in the reassessment process because of the importance of the interests involved.
- 21.161 It will be a challenging task to secure greater involvement by represented persons in this process. There are significant resource implications for VCAT because 71 per cent of the matters it handles in the Guardianship List are reassessments of orders.¹⁹⁹ In those cases where the ongoing need for an order is quite clear, there may be limited benefit in conducting a hearing. However, the Commission believes that the current processes appear to be too heavily weighted in favour of administrative convenience rather than thorough review of the person's current circumstances.

¹⁹⁸ *Guardianship and Administration Act 1986 (Vic)* ss 61–3

¹⁹⁹ VCAT, *Annual Report 2010/2011*, above n 9, 43.



- 21.162 New guardianship legislation should regulate the process of reassessing personal guardianship and financial administration orders in more detail than is currently provided for in the G&A Act. The Commission believes it is preferable to use the term ‘review’ rather than ‘reassessment’ to describe periodic examinations of the ongoing need for decision-making assistance, because it more clearly conveys the purpose of this activity.
- 21.163 The Commission proposes that new guardianship legislation should require VCAT to determine the most appropriate manner in which to review an order. VCAT should seek to contact the represented person to inform them of the forthcoming review and inform them of their rights to participate in the review.
- 21.164 In deciding the most appropriate way to conduct the review, VCAT should also consult those people who were parties to the original application. If the represented person is unable to express a preference about the format of the review, VCAT should only deal with matters ‘on the papers’ where it is satisfied that a hearing is unnecessary. Greater use could be made of telephone and video link reviews.
- 21.165 Subject to the comments below about changes to the appeal process, the Commission agrees with VCAT’s submission that rehearings are unnecessary because they duplicate the reassessment hearing process.²⁰⁰ The rehearing and reassessment processes could be merged. If this step is taken it should be possible for a represented person, or any other person with sufficient interest, to seek a review of a Guardianship List order at any time.

RECOMMENDATIONS

Review of orders

382. New guardianship legislation should require VCAT to review all ongoing personal guardianship and financial administration orders at regular intervals determined by VCAT, which should ordinarily be not less than annually for personal guardianship orders and not less than every three years for financial administration orders.
383. The decision to conduct a review hearing should not be dependent on the represented person or other interested people requesting a review hearing from VCAT.
384. VCAT should assess the most appropriate means for conducting each review by attempting to contact the represented person and by considering whether:
- (a) a full review hearing is necessary
 - (b) the matter can be dealt with by a telephone hearing
 - (c) the matter can be dealt with ‘on the papers’ based on the information available to VCAT.
385. VCAT should also inform those people who were parties to the original application about the pending review and consider their responses when determining the most appropriate means for conducting the review.
386. When the represented person is unable to express a preference about the format of the review, VCAT should only deal with matters ‘on the papers’ where it is satisfied that a hearing is unnecessary.

²⁰⁰ Submission CP 80 (Victorian Civil and Administrative Tribunal).

Applications for unscheduled reviews

- 21.166 The represented person should have a right to seek review of an order at any time. The summary disposal powers in section 75 of the VCAT Act are sufficient to enable the Guardianship List to respond adequately to people who persistently apply for a review even though their circumstances have not changed. An interested person should be permitted to seek review of an order at any time with the leave of VCAT.
- 21.167 In instances where VCAT dismisses a represented person's application for review of an order because of lack of evidence of changed circumstances since the order was made, VCAT should refer the represented person to organisations that might assist them to gather evidence in support of the application.

RECOMMENDATIONS

Applications for unscheduled reviews

387. A represented person should be permitted to seek review of an order made by the Guardianship List at any time.
388. A person with an interest in the affairs of a represented person should be permitted to seek review of an order made by the Guardianship List at any time with the leave of VCAT.
389. Where an application for an unscheduled review by a represented person is refused because VCAT concludes that there is insufficient evidence upon which to review the order, VCAT should advise the represented person of organisations that might assist them to gather additional evidence.

Appeals

- 21.168 As already noted, it is possible for a party to proceedings in the Guardianship List to invoke the right to appeal to the Supreme Court on a question of law. This right is rarely exercised in Guardianship List matters, no doubt because of the costs and delay associated with Supreme Court appeals.
- 21.169 In view of the issues at stake in Guardianship List proceedings—matters that affect people's 'autonomy and capacity to manage their lives'—it is surprising that there is no general right of appeal from orders appointing a guardian or an administrator. Before VCAT assumed jurisdiction in matters under the G&A Act, there was a general right of appeal from orders of the Guardianship and Administration Board to the former Victorian Administrative Appeals Tribunal.²⁰¹ It is possible to appeal from any decisions of the Mental Health Review Board.²⁰²
- 21.170 The rehearing provisions in the G&A Act are most likely intended to be a substitute for a general right of appeal. While a rehearing is quicker and cheaper than appealing to the Supreme Court under section 148 of the VCAT Act, it does not provide the same discipline as overturning an incorrect decision on appeal and nor has it produced a useful body of case law about the G&A Act. It is useful for all judicial officers and tribunal members to be subjected to regular scrutiny by a higher authority, especially when they make discretionary decisions that alter people's lives.

²⁰¹ This right was provided for in s 67 of the *Guardianship and Administration Board Act 1986* (Vic) and was repealed by s 129(3)(a) of the *Tribunals and Licensing (Miscellaneous Amendment) Act 1998* (Vic).

²⁰² *Mental Health Act 1986* (Vic) s 120.



- 21.171 For this reason, the Commission believes it would be desirable for the Attorney-General and the President of VCAT to consider a mechanism for conducting appeals in Guardianship List matters. Some other large Australian tribunals have internal appeals divisions, which appear to be a cost-effective means of determining appeals by a body with expertise in the matter in question.²⁰³
- 21.172 VCAT has recently considered the establishment of an internal appeals division. The former VCAT President, Justice Kevin Bell, supported this proposal in his 2009 review of VCAT.²⁰⁴ The current President, Justice Iain Ross, has expressed ‘reservations’ about this proposal because of the ‘significant risk of increased cost and delay’ and because the proposal seems ‘antithetical to the notion of VCAT as a provider of quick and affordable justice’.²⁰⁵ While these considerations are clearly relevant when considering VCAT’s broader role as a ‘dispute resolution service’,²⁰⁶ they seem less relevant when considering Guardianship List matters and serve to highlight how different the Guardianship List is to other matters that fall within VCAT’s jurisdiction.
- 21.173 One of the most important shortcomings of current Victorian guardianship law is the lack of a useful body of case law that explains how broadly-phrased statutory provisions are being interpreted and which indicates how the many discretionary powers in the G&A Act are being applied. VCAT has not taken any active steps to produce and publish an extensive body of case law, especially in the past few years. The new guardianship legislation proposed by the Commission will also be broadly phrased and contain numerous discretionary powers. It appears highly unlikely that there will be any helpful elaboration of that legislation without an accessible and active appeals mechanism. The Commission urges the Attorney-General and the President of VCAT to consider this matter when evaluating the need for a modern mechanism for conducting appeals in Guardianship List matters.
- 21.174 There should continue to be a right of appeal to the Supreme Court from Guardianship List matters on questions of law, regardless of whether VCAT has its own internal appeals mechanism. While it is highly likely that this avenue of appeal will continue to be rarely used because of cost, it is clearly desirable that the state’s highest court continues to play a supervisory role in Guardianship List matters.
- 21.175 The Commission believes that the rehearing provisions in the G&A Act should be retained if there continues to be no internal appeals mechanism at VCAT. While it is possible to merge the existing reassessment and rehearing provisions, the reviews proposed by the Commission are intended to provide an opportunity to reconsider an order if circumstances have changed. They are not designed to be a process by which a person can test the correctness of an order they believe to be incorrect. In the absence of an internal appeals mechanism at VCAT, rehearings would continue to be a means by which people can test the correctness of an order with which they disagree.

²⁰³ *Administrative Decisions Tribunal Act 1997* (NSW) ch 7 pt 1; *Queensland Civil and Administrative Decisions Tribunal Act 2009* (Qld) ch 2 div 4.

²⁰⁴ Bell, above n 4, 55–60.

²⁰⁵ Ross, above n 5, 51.

²⁰⁶ *Ibid* 2.

RECOMMENDATIONS

Appeals

390. The Attorney-General and the President of VCAT should consider the merits of establishing an internal appeals division within VCAT to hear appeals from Guardianship List matters.
391. If an appeals division of VCAT is established, it should be possible to appeal from an order of the Guardianship List as of right on a question of law and with leave when challenging the merits of the order.
392. If an appeals division of VCAT is established, new guardianship legislation should not reproduce the existing provisions in the *Guardianship and Administration Act 1986* (Vic) concerning rehearings.
393. If an appeals division of VCAT is not established, new guardianship legislation should reproduce the existing provisions in the *Guardianship and Administration Act 1986* (Vic) concerning rehearings.
394. It should continue to be possible to appeal to the Supreme Court from orders made in the Guardianship List on questions of law.

CONFIDENTIALITY ISSUES

- 21.176 There are two possible reasons for the current difficulties associated with access to the confidential and sensitive materials that are filed with VCAT in many Guardianship List matters:
- There is a lack of clarity in some instances about who are the parties to some Guardianship List applications.
 - The provisions in section 146 of the VCAT Act concerning access to the materials on all VCAT proceeding files do not appear to have been designed with Guardianship List matters in mind.
- 21.177 Other than in exceptional circumstances, people who are parties to any form of litigation usually have access to all of the materials that the court or tribunal considers in reaching a decision. This right ultimately flows from the court or tribunal's natural justice obligation to conduct a fair hearing. The Commission does not propose any changes to VCAT's natural justice obligations in Guardianship List matters. However, it does propose that VCAT take the time to identify the parties to any Guardianship List matters so that these people can be clearly distinguished from people who are entitled to notice of a hearing.
- 21.178 While parties should continue to have access to all of the materials that VCAT considers in reaching a decision, other than in exceptional circumstances, people who are entitled to notice of a hearing should not enjoy such a right. They should be subject to the same rules as members of the public when seeking access to a VCAT proceeding file. VCAT should take the time at the commencement of every hearing to indicate those people who are parties to the proceeding and to explain to those people their rights as a party.
- 21.179 The Commission believes that VCAT files in Guardianship List matters should be closed to the public unless VCAT determines otherwise. There was no general right of access to Guardianship Board files under the *Guardianship and Administration Board Act 1986* (Vic). It does not appear that thought was given to the matters that are usually



included in Guardianship List files, such as medical reports, when the VCAT Act was devised. The issues of public disclosure that appeared to have influenced the general right of access to VCAT proceeding files in section 146(3) of the VCAT Act should not apply in Guardianship List matters.

- 21.180 It is not in the public interest for all members of the community to have access to highly sensitive material about a person who might be found to lack the capacity to make their own decisions because of a disability. The Commission notes that VCAT supports this recommendation.²⁰⁷
- 21.181 VCAT should advise an individual or organisation holding information about a person of the implications of producing that information. A person who provides confidential information to VCAT should be able to request that it not be provided to some or all of the parties to the proceeding, and provide a justification for this request. VCAT should determine requests of this nature in the light of its natural justice obligations in section 97 of the VCAT Act.

RECOMMENDATIONS

Access to documents in VCAT files

395. Section 146(3) of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* should be amended to provide that it does not apply to Guardianship List matters.
396. To avoid doubt, new guardianship legislation should specify that people entitled to notice of a Guardianship List proceeding, who are not parties in a proceeding, do not have a right of access to documents relating to the proceeding held by VCAT.

Information provided to VCAT

397. If VCAT or the Public Advocate requests written information from an individual or organisation to assist with a guardianship hearing or investigation, VCAT or the Public Advocate must advise the person holding the information about the use that could be made of that information. The advice must be given at the time the information is requested and include advice about:
- (a) the people who might be given access to that information
 - (b) the procedure to follow if the holder of the information requests that some or all of the information be withheld from some or all of the parties to the proceeding.
398. A person or organisation may request that information provided to VCAT in relation to a Guardianship List proceeding not be disclosed to some or all parties to the proceeding. VCAT must determine this request according to law before providing any of the information in question to any of the nominated parties.

ADVICE FUNCTION

- 21.182 The G&A Act currently enables guardians, enduring guardians, administrators and the person responsible to seek advice from VCAT about any matter that falls within the scope of their appointment.²⁰⁸ VCAT may also deliver advice on its own motion to enduring guardians, the person responsible and administrators,²⁰⁹ but not to guardians.

²⁰⁷ Submission CP 80 (Victorian Civil and Administrative Tribunal).

²⁰⁸ *Guardianship and Administration Act 1986 (Vic)* ss 30(1), 35E(1), 42I(1), 42W(1), 55(1).

²⁰⁹ *Ibid* ss 35E(3), 42I(4), 42W(4), 55(4A).

21.183 The Commission believes that these are useful powers that should be replicated and extended in new guardianship legislation. VCAT should have the power to offer advice on application, or on its own motion, to both tribunal-appointed and personally appointed substitute decision makers, co-decision makers and supporters.

RECOMMENDATIONS

Advice function

399. New guardianship legislation should permit VCAT to provide advice to any substitute decision maker, co-decision maker or supporter about the manner in which they should or should not exercise their powers.

400. This power should be exercisable on the application of any person with an interest in the affairs of the represented person or by VCAT on its own motion.

OTHER MATTERS

Accessibility for Indigenous Victorians

21.184 The issue of accessibility of guardianship to Indigenous Victorians has been identified in a number of submissions and consultations.²¹⁰ Recent academic work in the area has suggested that, while there is a significant gap in research in the area, it is possible guardianship laws may not be meeting Indigenous people's needs because of 'cultural barriers, such as the misfit between the legislation and Indigenous concepts such as cultural obligation'.²¹¹

21.185 VCAT has acknowledged that it is under-utilised generally by Indigenous communities and is currently consulting further on ways to identify access barriers.²¹² One option identified in the *One VCAT* review was the introduction of a Koori Liaison Officer.²¹³ The Commission believes that this could be particularly beneficial in relation to sensitive, personal areas such as guardianship. The proposal for a Koori liaison officer was supported in a number of submissions.²¹⁴

21.186 The Commission therefore recommends that as part of VCAT's efforts to improve accessibility of the tribunal to Indigenous Victorians, a position of Koori Liaison Officer should be established at VCAT, and assist with Guardianship List matters where appropriate.

RECOMMENDATION

Accessibility for Indigenous Victorians

401. VCAT should establish a Koori Liaison Officer position to assist with Guardianship List matters where appropriate.

210 For eg, Submissions CP 19 (Office of the Public Advocate) and CP 73 (Victoria Legal Aid).

211 Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity' (2010) 45(3) *Australian Journal of Social Issues* 383, 390.

212 *Transforming VCAT: Promoting Excellence*, above n 86, 17.

213 Bell, above n 4, 25.

214 Submissions CP 22 (Alzheimer's Australia Vic), CP 33 (Eastern Health) and CP 57 (Aged Care Assessment Service in Victoria).



Chapter 22

Age

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INTRODUCTION

- 22.1 The terms of reference ask the Commission to consider if the provisions of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) should be extended to include people who are 17 years of age with impaired decision-making capacity. A gap in the current law means that a 17 year old is too young to have a guardian or administrator appointed under the G&A Act, but too old to have a guardian appointed under child protection legislation, the *Children Youth and Families Act 2005* (Vic) (CYF Act).
- 22.2 An order appointing either a guardian or administrator under the G&A Act can only take effect when the person is aged 18 years or over.¹ A young person under the age of 17 may be placed on a protection or permanent care order under the CYF Act.² While an existing child protection order made before the person's 17th birthday may remain in force until the person has turned 18,³ an order may not be made once a person has turned 17.⁴
- 22.3 Consequently, there is a gap between guardianship law and child protection law. For a variety of reasons, some 17 year olds with impaired decision-making ability may find themselves without a parent or any other person with legal authority to make decisions for them. There is no Victorian law, other than the Supreme Court's *parens patriae* powers,⁵ which can be used to make an appointment. There is also no public official with responsibility to care for young people in these circumstances.
- 22.4 Although it is difficult to assess how many 17 year olds may be adversely affected by this gap in the law, the numbers are likely to be low. The Secretary of the Department of Human Services (DHS) has advised that 'there may be approximately 30 young people currently known to Disability Services who might benefit from appointment of a guardian'.⁶ The Secretary estimated that should the CYF Act be extended to 18 years of age,
- the number of Protection Applications for 17 year olds would closely align but would probably be less than the 65 Protection Applications issued for 16 year olds in the last financial year.⁷
- 22.5 In 2010–11, only three per cent of the Public Advocate's new cases (27 people) related to people aged 18 or 19.⁸
- 22.6 This chapter contains recommendations designed to fill the gap between guardianship law and child protection law. This comes 30 years after both the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee) and the Child Welfare Practice and Legislation Review, chaired by Dr Terry Carney (Carney Committee), recommended that this gap be filled.⁹

1 *Guardianship and Administration Act 1986* (Vic) ss 19(1), 43(1).

2 A protection order or a permanent care order may be made for a child. The *Children, Youth and Families Act 2005* (Vic) s 3 defines a child for this purpose as a person who is under the age of 17. Under the Act, the Secretary may be appointed as the young person's guardian: ss 289–90. Alternatively, a young person may be placed in the custody of a third party: s 283.

3 *Children, Youth and Families Act 2005* (Vic) ss 275(2), 321(1)(c).

4 A protection order or a permanent care order may be made for a child. The *Children, Youth and Families Act 2005* (Vic) s 3 defines a child for this purpose as a person who is under the age of 17.

5 *Parens patriae* powers are those that belong to a superior court to make orders that are in the best interests of individuals, such as children and adults who lack capacity, who are unable to safeguard their own welfare. For a general discussion of the *parens patriae* jurisdiction see John Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14(2) *Oxford Journal of Legal Studies* 159. In Victoria, the *parens patriae* jurisdiction of the Supreme Court of Victoria is preserved through section 85 of the *Constitution Act 1975* (Vic) and has been affirmed in the Supreme Court. See, eg, *Gardner, re BWV* [2003] VSC 173 (29 May 2003) 95.

6 Attachment to letter from Gill Callister, Secretary, Department of Human Services, to Professor Neil Rees, 7 November 2011, *Responses to questions posed by the VLRC*, 1.

7 *Ibid* 4.

8 Office of the Public Advocate (Victoria), *Annual Report 2010–2011* (2011) 6.

9 Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982); Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984)

CURRENT LAW

- 22.7 In many areas, the law draws a sharp line between childhood and adulthood. For example, a young person must reach a certain age before they may vote,¹⁰ drive,¹¹ drink alcohol,¹² marry¹³ or engage in a sexual relationship.¹⁴ One of the primary reasons for these sharp lines is practicality. It would simply be too difficult to make individual determinations about whether particular young people possess the maturity to vote or to drink alcohol responsibly. Achieving a particular age acts as a substitute for individual assessments of capacity.
- 22.8 However, in other areas, such as consent to medical treatment, the common law has recognised that because young people have the maturity to make decisions for themselves at different ages, each situation needs to be considered on its merits.¹⁵

SUBSTITUTE DECISION MAKING FOR PEOPLE UNDER 18

- 22.9 The G&A Act does not provide for substitute decision making for people under the age of 18. An appointment under the G&A Act can only take effect when a person is aged 18 years or over.¹⁶ While a guardianship or administration order may be made for a person who is *under* the age of 18, the order only takes effect when the person reaches the age of 18.¹⁷
- 22.10 If substitute decision making is required for a person under 18, the young person's parents generally have this power and responsibility.¹⁸ The *Family Law Act 1975* (Cth) affirms that, usually, 'each of the parents of a child who is not 18 has parental responsibility for the child'.¹⁹ Parental responsibility is defined as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.²⁰
- 22.11 There are a number of situations, however, in which Commonwealth or Victorian law provides for a person other than a young person's parents to make substitute decisions if the young person does not have capacity to make the decision themselves. These include:
- situations in which a parenting order has been made under the Family Law Act that gives 'parental responsibility' to someone other than a parent²¹
 - situations in which guardianship is given to someone other than a parent under the CYF Act²²

10 The legal age at which a person is entitled to vote is 18 years: *Commonwealth Electoral Act 1918* (Cth) s 93(1).

11 The legal age at which a person may be granted a driver licence in Victoria is 18 years: *Road Safety Act 1986* (Vic) s 19(1).

12 Subject to certain exceptions, it is an offence for licensed or authorised premises to supply liquor to a person under 18 years: *Liquor Control Reform Act 1998* (Vic) s 119.

13 Generally, only a person aged 18 years or over is entitled to be married. A person aged 16–18 may apply to a judge or magistrate for permission: *Marriage Act 1961* (Cth) ss 11–12.

14 The age of consent to sexual relations is 16 years: *Crimes Act 1958* (Vic) s 45. Consent is a defence to sexual penetration of a child under the age of 16 if: (a) at the time of the alleged offence, the child was aged 12 or over and the accused satisfies the court on the balance of probabilities that they believed on reasonable grounds that the child was aged 16 or older; or (b) the accused was not more than two years older than the child; or (c) the accused satisfies the court on the balance of probabilities that they believed on reasonable grounds that they were married to the child.

15 Instead of a fixed age test, the law says that determining whether a young person can consent to a medical treatment will depend upon the specific procedure or treatment in question and the young person's maturity: see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *Secretary, Department of Health and Community Services (NT) v JWB ('Marion's case')* (1991) 175 CLR 218.

16 *Guardianship and Administration Act 1986* (Vic) ss 19(1), 43(1).

17 *Ibid.*

18 A young person will not always require a substitute decision maker just because they are under the age of 18. The age at which a young person may provide legally effective consent on their own behalf varies depending on factors such as the type of decision and the maturity and understanding of the young person. For a discussion of this issue in relation to consent to medical treatment, see New South Wales Law Reform Commission, *Young People and Consent to Health Care*, Report No 119 (2008) 78–88.

19 *Family Law Act 1975* (Cth) s 61C. This reflects common law principles: see *Department of Health and Community Services (NT) v JWB ('Marion's case')* (1992) 175 CLR 218.

20 *Family Law Act 1975* (Cth) s 61B.

21 *Family Law Act 1975* (Cth) s 64C.

22 See, eg, *Children, Youth and Families Act 2005* (Vic) ss 283, 289–90.



- some special medical procedures, such as a ‘planned’ sterilisation,²³ which require court authorisation.²⁴

Parenting orders under the Family Law Act

22.12 A parenting order made under the Family Law Act may alter the ‘usual’ position that each parent has decision-making powers and responsibility for their child.²⁵ For instance, one parent may be granted sole responsibilities, to the exclusion of the other parent, for making decisions in relation to a child.²⁶ A parenting order may also give ‘parental responsibility’ to someone other than a parent, for example, a grandparent.²⁷ The terms of the order specify which of the duties, powers, responsibilities or authority in relation to the child are given to the person named in the order.²⁸

Guardianship of children under the CYF Act

- 22.13 A primary purpose of the CYF Act is to ‘provide for the protection of children’.²⁹ In some cases, this requires the transfer of guardianship from a parent to someone else to protect the child. Guardianship is defined in the CYF Act as ‘all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of the child’.³⁰ It does not include the right to have the daily care and control of the child or the right and responsibility to make decisions concerning the daily care and control of the child.³¹
- 22.14 The Children’s Court of Victoria may place a child on a protection order if it finds that the child is in need of protection. The Court may also make an order when there is a substantial and irreconcilable difference between the person who has custody of the child and the child to such an extent that the care and control of the child are likely to be seriously disrupted.³² Some protection orders (guardianship to secretary order³³ and long-term guardianship to secretary order³⁴) transfer guardianship from a parent to the Secretary of DHS.
- 22.15 Another type of order, called a permanent care order, may transfer custody and guardianship of the child from the parent to another person.³⁵ This type of order cannot be made unless the child’s parents have not had care of the child for a specified period.³⁶ The Children’s Court must also be satisfied that the parents are unable or unwilling to resume custody and guardianship of the child, or that it would not be in the child’s best interests for the parents to resume custody and guardianship of the child.³⁷

23 In *P v P* (1994) 181 CLR 583, 597, the term ‘planned’ sterilisation was used to describe a sterilisation that is not a by-product of surgery carried out to treat some malfunction or disease. The term ‘non-therapeutic’ sterilisation was used in *Department of Health and Community Services (NT) v JWB (‘Marion’s case’)* (1992) 175 CLR 218, 250.

24 See *Department of Health and Community Services (NT) v JWB (‘Marion’s case’)* (1992) 175 CLR 218. *Family Law Act 1975* (Cth) s 67ZC. In Victoria, this would generally be the Family Court but in some cases could be the Supreme Court of Victoria. For a general discussion of the jurisdictional issues, see Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 73–81.

25 *Family Law Act 1975* (Cth) ss 61C, 61D. The *Family Law Act 1975* (Cth) also provides that parental responsibility may also be varied or displaced by any court order, including orders made under other legislation: at s 61C(3).

26 *Family Law Act 1975* (Cth) ss 61D, 64B(2)(c).

27 *Ibid* s 64C.

28 *Ibid* s 61D(1). The range of people who may apply for a parenting order is broad. It includes parents, the child, a grandparent or any other person concerned with the care, welfare and development of the child: s 65C.

29 *Children, Youth and Families Act 2005* (Vic) s 1(b).

30 *Ibid* s 4.

31 *Ibid* s 4.

32 *Ibid* s 274.

33 In 2008–09, the Court made 74 guardianship orders: see Children’s Court of Victoria, *Annual Report 2008–2009* (2009) 22.

34 *Children, Youth and Families Act 2005* (Vic) s 290. In 2008–09, the Court made 43 long-term guardianship orders: see Children’s Court of Victoria, *Annual Report 2008–2009* (2009) 19.

35 *Children, Youth and Families Act 2005* (Vic) s 321(1)(a). If particular conditions are fulfilled, it may also vest guardianship of the child jointly in the person(s) named in the order and the child’s parent: s 321(1)(b).

36 *Children, Youth and Families Act 2005* (Vic) s 319(1)(a).

37 *Ibid* s 319(1)(b). Section 319 also requires the Court to be satisfied of a number of other matters for an order to be made.

22.16 None of these orders, which provide guardianship powers to someone other than a parent, may be made once a person has turned 17.³⁸ However, an existing order made before the young person's 17th birthday may remain in force until the person turns 18.³⁹

CURRENT GAP IN THE SYSTEM FOR 17 YEAR OLDS

22.17 The Children's Court of Victoria was originally given exclusive jurisdiction for both child protection and criminal matters concerning children under the age of 17.⁴⁰ Between 1982 and 1984, the Carney Committee conducted a comprehensive review of the Victorian child welfare system. It recommended that the age jurisdiction of the Court's Criminal Division and the Family Division should extend to 18 year olds.⁴¹

22.18 The Cocks Committee, which developed policy recommendations for the original G&A Act in 1982, also acknowledged the gap for 17 year olds. It recommended that the proposed guardianship tribunal should be able to make an order for a 17 year old in 'exceptional circumstances'.⁴² This recommendation was not adopted.

22.19 In 2004, the age limit for the Criminal Division of the Children's Court was increased to 18.⁴³ However, the age limit for the child protection jurisdiction of the Family Division of the Court was not increased at the same time. Consequently, the longstanding gap between the child protection and adult guardianship systems remains.⁴⁴

THE PROVISION OF DHS SERVICES

22.20 Young people with a disability may require services from either or both of DHS's disability and child protection arms. As these two areas of DHS service delivery operate in quite different ways and under different legislation, the availability and quality of those services could have a significant impact on the young person's need for guardianship.

Disability services

22.21 People with a disability, their family and their carers can access support services through local community organisations or the DHS disability support system.⁴⁵ There are various types of supports available for people with disabilities, including funding and services in the areas of:

- information, planning and capacity building
- individual support and targeted services
- residential accommodation services.⁴⁶

38 A protection order or a permanent care order may be made for a child. The *Children, Youth and Families Act 2005* (Vic) s 3 defines a child, for this purpose, as a person who is under the age of 17.

39 *Children, Youth and Families Act 2005* (Vic) ss 275(2), 321(1)(c).

40 *Children's Court Act 1906* (Vic) s 12.

41 Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 2, 409–13. See the definition of 'child' in s 3 of the draft Bill proposed by the Carney Committee: Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 1.

42 Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 74. This report is discussed in more detail in Chapter 2.

43 *Children and Young Persons (Age Jurisdiction) Act 2004* (Vic) s 3.

44 The Commission notes that it has already proposed increasing the age jurisdiction in the CYF Act to allow protection applications to be made for any child under the age of 18: Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Report No 19 (2010) 346.

45 Department of Human Services (Victoria), *Disability Support Register (DSR) Registration Guidelines* (2008) 3.

46 Department of Human Services (Victoria), *Disability Services Policy and Funding Plan 2009–2012* (2009) 31.



22.22 These services are provided under the *Disability Act 2006* (Vic), with eligibility determined by need rather than by age.⁴⁷ The Act does not give a person with a disability, or their family, an enforceable entitlement to services.

Child protection services

22.23 The Child Protection Service supports vulnerable children and families in a variety of ways. In some cases a family will seek support on a voluntary basis. In others, a child may be supported because they have come under the custody or guardianship of the Secretary of DHS through an order of the Children's Court. The Secretary is obliged to provide services in these circumstances.

22.24 Service provision is based on the principle that, generally, the best protection for children is within the family, and therefore in the first instance services are provided to encourage the young person to stay within the family by strengthening the family's capacity to protect them. Services funded by DHS specifically for children and their families include:

- parenting and skill-development services for parents with infants and young children
- trauma-related services
- therapeutic home-based or residential services
- secure welfare services
- intensive care management funded services
- targeted care packages.⁴⁸

22.25 In addition, children and families may be referred to universal secondary services including maternal child health services, child and family services, mental health services, drug and alcohol services, and out of home care services.⁴⁹

TRANSITIONING PROCESS BETWEEN THE CHILD PROTECTION AND ADULT GUARDIANSHIP SYSTEMS

22.26 Under the CYF Act, DHS is not required to act in a protective role or provide child protection services once a child reaches the age of 17, unless an existing order is extended until the child turns 18.⁵⁰ However, in some circumstances the Secretary is responsible for providing or arranging services to assist in supporting young people under the age of 21 to make the transition to independent living. This responsibility arises if a person has previously been in the custody or guardianship of the Secretary.⁵¹

22.27 The kinds of services that may be provided to support a person to make the transition to independent living include:

- the provision of information about available resources and services
- depending on the Secretary's assessment of need:
 - financial assistance
 - assistance in obtaining accommodation or setting up a residence
 - assistance with education and training
 - assistance with finding employment

⁴⁷ *Disability Act 2006* (Vic) s 49.

⁴⁸ Letter from Gill Callister, Secretary, Department of Human Services, to Professor Neil Rees, 7 November 2011.

⁴⁹ *Ibid.*

⁵⁰ *Children, Youth and Families Act 2005* (Vic) s 275(2).

⁵¹ *Children, Youth and Families Act 2005* (Vic) s 16(1)(g).

- assistance in obtaining legal advice
 - assistance in accessing health and community services
 - counselling and support.⁵²
- 22.28 Services are provided by community-based agencies in each of the eight department regions. DHS Practice Advice stipulates that each young person is assigned a case manager who must put in place a transition plan at least one year before a young person transitioning to independence leaves the custody or guardianship of the Secretary. Where the Secretary identifies that a young person is unable to make and/or communicate their choices, an application will be made for the appointment of a guardian under the G&A Act, but not until the person turns 18.⁵³

OTHER JURISDICTIONS

- 22.29 New South Wales is the only Australian state in which guardianship laws apply to people at age 16.⁵⁴ All other states and territories have legislation similar to the current Victorian provisions. They either allow only for the appointment of a guardian for a person aged 18 years or over, or provide that an appointment is only to take effect when the person turns 18.⁵⁵
- 22.30 Victoria is the *only* Australian jurisdiction to exclude 17 year olds (not subject to an existing protection order) from its child protection system. In every other state and territory, the child protection jurisdiction extends to 18 year olds.⁵⁶

NEW SOUTH WALES

- 22.31 New South Wales law provides for an age overlap between the child protection and adult guardianship systems. A person up to the age of 18 who is in need of protection may be placed on a care order under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).⁵⁷ It is also possible to appoint a guardian for a young person aged 16 or over under the *Guardianship Act 1987* (NSW).⁵⁸ This means that a person aged 16 to 18 years could be subject to either a guardianship order or a care order.
- 22.32 The Commission understands that the majority of applications for guardianship orders made for 16 to 18 year olds are for young people who are already under the protection of the Director-General of the Department of Community Services and who will have an ongoing need for substitute decision making after turning 18.⁵⁹ In most cases, the New South Wales Public Guardian is appointed as guardian.⁶⁰ There have been concerns about the transition of people from the child protection to the adult guardianship system because of a time lag between the removal of support by the Department of Community Services and the appointment of a guardian under the *Guardianship Act 1987* (NSW).

⁵² *Ibid* s 16(4).

⁵³ Letter from Gill Callister, Secretary, Department of Human Services, to Professor Neil Rees, 7 November 2011.

⁵⁴ *Guardianship Act 1987* (NSW) s 15(1)(a).

⁵⁵ *Guardianship and Management of Property Act 1991* (ACT) s 8C. See *Legislation Act 2001* (ACT) Dictionary pt 1 which defines 'adult' as an individual who is at least 18 years old; *Adult Guardianship Act 1988* (NT) ss 3(1), 11(1); *Guardianship and Administration Act 2000* (Qld) ss 11A, 13; *Guardianship and Administration Act 1995* (Tas) s 19(1); *Guardianship and Administration Act 1990* (WA) ss 43(1), (2a).

⁵⁶ *Children and Young People Act 2008* (ACT) s 12. See *Legislation Act 2001* (ACT) Dictionary pt 1, which defines 'adult' as an individual who is at least 18 years old; *Care and Protection of Children Act 2007* (NT) s 8; *Child Protection Act 1999* (Qld) s 8; *Children's Protection Act 1993* (SA) s 6; *Children, Young Persons and Their Families Act 1997* (Tas) s 3; *Children and Community Services Act 2004* (WA) s 3.

⁵⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 3, 71. Section 3 of the Act distinguishes between a 'child' and a 'young person'. A 'child' is a person under 16 and a 'young person' is a person aged 16 or over, but under 18. A care order may be made for a child or young person.

⁵⁸ *Guardianship Act 1987* (NSW) s 15(1)(a).

⁵⁹ Teleconference with Malcolm Schyvens and Esther Cho, Acting Chair and Legal Officer, New South Wales Guardianship Tribunal (24 August 2010).

⁶⁰ *Ibid*.



WESTERN AUSTRALIA

- 22.33 In Western Australia, an order for the appointment of a guardian may be made when a young person is 17, so that it may come into effect on the young person's 18th birthday.⁶¹ In 2007, the Western Australian Department for Child Protection (DCP) and the Western Australian Office of the Public Advocate created a memorandum of understanding⁶² to improve planning considerations for young people leaving state care who may require guardianship and administration assistance as young adults. The memorandum of understanding was re-signed in January 2011 after significant revision.
- 22.34 The main objectives of the memorandum of understanding are to:
- ensure knowledge of DCP's legislative responsibility to continue providing support to a young person up to the age of 25 years, even though a protection order expires at 18 years of age
 - ensure that DCP caseworkers are aware of the role of a guardian or administrator under the *Guardianship and Administration Act 1990 (WA)*
 - ensure that Public Advocate staff are aware of the key aspects of the legislation, and the role of the DCP
 - continuously improve the way in which DCP and the Public Advocate collaborate before a young person turns 18, and to ensure the Public Advocate is involved in discussions about the need for a guardian or administrator to be appointed.⁶³
- 22.35 The memorandum of understanding outlines the role and responsibilities of the DCP and the Public Advocate. It outlines the procedures that must be undertaken by the DCP before it refers a young person to the Public Advocate, and details matters that must be included in the development of a leaving care plan for each young person leaving the care of the Chief Executive Officer of the DCP.⁶⁴

INTERNATIONAL OBLIGATIONS

- 22.36 The current age jurisdiction of the CYF Act does not appear to be compatible with Australia's obligations under the United Nations' *Convention on the Rights of the Child* (CROC).⁶⁵ Article 19 of CROC requires states parties to implement statutory systems to protect children from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (including sexual abuse) while in the care of parents or legal guardians.⁶⁶
- 22.37 Importantly, article 1 of CROC defines 'child' to mean a person under the age of 18, with one limited exception that is not applicable to Australia.⁶⁷ The absence of child protection jurisdiction in the Children's Court for 17 year olds may be inconsistent with the obligation in article 19 for the state to take all appropriate legislative measures to protect people under the age of 18.

61 *Guardianship and Administration Act 1990 (WA)* ss 43(1)–(2a).

62 Memorandum of Understanding between the Department for Child Protection and the Public Advocate, *Procedures for Young Adults with Decision-Making Disabilities Leaving the Care of the Department for Child Protection*, cited with permission of the Public Advocate (Western Australia), 2 December 2011 (*Procedures for Young Adults with Decision-Making Disabilities Leaving the Care of the Department for Child Protection*).

63 Pauline Bagdonavicius, Public Advocate (Western Australia), 'Looking Back: Looking Forward - Lessons Learnt From Redress' (Speech delivered at the 29th Annual Australian and New Zealand Association of Psychiatry, Psychology and Law, Fremantle, Western Australia, 27 November 2009) <http://www.publicadvocate.wa.gov.au/_files/Speech_lessons_learned_from_Redress.pdf>.

64 *Procedures for Young Adults with Decision-Making Disabilities Leaving the Care of the Department for Child Protection*, above n 62.

65 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). The incompatibility with CROC of having an under 17 jurisdictional limit for the Criminal Division was one of the reasons given for increasing the upper age limit of the Criminal Division's jurisdiction in 2004: see Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 2004, 566 (Rob Hulls MP, Attorney-General).

66 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 19.

67 *Ibid* art 1. The limited exception applies if the law of the state party provides that the age of majority is younger than 18 years old.

COMMUNITY RESPONSES

- 22.38 The majority of community responses on this issue acknowledged the current gap between child protection and adult guardianship systems for 17 year olds, and supported reform.⁶⁸ The need for effective transition between the two systems, including the provision of continuous support, was also emphasised.⁶⁹
- 22.39 In the consultation paper, the Commission presented three reform options aiming to close the gap between the child protection and adult guardianship systems. These were to:
- increase the age jurisdiction under the CYF Act
 - lower the age jurisdiction under the G&A Act
 - lower the age jurisdiction under the G&A Act and increase the age jurisdiction in the CYF Act.
- 22.40 There were a variety of responses to these options.

INCREASING THE AGE JURISDICTION UNDER THE CYF ACT TO 18 YEARS

- 22.41 A number of organisations supported extending the age jurisdiction of the CYF Act to include 17 year olds, rather than utilising the adult guardianship system for these people.⁷⁰ It was noted that providing child protection to 17 year olds would ensure that Victoria complies with international human rights law,⁷¹ juvenile justice provisions,⁷² and Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁷³ It was also argued that extending the coverage of the CYF Act would provide better consistency between guardianship laws and other Victorian legislation.⁷⁴

LOWERING THE AGE JURISDICTION OF THE G&A ACT

- 22.42 There was also significant support for lowering the age jurisdiction in the G&A Act. Some organisations suggested a guardian or administrator should be able to be appointed for anyone 16 years and over,⁷⁵ while others thought appointments should only be possible for people 17 years and over.⁷⁶ It was argued that in some instances neither a young person's parents, nor DHS, would be an appropriate decision maker for a person under 18 years.⁷⁷
- 22.43 There were some reservations about this proposal, however. Some organisations expressed concern that if the age were lowered and a guardian or administrator was appointed for a young person under the G&A Act, services and funding that are currently provided under the CYF Act may no longer be made available for a

68 For eg, Submissions IP 29 (Australian Association of Social Workers), IP 30 (Victorian Aboriginal Legal Service), IP 42 (Health Services Commissioner), CP 19 (Office of the Public Advocate), CP 36 (Berry Street) and CP 44 (Leadership Plus).

69 For eg, Submissions CP 36 (Berry Street) and CP 73 (Victoria Legal Aid).

70 For eg, Submissions CP 19 (Office of the Public Advocate), CP 33 (Eastern Health), CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 75 (Federation of Community Legal Centres (Victoria)).

71 Submissions CP 36 (Berry Street) and CP 73 (Victoria Legal Aid).

72 Submission CP 73 (Victoria Legal Aid).

73 Specifically with s 17(2) of the Charter, concerning the protection of families and children: Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

74 Submission IP 30 (Victorian Aboriginal Legal Service).

75 For eg, consultation with Alzheimer's Australia Vic (19 April 2010), roundtable with seniors (in partnership with Council on the Ageing Victoria) (5 May 2011); Submissions IP 23 (Mental Illness Fellowship Victoria) and CP 44 (Leadership Plus).

76 For eg, consultations with Villamanta Disability Legal Centre (19 April 2010), Julian Gardner (26 March 2010); Submissions IP 5 (Southwest Advocacy Association) 7, IP 29 (Australian Association of Social Workers), IP 33 (Trustee Corporations Association of Australia), IP 50 (Action for Community Living) and IP 59 (State Trustees Limited).

77 Submission IP 43 (Victoria Legal Aid).



young person,⁷⁸ particularly as a guardian does not have the authority to direct service providers.⁷⁹ The Public Advocate was particularly concerned about this, suggesting that:

closure of the existing gap carries with it the danger that guardianship will be increasingly asked to provide case management for people leaving state care, instead of being provided by a proper 'leaving care team'.⁸⁰

22.44 Victoria Legal Aid argued that reducing the age limit of the G&A Act to 16 could lead to the

risk that children may not have access to age-appropriate services once placed on an order. This risk needs to be managed by clear guidelines to ensure that guardianship orders are only made for young people in exceptional circumstances.⁸¹

Lowering the age jurisdiction of the G&A Act for administration

22.45 While the Public Advocate did not support allowing a guardian to be appointed for people under 18, she did support allowing an administrator to be appointed for 16 and 17 year olds.⁸² Other organisations also supported allowing young people to have an administrator appointed once they turn 16.⁸³

22.46 Government benefits available to people aged between 16 and 18 include the disability support pension, the youth disability supplement, pharmaceutical allowance, and mobility allowance.⁸⁴ It was argued that young people with disabilities might require financial assistance to manage these funds. They may also require financial assistance for specific circumstances, such as the management of a deceased estate.⁸⁵ Some organisations raised concerns that young people with disabilities may be particularly vulnerable to financial exploitation, as they are eligible to receive benefits but not to have an administrator to manage their financial affairs until they are 18.⁸⁶

LOWERING THE AGE JURISDICTION IN THE G&A ACT, AND INCREASING THE AGE JURISDICTION IN THE CYF ACT

22.47 A number of organisations and individuals supported the Commission's preferred reform option to lower the age jurisdiction in the G&A Act and increase the age jurisdiction in the CYF Act.⁸⁷ Berry Street argued that this option

allows for the cross-over and careful planning for young people exiting the child protection system rather than being done hastily when the young person becomes 18. This option allows for a choice at 16 for a young person and their family to decide which legislation best meets their individual needs.⁸⁸

22.48 Victoria Legal Aid did not support the Commission's proposal, arguing that 'where there are overlapping responsibilities, there is a greater risk of a client falling between the cracks'.⁸⁹

⁷⁸ Submissions CP 19 (Office of the Public Advocate) and CP 73 (Victoria Legal Aid).

⁷⁹ Submission CP 19 (Office of the Public Advocate).

⁸⁰ Submissions IP 8 (Office of the Public Advocate) and CP 19 (Office of the Public Advocate).

⁸¹ Submission CP 73 (Victoria Legal Aid).

⁸² Submission CP 19 (Office of the Public Advocate).

⁸³ Submission IP 27 (Marillac), IP 47 (Law Institute of Victoria), IP 44 (Australian Bankers' Association), CP 70 (State Trustees Limited) and CP 73 (Victoria Legal Aid).

⁸⁴ See Centrelink (Commonwealth) *Payments* (10 November 2011) <<http://www.centrelink.gov.au/internet/internet.nsf/payments/index.htm>>. These benefits are outlined in more detail in Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2010) [11.35].

⁸⁵ Submission CP 70 (State Trustees Limited).

⁸⁶ For eg, Submissions IP 59 (State Trustees Limited) and CP 73 (Victoria Legal Aid).

⁸⁷ For eg, Submissions CP 24 (Autism Victoria), CP 29 (STAR Victoria), CP 35 (Ursula Smith), CP 36 (Berry Street), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University) and CP 70 (State Trustees Limited).

⁸⁸ Submission CP 36 (Berry Street).

⁸⁹ Submission CP 73 (Victoria Legal Aid). VLA cited the example of young people having been eligible for services from both Child Protection and Disability Services, yet not adequately served by either service due to each suggesting that service provision is the responsibility of the other.

- 22.49 In the consultation paper, the Commission asked what could be done to manage the risk that young people may not have access to the services currently available should the jurisdictions overlap.
- 22.50 It was suggested that clear policy guidelines and targeted education campaigns should be developed to address any risk that young people would have less access to services.⁹⁰ DHS and some other organisations suggested the implementation of protocols or memoranda of understanding between the relevant organisations.⁹¹ Berry Street suggested that a protocol should strive to achieve ‘best interests’,
 which ensures that any practice resulting from the division of statutory responsibility for young people aged 16–18 is predicated on what best suits the needs of the young person rather than agency resource implication or other demarcation.⁹²
- 22.51 DHS suggested it may be appropriate to consider the Cocks Committee recommendation that the age jurisdiction of the G&A Act only be extended to 17 year olds ‘in exceptional circumstances’.⁹³
- 22.52 Some organisations suggested that further enquiry into the area is needed.⁹⁴ For example, Victoria Police recommended that an ‘analysis of the potential to broaden the range of individuals who are subject to these Acts and the resource impact on the affected service providers’ should precede any legislative amendment.⁹⁵

THE COMMISSION’S VIEWS AND CONCLUSIONS

CLOSING THE GAP BETWEEN THE CHILD PROTECTION AND ADULT GUARDIANSHIP SYSTEMS

- 22.53 The Commission believes that the most effective way to close the gap between the child protection and adult guardianship systems is to allow for some overlap between the two systems. This can be done by lowering the age jurisdiction in new guardianship legislation to people who are 16 years and over and increasing the age jurisdiction in the CYF Act to people up to the age of 18.⁹⁶ This is an area where individual assessment of the needs of a particular young person, rather than a strict division of responsibility based on age alone, is the most desirable public policy.
- 22.54 This approach would provide flexibility when dealing with a particularly vulnerable group of people. Increasing the age jurisdiction of the CYF Act to allow a protection application to be made for a young person up to the age of 18 would allow 17 year olds who are in need of assistance to be brought within the Children’s Court protective jurisdiction, and, importantly, allow them access to services provided by DHS. This would ensure Victoria’s child protection system is consistent with all other Australian jurisdictions and international obligations under CROC.⁹⁷

⁹⁰ Submission CP 48 (Centre for the Advancement of Law and Mental Health—Monash University).

⁹¹ Submissions CP 29 (STAR Victoria), CP 36 (Berry Street). Letter from Gill Callister, Secretary, Department of Human Services, to Professor Neil Rees, 7 November 2011.

⁹² Submission CP 36 (Berry Street).

⁹³ Letter from Gill Callister, Secretary, Department of Human Services, to Professor Neil Rees, 7 November 2011.

⁹⁴ Submissions CP 16 (Victoria Police), CP 27 (Catholic Archdiocese of Melbourne) and CP 35 (Ursula Smith).

⁹⁵ Submission CP 16 (Victoria Police).

⁹⁶ The Commission notes that it has already proposed increasing the age jurisdiction in the CYF Act to allow protection applications to be made for any child under the age of 18: Victorian Law Reform Commission, *Protection Applications in the Children’s Court*, Report No 19 (2010) 346.

⁹⁷ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).



- 22.55 In some circumstances, both the Children’s Court and VCAT would have jurisdiction to make orders for 16 and 17 year olds. In these instances, a determination would need to be made as to which is the most appropriate system. It would be appropriate to make an order under guardianship legislation when the person’s primary need is substitute decision making. It would be appropriate to make an order under the CYF Act when the person’s primary need is the protection of a child.
- 22.56 In order to ensure that orders are made under the most appropriate legislation, the Commission recommends the Public Advocate and the Secretary of DHS develop protocols regarding their respective roles in relation to 16- and 17-year-old people with disabilities for whom guardianship issues arise. In addition to other matters, these protocols should address how to determine which system is most appropriate for a young person who falls within the age jurisdiction of both systems. The Children’s Court and VCAT should be given the power to refer a case to the other tribunal or court if it believes that the case would be more appropriately dealt with in the other jurisdiction.

RECOMMENDATIONS

Closing the gap between the adult guardianship and child protection jurisdictions

402. The age jurisdiction for guardianship and administration should be lowered to 16 years and over in new guardianship legislation, and increased to 18 years in the *Children, Youth and Families Act 2005 (Vic)*. The *Children, Youth and Families Act 2005 (Vic)* should be amended to enable a protection application to be made in relation to any person under the age of 18 years.
403. New guardianship legislation should allow a personal guardian or a financial administrator to be appointed for any person who has attained the age of 16 years and who satisfies the relevant criteria for appointment.

Choice between child protection and adult guardianship for young people

404. New guardianship legislation should define ‘young person’ as a person who is 16 or 17 years old.
405. The *Children, Youth and Families Act 2005 (Vic)* and new guardianship legislation should contain guidance about when it is preferable to make orders under either the *Children, Youth and Families Act 2005 (Vic)* or guardianship legislation for a young person who is eligible for an appointment under both systems.
406. It is appropriate to make an order under guardianship legislation when the person’s primary need is substitute decision making. It is appropriate to make an order under the *Children, Youth and Families Act 2005 (Vic)* when the person’s primary need is the protection of a child.

VCAT and the Children’s Court may refer matters

407. VCAT should be permitted to refer an application for the appointment of a personal guardian or financial administrator for a young person to the Children’s Court if it believes that the application is better dealt with as a protection application under the *Children, Youth and Families Act 2005 (Vic)*.
408. The Children’s Court should be permitted to refer a protection application for a young person with impaired decision-making ability because of a disability to VCAT if it believes that the application is better dealt with under guardianship legislation.

Protocol between the Public Advocate and the Department of Human Services

409. The Public Advocate and the Secretary of the Department of Human Services should develop protocols regarding their respective roles in relation to young people with disabilities for whom guardianship issues arise.

410. The protocols should address:

- (a) the respective roles of the child protection, disability services and adult guardianship systems
- (b) how to determine which system is most appropriate for a young person if a person falls within the age jurisdiction of both systems
- (c) the role of the Department of Human Services in providing services
- (d) the role of the Public Advocate in providing advocacy.

Transition between the two systems

- 22.57 It is vitally important that young people with a disability experience a smooth transition between the child protection and the adult guardianship systems. As well as establishing protocols about their respective roles, the Commission recommends that the Secretary of DHS and the Public Advocate develop a memorandum of understanding in order to ensure young people are transitioned appropriately and effectively between the two systems.
- 22.58 This agreement may draw upon the memorandum of understanding developed between the Western Australian DCP and their Public Advocate.⁹⁸ For example, it should clearly articulate the role and responsibilities of DHS and the Public Advocate, including the responsibility for DHS to provide services for young people who move out of its care and into guardianship under the G&A Act, and the types of services that should be provided. The memorandum of understanding should also establish formal mechanisms and obligations for regular communication and detailed protocols for the development of individual leaving care plans for young people.
- 22.59 New guardianship legislation should provide that a young person's entitlement to or eligibility for services or support under the CYF Act or the Disability Act should not be affected by the appointment of a personal guardian⁹⁹ or financial administrator¹⁰⁰ for that person. This should ameliorate any risk that a young person may not have the same access to services if they have a guardian or administrator under the G&A Act.
- 22.60 The Commission believes it would be advantageous for the Public Advocate to become involved in an advocacy capacity for young people with disabilities who are already in the child protection system, before taking on a guardianship role. This would help ensure a smoother transition between the two systems. The memorandum of understanding between the Secretary of DHS and the Public Advocate should also outline procedures for guardians to follow in order to access age-appropriate services on behalf of a represented person, and should outline the advocacy role of the Public Advocate for young people.

⁹⁸ Memorandum of Understanding between the Department for Child Protection and the Public Advocate, *Procedures for Young Adults with Decision-Making Disabilities Leaving the Care of the Department for Child Protection*, cited with permission of the Public Advocate (Western Australia), 2 December 2011.

⁹⁹ In Chapter 5, the Commission recommends replacing the term 'guardian' with 'personal guardian'.

¹⁰⁰ In Chapter 5, the Commission recommends replacing the term 'administrator' with 'financial administrator'.



- 22.61 In addition, the Secretary should identify any young person for whom she is the guardian or long-term custodian and who is likely to benefit from an appointment under guardianship legislation when they are no longer under her care and protection, and make an application to VCAT under guardianship legislation when appropriate.

RECOMMENDATIONS

Transition between the two systems

411. New guardianship legislation should provide that a young person's entitlement to or eligibility for services or support under the *Children, Youth and Families Act 2005* (Vic), or the *Disability Act 2006* (Vic) should not be affected by the appointment of a personal guardian or financial administrator for that person.

Transition from guardianship by the Secretary of the Department of Human Services to guardianship under new guardianship legislation

412. The Secretary of the Department of Human Services should be required to:

- (a) identify any young person for whom she is the guardian or long-term custodian and who is likely to benefit from an appointment under guardianship legislation when they are no longer under her care and protection
- (b) make an application to the tribunal under guardianship legislation when appropriate.

Memorandum of understanding about transitioning

413. The Public Advocate and the Secretary of the Department of Human Services should develop a memorandum of understanding regarding their respective roles in relation to the transition of young people from the child protection to the adult guardianship system, including the role of the Department of Human Services in providing services, formal mechanisms and obligations for communication and detailed protocols for the development of leaving care plans for young people.

Role of the Public Advocate

414. The Public Advocate should provide advocacy for any young person under the guardianship or custody of the Secretary of the Department of Human Services who is likely to require an order under guardianship legislation.



Chapter 23 **Disability Act**

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INTRODUCTION

23.1 This chapter considers the interaction between the *Guardianship and Administration Act 1986* (Vic) (G&A Act) and the *Disability Act 2006* (Vic), particularly in relation to arrangements for people with impaired decision-making ability who might pose a serious risk to the safety of others.

CURRENT LAW

23.2 The Disability Act establishes a framework for providing support and services to people with disabilities throughout Victoria. It interacts with the G&A Act in a number of areas as it provides for substituted consent for:

- general supports and services
- admission to residential institutions
- restrictive interventions, such as restraint and seclusion
- compulsory treatment.

23.3 The Disability Act's provisions apply to people with a broad range of disabilities. However, they do not apply to people with a mental illness or disabilities related to ageing.¹ The provisions regarding compulsory treatment apply only to people with an intellectual disability.² These provisions are the focus of this chapter.

23.4 The other identified interactions between the Disability Act and the G&A Act are discussed in detail in the consultation paper.³ They include:

- consent to general supports and services
- consent to admission to residential institutions
- consent to restrictive interventions
- consent to compulsory treatment.

23.5 The Commission believes that there is no need to make any recommendations about these matters because the two statutes appear to operate together satisfactorily in these areas.

23.6 Prior to the introduction of the Disability Act, guardians were sometimes asked to consent to these matters for people with a disability who lacked capacity to make their own decisions.⁴

COMPULSORY TREATMENT

23.7 Compulsory treatment can be provided under the Disability Act in a number of ways, most of which are ordered by a court in relation to a person who:

- has been charged with an offence but is unfit to stand trial or is not guilty because of mental impairment⁵
- has been convicted of an offence,⁶ or
- is already in prison.⁷

Guardians are not usually involved in these matters.

1 *Disability Act 2006* (Vic) s 3 (definition of 'disability').

2 *Ibid* s 152(1)(a).

3 Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 418–20.

4 These decisions can continue to be made by guardians since the introduction of the Disability Act, with the exception of compulsory treatment for people with intellectual disabilities.

5 *Disability Act 2006* (Vic) ss 180–2.

6 *Ibid* ss 151–65.

7 *Ibid* ss 166–79.

- 23.8 The Disability Act also permits the Victorian Civil and Administrative Tribunal (VCAT) to order compulsory treatment for a person with an intellectual disability who poses a significant risk of serious harm to others. This is done by making a supervised treatment order.⁸
- 23.9 Because the Disability Act limits the use of supervised treatment orders to people with an intellectual disability, guardianship remains the only means of providing compulsory treatment to people with other cognitive impairments.

COMMUNITY RESPONSES

- 23.10 In the consultation paper, the Commission suggested that the Disability Act's compulsory treatment provisions could be extended to include people with an acquired brain injury in order to overcome the reliance upon guardianship orders in those instances where protection of the public is a primary reason for seeking compulsory treatment. The Public Advocate supported this suggestion.⁹
- 23.11 Victoria Legal Aid expressed reservations about the proposal, and raised concerns about the compulsory treatment provisions in the Disability Act as they currently apply to people with an intellectual disability, because of the lack of a reliable framework for predicting future risk.¹⁰

OTHER JURISDICTIONS

- 23.12 The Australian Capital Territory is the only Australian jurisdiction that has a compulsory care and treatment regime for people with a broad range of cognitive impairments who are at risk of harming others. These are found in the *Mental Health (Treatment and Care) Act 1994* (ACT), which allows for, among other things, community care orders that involve compulsory care and treatment for someone with a mental dysfunction¹¹ who is likely to do serious harm to themselves or someone else.¹²

THE COMMISSION'S VIEWS AND CONCLUSIONS

- 23.13 In an earlier reference, the Commission proposed a new legislative regime for compulsory care of and treatment for people with cognitive impairments who pose a serious risk to others.¹³
- 23.14 This recommendation was partially implemented by the provisions for supervised treatment orders for people with intellectual disabilities in part 8 of the Disability Act.
- 23.15 However, the Commission's recommendation for broader application of these provisions was not adopted. When introducing the Bill, the Minister argued that, at that time, there was little evidence regarding appropriate treatments to reduce at-risk behaviour of people with an acquired brain injury.¹⁴

⁸ Ibid ss 183–201.

⁹ Submission CP 19 (Office of the Public Advocate).

¹⁰ Submission CP 73 (Victoria Legal Aid).

¹¹ Mental dysfunction is defined in s 3 of the *Mental Health (Treatment and Care) Act 1994* (ACT) as 'a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion'.

¹² *Mental Health (Treatment and Care) Act 1994* (ACT) ss 36–36A.

¹³ Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Report No 4 (2003). The Commission suggested that 'cognitive impairment' should be defined as 'a significant and long-term disability in comprehension, reasoning, learning or memory that is the result of any damage to, or any disorder, imperfect or delayed development, impairment or deterioration of the brain or mind': at 115.

¹⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 1 March 2006, 418 (Sherryl Garbutt, Minister for Community Services).

Disability Act



- 23.16 This argument should not prevent the extension of the supervision treatment order provisions in the Disability Act to people with an acquired brain injury. The provisions relating to a supervised treatment order stipulate that the person can be detained under the order only if they receive treatment as part of a treatment plan that will both benefit the person and substantially reduce the risk of serious harm to another person.¹⁵ If VCAT is not satisfied that such a service can be provided, then a supervised treatment order cannot be made. With this safeguard in place in the legislation, there is no reason to exclude people with an acquired brain injury from the Act's supervised treatment order provisions.
- 23.17 Without such provisions, there continues to be an expectation that guardians will consent to detention and treatment in these circumstances. While the Commission understands that the number of people for whom guardianship is used in this way is relatively small, this practice is not consistent with the long-accepted purpose of guardianship. Guardianship should be a mechanism for promoting the personal and social wellbeing of a person with a disability who is unable to make their own decisions rather than a device to protect the community from people who pose a risk to the safety of others.
- 23.18 While there will be some costs associated with this proposal, the Commission understands that they are likely to be modest.¹⁶

RECOMMENDATION

Extending supervised treatment orders in the Disability Act

415. The *Disability Act 2006 (Vic)* should be amended to extend the application of the supervised treatment order provisions in part 8 to people with an acquired brain injury.

¹⁵ *Disability Act 2006 (Vic)* s 191(6)(c).

¹⁶ In its most recent annual report, the Public Advocate reported that she currently acts as guardian for 200 people with an acquired brain injury: Office of the Public Advocate (Victoria), *Annual Report 2010–2011* (2011) 7. The Commission understands that only a very small number of these people have those guardianship orders for the purposes of protecting others from serious harm.



Chapter 24 **Mental Health Act**

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INTRODUCTION

- 24.1 The Commission has been asked to consider how guardianship laws should interact with other statutory regimes that authorise different forms of substitute decision making for people with impaired ability to make their own decisions.
- 24.2 This chapter considers the relationship between guardianship laws and the *Mental Health Act 1986* (Vic), which creates a form of clinical guardianship by permitting a senior psychiatrist¹ to authorise the detention² and treatment³ of a person with a mental illness in some circumstances.⁴
- 24.3 The terms of reference direct the Commission to consider contemporaneous reviews of other substitute decision-making legislation that are relevant to this review. In preparing this chapter, the Commission considered the review of the Mental Health Act that commenced in 2008 and which led to the exposure draft of a Mental Health Bill released on 7 October 2010.⁵
- 24.4 The Department of Health received more than 200 submissions in response to the exposure draft of the Bill. In 2011, further roundtable meetings were held and an expert advisory group was reconvened.⁶ The Victorian Government announced that it anticipated introducing a revised Bill into the Victorian Parliament in 2012, with the aim of new mental health legislation commencing in 2013.⁷

CURRENT LAW

BACKGROUND

- 24.5 The current Victorian Mental Health Act was enacted at the same time as the *Guardianship and Administration Act 1986* (Vic) (G&A Act). Both Acts formed part of a package of complementary legislation for people with a disability.⁸ These Acts marked an end to the longstanding practice of using the same laws to respond to the needs of people with a mental illness and those with an intellectual disability. Earlier legislation—ranging from Victoria’s first mental health statute, the *Lunacy Act 1867* (Vic), to the *Mental Health Act 1959* (Vic)—had been the primary source of substitute decision-making authority for all people with impaired decision-making capacity.
- 24.6 As indicated in earlier chapters, one of the primary reasons for establishing the Cocks Committee, which produced the report that formed the basis of the G&A Act, was the creation of new laws to meet the legal needs of people with an intellectual disability at a time of de-institutionalisation.⁹ The existing mental health legislation—the *Mental Health Act 1959* (Vic)—was not designed to ‘enable intellectually handicapped people to live with dignity in the community’.¹⁰

1 This person is referred to as the ‘authorised psychiatrist’, whose powers may be delegated to any other qualified psychiatrist: *Mental Health Act 1986* (Vic) s 96.

2 *Mental Health Act 1986* (Vic) s 12AC(4).

3 *Ibid* ss 12AD(2), 85(1)(a)(iv).

4 The criteria for involuntary treatment are set out in *ibid* s 8.

5 See Department of Health (Victoria), Exposure Draft Mental Health Bill 2010 (Vic) available at: <<http://www.health.vic.gov.au/mentalhealth/mhactreview/>>.

6 Department of Health (Victoria), *Mental Health Act Review Information Sheet* (May 2011) <[http://docs.health.vic.gov.au/docs/doc/A886BEE05026CF25CA257895007C24A9/\\$FILE/Information%20sheet%20-%20May%202011.pdf](http://docs.health.vic.gov.au/docs/doc/A886BEE05026CF25CA257895007C24A9/$FILE/Information%20sheet%20-%20May%202011.pdf)>.

7 *Ibid*.

8 Most of the *Guardianship and Administration Board Act 1986* (Vic) came into operation on 14 July 1987, while most of the *Mental Health Act 1986* (Vic) commenced operation on 1 October 1987. The *Intellectually Disabled Persons Services Act 1986* (Vic) (now replaced by the *Disability Act 2006* (Vic)) was part of the same package of legislation for the benefit of people with a disability.

9 Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 11–12.

10 *Ibid* 12.

- 24.7 While a majority of the Cocks Committee supported a 'generic approach [that] would enable the benefits of guardianship and estate administration to be made available to society as a whole',¹¹ the Committee limited its recommendations to laws designed for people with an intellectual disability because this focus reflected both the expertise of the Committee members and the reasons for its creation.¹²
- 24.8 The Victorian Parliament accepted the Cocks Committee's recommendation for generic laws by passing legislation that enabled a guardian or administrator to be appointed for any person with impaired decision-making ability because of a 'disability'. 'Disability' was originally defined to mean 'intellectual impairment, mental illness, brain damage, physical disability or senility',¹³ but was amended in 1999 to mean 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.¹⁴
- 24.9 Interestingly, the Myers Committee, which was established in 1980 to advise about the desirability of new mental health legislation, recommended that guardians should be appointed for people with a mental illness in some circumstances.¹⁵ The Myers Committee considered guardianship appropriate for the 'many persons [who] may suffer from mental illness which requires treatment but still not be judged to constitute an immediate threat to themselves or to the community' and who 'may be incapable of caring for themselves'.¹⁶
- 24.10 This recommendation was not adopted in either the G&A Act or the Mental Health Act. Nor was it raised in parliamentary debates—perhaps because the new concept of community treatment orders¹⁷ was seen as the best way of providing mandatory treatment to people while living in the community.

CURRENT OPERATIONS

- 24.11 The Mental Health Act authorises health professionals to detain and involuntarily treat some people with a mental illness in defined circumstances. These actions would constitute false imprisonment and assault if not expressly permitted by law.
- 24.12 In order to be eligible for involuntary treatment, a person must satisfy five criteria set out in section 8 of the Mental Health Act. In broad terms, they are:
- The person appears to be mentally ill.¹⁸
 - The person requires immediate treatment that can be obtained compulsorily.¹⁹
 - Involuntary treatment is necessary for the person's health or safety or for the protection of members of the public.²⁰
 - The person has refused, or is unable to consent to, the necessary treatment.²¹
 - There is no less restrictive way of providing adequate treatment.²²

11 Ibid 95.

12 Ibid 96.

13 Definition of 'disability' in *Guardianship and Administration Board Act 1986* (Vic) s 3, later amended by *Guardianship and Administration (Amendment) Act 1999* (Vic) s 4.

14 Definition of 'disability' in *Guardianship and Administration Act 1986* (Vic) s 3.

15 Consultative Council on Review of Mental Health Legislation, Parliament of Victoria, *Report of the Consultative Council on Review of Mental Health Legislation* (1981) recommendations 10, 11.

16 Ibid 60.

17 *Mental Health Act 1986* (Vic) s 14.

18 Ibid s 8(1)(a). Mental illness is broadly defined as 'a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory': at s 8(1A). Various conditions or activities, such as intellectual disability and use of alcohol or drugs, are expressly excluded from the definition of mental illness: at s 8(2).

19 *Mental Health Act 1986* (Vic) s 8(1)(b).

20 Ibid s 8(1)(c).

21 Ibid s 8(1)(d).

22 Ibid s 8(1)(e).



- 24.13 A person may receive involuntary treatment as an in-patient in a hospital or while living in the community.²³ A community treatment order may specify where the person must live.²⁴ Clinicians are responsible for these initial treatment and detention decisions. External accountability is provided by:
- the Mental Health Review Board, which hears appeals from and conducts periodic external reviews of involuntary patients²⁵
 - the Chief Psychiatrist, who has general clinical responsibility for patients receiving treatment under the Mental Health Act²⁶
 - community visitors, who have the power to inspect mental health services, speak to patients and report to the Minister.²⁷
- 24.14 The Mental Health Act establishes processes that permit clinical assessment of a person's need for involuntary treatment and detention. The Act authorises the police to apprehend people in the community in various circumstances²⁸ and to arrange for their transport to hospital for clinical assessment.²⁹ It permits a medical practitioner to conduct an initial psychiatric assessment of a person brought to a hospital and to detain that person for 24 hours,³⁰ as well as provide treatment until the authorised psychiatrist³¹ conducts an examination.³²
- 24.15 If the authorised psychiatrist determines that the person satisfies the criteria for involuntary treatment, the person may be detained in hospital as an involuntary patient or placed on a community treatment order.³³ An involuntary treatment order under the Mental Health Act is a form of clinical guardianship because the authorised psychiatrist has the power to determine a person's place of residence³⁴ and to authorise both psychiatric and non-psychiatric treatment.³⁵
- 24.16 The authorised psychiatrist is the only person who can authorise psychiatric treatment for an involuntary patient. Non-psychiatric treatment is dealt with a little differently. A guardian appointed by the Victorian Civil and Administrative Tribunal (VCAT), an enduring guardian appointed by a person with capacity, or an agent appointed under the *Medical Treatment Act 1988* (Vic), as well as the authorised psychiatrist, can provide substitute consent to non-psychiatric treatment of a person who is an involuntary patient.³⁶
- 24.17 The Mental Health Act permits a person subject to an involuntary treatment order to appeal to the Mental Health Review Board at any time for review of their order.³⁷ The Board must also review all involuntary orders within eight weeks of being made.³⁸ The Board has determinative powers that are not discretionary—it must discharge a person from an involuntary order if it is not satisfied that the relevant criteria are met.³⁹

23 Ibid ss 12AC(2)–(4).

24 Ibid s 14(3)(b).

25 Ibid ss 22(1)(a)–(b).

26 Ibid ss 105–106A.

27 Ibid ss 107–117AA.

28 Ibid ss 10–11.

29 Ibid ss 9A–9B, 10.

30 Ibid s 12AA.

31 This is a person who is a qualified psychiatrist appointed by the relevant authority as the authorised psychiatrist of an approved mental health service: *Mental Health Act 1986* (Vic) s 96.

32 *Mental Health Act 1986* (Vic) s 12AB.

33 Ibid s 12AC.

34 Ibid ss 12AC(2)–(4), 14(3)(b). An involuntary inpatient must be accommodated at an approved mental health service. A community treatment order may specify where the person must live, if this is necessary for the treatment of the person's mental illness.

35 *Mental Health Act 1986* (Vic) s 12AD.

36 Ibid s 85(1).

37 Ibid s 29(1).

38 Ibid s 30(1).

39 Ibid s 36(2).

24.18 Various authorisation, licensing and supervision mechanisms accompany the extensive powers granted to clinicians by the Mental Health Act. There are provisions dealing with the licensing of places where people may be involuntarily detained⁴⁰ and the qualifications and responsibilities of the person in charge of that facility.⁴¹ Independent community visitors have the right to enter a psychiatric hospital to talk to patients and to examine records concerning treatment.⁴²

GUARDIANSHIP AND MENTAL HEALTH LAWS

24.19 Guardianship and mental health legislation have operated as partly separate, but parallel, substitute decision-making regimes for the past 25 years. Throughout this period, it has been possible for a tribunal to appoint an administrator to manage the financial affairs of a person with a mental illness or for a person with capacity to appoint an enduring guardian or an enduring attorney to make substitute decisions for them at times of incapacity about any matters other than psychiatric treatment.⁴³

24.20 It has been assumed that guardianship should not be used as a means of authorising non-consensual psychiatric treatment or imposing restrictions upon where a person with a mental illness lives because only mental health laws can regulate these activities. In practice, the Mental Health Act has been the sole means of providing substitute decision-making authority for both psychiatric treatment and place of residence decisions for a person who lacks capacity because of a mental illness. The reasons for this significant exception to the scope of a guardian's powers do not appear to have been clearly articulated and debated.

24.21 Despite the longstanding practice of not using guardianship laws to authorise psychiatric treatment for people with a mental illness, the Mental Health Act was amended in 2002 in an attempt to give the authorised psychiatrist clear legal primacy in relation to psychiatric treatment decisions for people who are involuntary patients.⁴⁴ In the second reading speech for the amending legislation, the Attorney-General said:

The Mental Health Act will be amended to explicitly clarify that decision-makers appointed under the Guardianship and Administration Act or the Medical Treatment Act do not have authority to consent, or withhold consent, to psychiatric treatment for involuntary patients.⁴⁵

There was no explanation of the reasons for this amendment to the Mental Health Act.

24.22 Section 3A of the Mental Health Act provides, in effect, that a guardian cannot make psychiatric treatment decisions for a person who is an involuntary patient under the Mental Health Act.⁴⁶ However, that section does not affect a guardian's authority⁴⁷ to make psychiatric treatment decisions—other than those concerning psychosurgery⁴⁸ and electroconvulsive therapy⁴⁹—for a represented person who does

40 Ibid ss 94, 94A. The Department of Health publishes a list of approved mental health services. See Department of Health (Victoria), *Victoria's Mental Health Services: A List of Approved Mental Health Services* (2010) <<http://www.health.vic.gov.au/mentalhealth/services/approved1010.pdf>>. At present, all approved mental health services are public bodies.

41 *Mental Health Act 1986* (Vic) s 96.

42 Ibid ss 109–12.

43 In 2009–10 the most significant client group of State Trustees—Victoria's largest administrator—were people with a mental illness (approximately 30%): email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

44 *Guardianship and Administration (Amendment) Act 2002* (Vic) s 29. While s 12AE of the *Mental Health Act 1986* (Vic) requires the authorised psychiatrist to inform the guardian of any person who is an involuntary patient that the person has become an involuntary patient, the Act says nothing about suspension of the guardian's powers or about priority between the powers of the authorised psychiatrist and those of a guardian.

45 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 April 2002, 961 (Rob Hulls MP, Attorney-General).

46 These decisions are the sole province of the authorised psychiatrist: *Mental Health Act 1986* (Vic) ss 3A(2)(c), 12AD.

47 Assuming, for the purposes of this argument, that the guardian has been given authority to make decisions about psychiatric treatment.

48 *Mental Health Act 1986* (Vic) ss 54–71.

49 Ibid ss 72–73.



not have the capacity to make their own decisions about the matter and who is not an involuntary patient. For example, section 3A does not prevent a guardian (with appropriate powers) from authorising a represented person's admission to a public or private mental health facility and consenting to psychiatric treatment on that person's behalf.⁵⁰ An agent (with appropriate powers) appointed under the Medical Treatment Act could also act in this way. It would be necessary for clinical staff at a public or private mental health facility to accept and act upon the guardian's, or agent's, authority to take these steps. The Commission is unaware of any circumstances in which a guardian's powers have been used to authorise psychiatric treatment for a represented person in a public or private mental health facility.

- 24.23 The Public Advocate and the Chief Psychiatrist⁵¹ have developed a memorandum of understanding that seeks to provide guidance to guardians and mental health professionals where their roles are uncertain or overlap.⁵² This memorandum says that while guardians have 'no authority to consent or withhold consent to the provision of psychiatric treatment', they may act as an advocate in relation to mental health services, should generally be kept informed of the represented person's treatment, and can provide consent to a discharge plan.⁵³

THE MENTAL HEALTH BILL

- 24.24 The Mental Health Bill, released as an exposure draft on 7 October 2010, does not deal directly with the interaction between mental health and guardianship laws.⁵⁴ The Bill authorises health professionals to detain and involuntarily treat some people with a mental illness in circumstances similar to those set out in the current Mental Health Act. Clause 120 of the Bill covers the same ground as section 3A of the Mental Health Act by seeking to give the authorised psychiatrist sole decision-making authority in relation to psychiatric treatment for a person who is an involuntary patient.
- 24.25 While the Bill changes some of the review and accountability mechanisms, none of the proposed reforms appears to have a direct bearing on the issue of whether a guardian (with appropriate powers) may authorise the admission of a represented person to a public or private mental health facility and consent to psychiatric treatment on that person's behalf.

THE FUSION PROPOSAL

- 24.26 Many commentators, both within Australia and internationally, have suggested that one body of law should govern substitute decision making for all people with impaired decision-making capacity due to disability.⁵⁵ This suggestion, which would cause

50 Assuming, for the purposes of this argument, that the represented person lacks capacity to make their own treatment decisions—otherwise VCAT cannot appoint a guardian and an enduring guardian cannot exercise their powers.

51 The Chief Psychiatrist has overall responsibility for the medical care and welfare of people receiving treatment or care for mental illness under the *Mental Health Act 1986* (Vic) s 105.

52 Department of Human Services (Victoria), *Memorandum of Understanding between the Chief Psychiatrist and the Public Advocate: Responsibilities and Roles when Working with People with Mental Illness* (2006).

53 *Ibid* 5–7.

54 Some attempts have been made in other Australian jurisdictions to prioritise mental health and guardianship legislation. In New South Wales, for example, s 3C of the *Guardianship Act 1987* (NSW) provides that while guardianship may continue to operate when a person is either a voluntary or involuntary patient in a mental health facility, the powers in the *Mental Health Act 2007* (NSW) prevail over those in the *Guardianship Act 1987* (NSW) whenever there is inconsistency. In Tasmania, the two bodies of law have been partially integrated with detention decisions made under mental health laws and involuntary treatment decisions governed by guardianship law: see *Mental Health Act 1996* (Tas) ss 32, 52.

55 See, eg, Tom Campbell, 'Mental Health Law: Institutionalised Discrimination' (1994) 28 *Australian and New Zealand Journal of Psychiatry* 554; Geneva Richardson, 'Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions' (2002) 65 *Modern Law Review* 702; Peter Bartlett, 'The Test of Compulsion in Mental Health Law: Capacity, Therapeutic Benefit and Dangerousness as Possible Criteria' (2003) 11 *Medical Law Review* 326; John Dawson and George Szmukler, 'The Fusion of Mental Health and Incapacity Legislation' (2006) 188 *British Journal of Psychiatry* 504; John Dawson and George Szmukler, 'Why Distinguish "Mental" and "Physical" Illness in the Law of Involuntary Treatment?' in Michael Freeman (ed), *Law, Mind and Brain* (Ashgate, 2009) 173.

guardianship and mental health legislation to merge, has become widely known as the 'fusion' proposal.⁵⁶ The primary argument in favour of fusion is that it is discriminatory to have a separate body of law that deals with the involuntary treatment and detention of people with a mental illness when guardianship laws exist as a generic substitute decision-making regime for all people who lack capacity because of a disability.⁵⁷

- 24.27 The identity of the substitute decision maker is one of the major points of difference between guardianship and mental health laws. The Mental Health Act gives a senior clinician the power to determine the place of residence and treatment needs of some people with a mental illness, while guardianship laws provide a generic substitute decision-making regime that permits VCAT to appoint a person's family member or friend⁵⁸ to make important decisions for them when they lack capacity to do so themselves. A person with capacity may also appoint a relative or friend as their enduring guardian⁵⁹ to make decisions for them when they become 'unable by reason of a disability to make reasonable judgments'.⁶⁰
- 24.28 A guardian with appropriate powers may determine where a person who lacks capacity—other than a person with a mental illness—will live and whether that person will have particular forms of treatment recommended by health professionals. Despite the obvious similarity between the treatment and residence powers of a guardian and those of an authorised psychiatrist when dealing with involuntary patients, it has never been considered appropriate in Victoria for a guardian to make psychiatric treatment or place of residence decisions for a person with a mental illness who does not have the capacity to make their own decisions.
- 24.29 Tom Campbell argues that the existence of separate mental health legislation allows for the manifestation of 'institutional discrimination',⁶¹ since the coercive measures permitted under the legislation are confined to people with a mental illness.⁶² He suggests that this confirms and perpetuates 'mental illness prejudice'.⁶³ Campbell argues that separate mental health legislation 'institutionalises the idea that there is something about "mental illness" itself which invites a system of control and coercion'.⁶⁴ He suggests that although issues of medical treatment and social control are conceptually and practically different, they become dangerously entangled in the context of mental illness, thereby allowing stereotyped prejudice to flourish.⁶⁵

56 John Dawson and George Szmukler, 'The Fusion of Mental Health and Incapacity Legislation' (2006) 188 *British Journal of Psychiatry* 504. One of the authors of this proposal, Professor George Szmukler (now Professor of Psychiatry at the Institute of Psychiatry, King's College, London), is a former chair of the Victorian Branch of the Royal Australian and New Zealand College of Psychiatry. It appears that the term 'fusion' was chosen because of its prominent use in the very lengthy debate among some lawyers, particularly in NSW, about whether the UK *Judicature Acts 1873–75* (and later Australian equivalents) caused the fusion or merger of the separate bodies of law known as the common law and equity. Those in favour of the 'fusion' argument in that debate are often cast as the progressives (see, eg, Michael Kirby, 'Equity's Australian Isolationism' (2008) 8(2) *Queensland University of Technology Law Journal* 444).

57 See, eg, Tom Campbell and Chris Heginbotham, *Mental Illness: Prejudice, Discrimination and the Law* (Aldershot, Dartmouth, 1991).

58 The Public Advocate is appointed to undertake the role of a guardian when no other suitable person is available: see *Guardianship and Administration Act 1986* (Vic) s 23(4).

59 *Guardianship and Administration Act 1986* (Vic) s 35A(1).

60 *Ibid* s 35B(1).

61 Tom Campbell, 'Mental Health Law: Institutionalised Discrimination' (1994) 28 *Australian and New Zealand Journal of Psychiatry* 554, 554.

62 *Ibid*.

63 *Ibid*.

64 *Ibid* 556.

65 *Ibid* 555.



- 24.30 Stephen Rosenman argues that it is both discriminatory and therapeutically undesirable to have separate mental health laws:
- Once they have qualified for compulsory hospitalisation, patients lose their autonomy and personal standing. Not only treatment but all facets of the patient's personal life fall completely under the power of the hospital staff. However benevolent the staff may be, patients resent staff who are at once their custodians and carers. Such resentment discourages the development of collaboration in treatment.⁶⁶
- 24.31 Rosenman suggests that using guardianship laws to provide substitute decision making for people with a mental illness who are in need of involuntary treatment would allow guardians to remain involved throughout the process and play a role that 'separates medical advice from consent'.⁶⁷
- 24.32 John Dawson and George Szmukler advocate the fusion of mental health and guardianship legislation because it is both unnecessary and discriminatory to have separate laws that govern compulsory psychiatric treatment.⁶⁸ They suggest that the law should always respond to a person's incapacity to make their own decisions about medical treatment in the same way, regardless of the cause of that incapacity.
- 24.33 Dawson and Szmukler argue that there are individual and community benefits in moving to a system that relies on the incapacity of a person with mental illness as the trigger for legal intervention. This step would 'shift the focus away from potential "risk of harm" as the central ground upon which psychiatric treatment may be imposed'.⁶⁹ They suggest that this shift is likely to have two main benefits: earlier clinical intervention for both physical and mental illnesses, and uniform application of the criminal law.⁷⁰
- 24.34 Szmukler has also written that this step would help reduce discrimination,⁷¹ because the current law permits the non-consensual treatment of people with a mental disorder regardless of whether they have the capacity to make treatment decisions. On the other hand, a person with a physical disorder cannot be treated non-consensually if they have capacity, even if rejecting treatment may result in death.⁷²
- 24.35 Dawson and Szmukler also argue that a legal shift to an incapacity focus would permit all people (whether mentally ill or not) who harmed or attempted to harm somebody when they had capacity to become the responsibility of the criminal justice system, while those who lacked capacity (because of any disability) could be assisted under guardianship legislation. They suggest that the shift would allow for 'consistent ethical principles [to be applied] across medical law'.⁷³
- 24.36 Geneva Richardson suggests that discrimination against people with a mental disorder would be avoided if 'mental health care could be provided according to the same principles, including respect for patient autonomy, as those which cover all other forms of health care'.⁷⁴ She also suggests that the existence of guardianship laws further entrenches prejudice against mental illness as long as the system coexists with separate mental health legislation.⁷⁵ Richardson argues that the existence of the two systems

66 Stephen Rosenman, 'Mental Health Law: An Idea Whose Time has Passed' (1994) 28 *Australian and New Zealand Journal of Psychiatry* 561, 562.

67 *Ibid* 565.

68 John Dawson and George Szmukler, 'The Fusion of Mental Health and Incapacity Legislation' (2006) 188 *British Journal of Psychiatry* 504.

69 *Ibid*.

70 *Ibid*.

71 George Szmukler and Frank Holloway, 'Mental Health Legislation is Now a Harmful Anachronism' (1998) 22 *Psychiatric Bulletin* 662, 663–4.

72 *Ibid* 662.

73 Dawson and Szmukler, 'The Fusion of Mental Health and Incapacity Legislation' above n 68, 504.

74 Geneva Richardson, 'Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions' (2002) 65 *Modern Law Review* 702, 707.

75 *Ibid* 716.

'encourages the perception of mental disorder as a condition apart'.⁷⁶ Where two parallel decision-making structures exist—based on two distinct sets of principles—mental disorder will be seen as the more threatening and its pariah status will be reinforced.⁷⁷

Some cautionary notes

Emergency intervention in mental health laws

24.37 Even the principal advocates of the fusion proposal accept that there have been some benefits in using mental health legislation to provide involuntary treatment to people with a mental illness, especially because of the availability of emergency intervention and detention powers. George Szmukler, Rowena Daw and John Dawson have written:

A major strength of non-consensual treatment schemes that are based on incapacity principles is the respect shown for the autonomy of those patients who retain their capacity; but these schemes are, nevertheless, often weak on the regulation of emergency treatment powers, detention in hospital, and forced treatment. These are the areas, in contrast, in which civil commitment schemes are strong. The use of force, and the detention and involuntary treatment of objecting patients, is clearly authorised and regulated by mental health legislation.⁷⁸

24.38 The relatively few emergency intervention powers in guardianship legislation, especially when compared to the Mental Health Act, is a matter of considerable importance when considering the merits of the fusion proposal.

24.39 Unlike the Mental Health Act,⁷⁹ the G&A Act does not authorise police officers (or any other public officials), without an order from VCAT, to enter the premises of and arrange assistance for people who might be at risk of serious harm because of lack of capacity. Nor does it allow the police to apprehend people in public places and convey them to hospital for further examination or treatment.⁸⁰ The G&A Act does permit VCAT to authorise the Public Advocate to enter private premises with a member of the police force for the purposes of preparing a report about the need for a guardianship order and to order, after considering the report, that a person be apprehended for protective purposes.⁸¹ This slow process of emergency intervention is poorly suited to mental health crises.

Additional safeguards in mental health laws

24.40 There is clearly a great need for transparent decision-making processes and appropriate external review when the law authorises public officers to deprive people of their liberty and to provide them with compulsory psychiatric treatment. Unlike the Mental Health Act, the G&A Act has few mechanisms for review of decisions to deprive a person of their liberty and provide treatment without consent. There is no current means of reviewing individual decisions made by either tribunal-appointed or personally appointed guardians.⁸²

76 Ibid.

77 Ibid.

78 George Szmukler, Rowena Daw and John Dawson, 'A Model Law Fusing Incapacity and Mental Health Legislation' (2010) 20 *Journal of Mental Health Law* 11, 12.

79 *Mental Health Act 1986* (Vic) s 10.

80 Ibid s 10(1).

81 *Guardianship and Administration Act 1986* (Vic) s 27.

82 In Chapter 19, the Commission recommends the introduction of merits review for individual guardianship decisions of the Public Advocate and financial decisions of State Trustees and other professional administrators.



24.41 External review processes are a central feature of the Mental Health Act, with the Mental Health Review Board having a range of powers to review decisions made by the authorised psychiatrist. In contrast, using guardianship laws to authorise treatment and place of residence for a person with a mental illness would result in the delegation of what have been seen as significant state powers—those of detention and compulsory treatment—to a single person whose decisions are not easily reviewed.

Decision-making principles in guardianship laws

24.42 The guiding considerations for guardians may also be a matter of concern should guardianship legislation become the only means of providing compulsory, but unwanted, treatment to a person with a mental illness. A guardian is required to act in the best interests of the represented person and, whenever possible, to consider that person's wishes before making decisions.⁸³ This may be very difficult if guardianship is the only mechanism that can be used to authorise involuntary detention and treatment for people with a mental illness. It is inevitable that there will be instances in which the guardian is encouraged by clinical staff to make decisions contrary to the expressed wishes of the represented person. In some instances, the guardian may conclude that it is preferable to accept clinical advice about treatment rather than follow the wishes of the represented person. This could be a recipe for conflict. In these circumstances, the relationship between a friend or relative who accepts appointment as a guardian and the represented person could be jeopardised.

COMMUNITY RESPONSES

RESPONSES TO THE INFORMATION PAPER

24.43 The Commission received a range of responses to questions in the information paper concerning the manner in which mental health and guardianship laws should interact. Some people supported the fusion proposal, some thought it would be a retrograde step, and others suggested there be further debate about the advantages and disadvantages of allowing guardians to authorise non-consensual psychiatric treatment for people who lack capacity due to mental illness and to make decisions about where they live.

24.44 The views of Anita Smith—the President of the Tasmanian Guardianship and Administration Board and the chair of the Australian Guardianship and Administration Council—were particularly influential because there has been some integration of mental health and guardianship laws in Tasmania. Ms Smith suggested:

With some adjustments, I believe that guardianship legislation can take the place of mental health laws which have not kept pace with contemporary attitudes towards psychiatric disability. In Tasmania, our experience has been that mental health teams are applying for guardianship in preference to imposing mental health orders because they view them as more targeted to the issues requiring decision, more suited to promoting stability and more consistent with therapeutic principles.⁸⁴

⁸³ *Guardianship and Administration Act 1986* (Vic) s 28. The Commission recommends that the 'best interests' obligation be replaced by a duty to promote the 'personal and social wellbeing of the represented person' with 'substituted judgment' being the paramount consideration: see Chapter 17.

⁸⁴ Submission IP 53 (Anita Smith).

24.45 Psychiatric Disability Services of Victoria (VICSERV) argued that mental health and guardianship laws should be integrated into one, ‘capacity-based’ legislative scheme.⁸⁵ VICSERV argued that this would remove the discriminatory approach of the current laws—that treat people with a mental illness differently to others—and ensure maximum protection of human rights.⁸⁶ Similarly, the Mental Health Legal Centre called for a single, capacity-based legislative framework for substitute decision making, rather than a diagnosis-based scheme.⁸⁷

24.46 The Law Institute of Victoria argued that the Victorian Government should consider single, comprehensive, capacity-based laws, and noted that the Mental Health Act Review had not engaged with the threshold question of whether there is an ongoing need for mental health laws in any depth.⁸⁸

RESPONSES TO THE COMMISSION’S PROPOSALS IN THE CONSULTATION PAPER

24.47 In the consultation paper, the Commission identified three broad options when considering the relationship between guardianship and mental health laws. The three options are:

- **Option A: No change**—under this option it would remain impossible for a person to appoint an enduring guardian or for VCAT to appoint a guardian to make decisions about psychiatric treatment and place of residence for a person with impaired decision-making capacity due to mental illness who becomes an involuntary patient under the Mental Health Act.
- **Option B: Fusion of guardianship and mental health laws**—this option would bring about the complete fusion of mental health and guardianship law. The Mental Health Act would cease to exist and guardianship legislation would become the sole substitute decision-making regime for all people with impaired decision-making capacity due to a disability
- **Option C: Limited use of guardianship for non-consensual psychiatric treatment**—this option would allow guardianship to be used as a mechanism for authorising psychiatric treatment and place of residence decisions in some circumstances. The Mental Health Act and guardianship legislation would operate as parallel mechanisms, permitting a third person to authorise psychiatric treatment and determine the place of residence for a person with a mental illness. Under this option, an enduring guardian (with appropriate powers) would be able to authorise all forms of treatment and place of residence decisions for a represented person with a mental illness when that person lacks capacity to make their own decisions. The powers of the enduring guardian would prevail over those of an authorised psychiatrist under the Mental Health Act, except in cases of emergency.

24.48 In the consultation paper, the Commission indicated a preference for Option C, but observed that many details—such as the accountability mechanisms for guardians and the means of resolving disagreements between clinicians and guardians—required consideration. The Commission invited debate about the merits of Option C.

⁸⁵ Submission IP 17 (Psychiatric Disability Services of Victoria).

⁸⁶ Ibid.

⁸⁷ Submission IP 58 (Mental Health Legal Centre).

⁸⁸ Submission IP 47 (Law Institute of Victoria).



24.49 Many organisations provided detailed responses to the Commission’s proposal, supporting or opposing the options outlined. Some organisations and community members thought there should be further inquiry into the interaction of mental health and guardianship laws before any changes are implemented.⁸⁹

Views in support of Option A (no change)

- 24.50 A number of organisations expressed support for retaining separate mental health and guardianship laws.⁹⁰
- 24.51 Some concerns were raised that allowing psychiatric treatment decisions to be dealt with under guardianship legislation would result in the loss of the external scrutiny and accountability that exists under current and proposed mental health legislation.⁹¹ Victoria Legal Aid argued that the introduction of sufficient protection into guardianship legislation would probably render proceedings more costly for people to access.⁹²
- 24.52 Some people were concerned about friends or family members making psychiatric treatment decisions for a person diagnosed with a mental illness.⁹³ They also referred to the potential for conflict and loss of trust between the people involved. One submission suggested that family members might not want to undertake the responsibility of the position,⁹⁴ while another noted that family members might feel pressured to accept an appointment.⁹⁵
- 24.53 One person noted that mental health laws are different to other substitute decision-making laws because they often require representatives to make decisions that are contrary to the wishes of the represented person.⁹⁶ The Public Advocate noted that these situations might compromise the role of supporters.⁹⁷
- 24.54 There were also concerns that adoption of Options B or C would reduce the responsibility of authorised psychiatrists who would propose treatment but not carry the same degree of responsibility for it.⁹⁸
- 24.55 Further, the Public Advocate argued that any changes to the current arrangements could fracture the distinction between voluntary and involuntary treatment.⁹⁹ The Law Institute of Victoria argued that the proposal would create a two-tiered system for those with and without enduring guardians, and that any use of guardians for psychiatric treatment decisions is likely to introduce unnecessary complexity into the system.¹⁰⁰

Views in support of Option B (fusion)

- 24.56 Some organisations and individuals were strongly in favour of complete fusion of mental health and guardianship laws.¹⁰¹ The Mental Health Legal Centre argued this is

89 For eg, Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 78 (Mental Health Legal Centre) and CP 78 (Mental Health Legal Centre—Appendix 1: Consumer Views).

90 For eg, Submissions CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria).

91 For eg, consultation with NSW Public Guardian (16 March 2011); Submissions CP 19 (Office of the Public Advocate), CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria).

92 Submission CP 73 (Victoria Legal Aid).

93 Roundtable with mental health consumers (in partnership with Mental Health Legal Centre and Victorian Mental Illness Awareness Council) (5 April 2011).

94 Consultation with Anita Smith (21 February 2011).

95 Consultation with Associate Professor Nicholas Tonti-Filippini (3 May 2011). Also Submission CP 27 (Catholic Archdiocese of Melbourne).

96 Consultation with Associate Professor Nicholas Tonti-Filippini (3 May 2011).

97 Submission CP 19 (Office of the Public Advocate).

98 Ibid.

99 The Public Advocate noted that it and many other organisations and individuals are calling for greater safeguards in the realm of involuntary psychiatric treatment: *ibid.*

100 Submission CP 77 (Law Institute of Victoria).

101 For eg, Submissions CP 47 (Dr Michael Murray), CP 59 (Carers Victoria), CP 78 (Mental Health Legal Centre) and CP 78 (Mental Health Legal Centre—Appendix 1: Consumer Views).

a more consistent approach to mental health that does not treat people with mental illness differently from other members of the community.¹⁰² The Mental Health Legal Centre noted that its consumers were

keenly questioning the need for separate mental health laws which, on their face reinforced the different and discriminatory way in which they were treated as a result of their diagnosis.¹⁰³

- 24.57 The Mental Health Legal Centre noted that there was a strong feeling among consumers that the Commission’s proposal of limited use of guardians for non-consensual psychiatric treatment represented a ‘compromise of the rights of people labelled with a mental illness’.¹⁰⁴ Consumers raised concerns about the extent to which, in practice, substitute decision makers might step in prematurely in situations that might not meet the threshold for substitute decision making under the involuntary treatment provisions of the Mental Health Act.¹⁰⁵
- 24.58 Carers Victoria was in favour of fusion, arguing that it would potentially address some of the intractable problems of the current Mental Health Act. These problems include the potential conflict of interests created by an authorised psychiatrist being responsible for providing treatment advice, assessing capacity to consent and acting as a substitute decision maker for a person with a mental illness who lacks capacity. Furthermore, the fact that incapacity to consent to treatment is equated with a refusal to consent to treatment, means that people with capacity to consent are unable to refuse treatment for mental illness. Carers Victoria argued that the
- potential inability to refuse psychiatric treatment is not only discriminatory, but that it also underpins the disempowering experience of the mental health system as reported by people with a mental illness.¹⁰⁶

Views in support of Option C (greater overlap)

- 24.59 Some organisations and individuals supported the Commission’s proposal that it should be possible, in some circumstances, to use guardianship as a mechanism for authorising psychiatric treatment and place of residence decisions for a person who lacks capacity to make their own decisions due to mental illness.¹⁰⁷ Some groups indicated that their support for the Commission’s proposal was contingent on the provision of rigorous safeguards against misuse of powers and external accountability.¹⁰⁸
- 24.60 A number of organisations and consumers thought there should be further inquiry into the interaction of mental health and guardianship laws before making any changes.¹⁰⁹ Other organisations thought it was premature to comment on the Commission’s proposal until the Victorian review of mental health legislation is finalised.¹¹⁰
- 24.61 Other organisations sought more detail on the Commission’s proposals to allow them to comment more fully.¹¹¹

102 Consultation with Mental Health Legal Centre (28 April 2011).

103 Submission CP 78 (Mental Health Legal Centre—Appendix 1: Consumer Views).

104 Ibid.

105 Ibid.

106 Submission CP 59 (Carers Victoria).

107 For eg, Submissions CP 35 (Ursula Smith) and CP 48 (Centre for the Advancement of Law and Mental Health—Monash University).

108 Submission CP 75 (Federation of Community Legal Centres (Victoria)). Also Consultation with Julian Gardner (29 March 2011).

109 For eg, Submissions CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 78 (Mental Health Legal Centre) and CP 78 (Mental Health Legal Centre—Appendix 1: Consumer Views).

110 Submission CP 68 (Australian Nursing Federation).

111 Submissions CP 59 (Carers Victoria) and CP 78 (Mental Health Legal Centre).



THE COMMISSION'S VIEWS AND CONCLUSIONS

APPOINTMENT OF AN ENDURING PERSONAL GUARDIAN TO MAKE PSYCHIATRIC TREATMENT DECISIONS

- 24.62 Victorian law permits anyone with capacity to appoint someone—such as a family member or close friend—to make medical treatment decisions for them if they lose capacity at some time in the future.¹¹² Appointments of this nature are usually final and binding¹¹³—even for end of life decisions—except when dealing with psychiatric treatment. An authorised psychiatrist has exclusive powers to prescribe and authorise psychiatric treatment for an involuntary patient under the Mental Health Act, even though that person has validly appointed an enduring guardian to make psychiatric treatment decisions for them.
- 24.63 It is self-evident that the existing law and practice concerning authorisation of non-consensual psychiatric treatment for people with a mental illness treats people with a mental illness differently to others who experience impaired decision-making capacity because of disability. Whether that different treatment amounts to unjustifiable discrimination against people with a mental illness as some commentators suggest,¹¹⁴ or whether it constitutes a special measure¹¹⁵ for the benefit of people with a mental illness, is a matter for ongoing debate.
- 24.64 There are clinical issues to consider, as well as legal ones, when considering why psychiatric treatment decisions are currently an exception to the law that governs all other forms of substitute decision-making for medical treatment. Psychiatrist Stephen Rosenman has suggested that permitting a guardian to make psychiatric treatment decisions is beneficial—both ethically and clinically—because it separates medical advice from consent to treatment.¹¹⁶ This observation is particularly important at a time when mental health policy promotes participation by a person with a mental illness and their family in decisions about treatment and care.¹¹⁷
- 24.65 The Commission believes it is time to give people a choice about the person who will make psychiatric treatment decisions for them in some circumstances when they are unable to do so themselves. It should be possible for a person with capacity (a principal) to appoint another consenting person to be their enduring personal guardian¹¹⁸ to make psychiatric treatment (and any other medical treatment decisions) for them when they lack capacity to make their own decisions. In some instances, the psychiatric treatment powers of an enduring personal guardian should prevail over the powers of the authorised psychiatrist if the principal becomes an involuntary patient under the Mental Health Act. Without this change, the law will continue

¹¹² This can be through the appointment of an agent under section 5A of the *Medical Treatment Act 1988* (Vic) or the appointment of an enduring guardian with health care powers under pt 4 div 5A of the *Guardianship and Administration Act 1986* (Vic).

¹¹³ However, an application may be made to VCAT to suspend or revoke the authority of an agent or enduring guardian. See *Medical Treatment Act 1988* (Vic) s 5C, *Guardianship and Administration Act 1986* (Vic) s 35D. Where an agent or enduring guardian withholds consent to medical treatment a medical practitioner may proceed if they provide adequate notice to the agent or guardian, notify the Public Advocate, and wait a prescribed period of time: *Guardianship and Administration Act 1986* (Vic) ss 42L, 42M. If an agent has completed a valid refusal of treatment certificate, a medical practitioner may only proceed with the treatment if VCAT suspends or revokes the agent's authority (and thereby suspends or revokes the refusal of treatment certificate): see *Medical Treatment Act 1988* (Vic) ss 5C, 5D.

¹¹⁴ See, eg, Tom Campbell, 'Mental Health Law: Institutionalised Discrimination' (1994) 28 *Australian and New Zealand Journal of Psychiatry* 554; Geneva Richardson, 'Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions' (2002) 65 *Modern Law Review* 702; Peter Bartlett, 'The Test of Compulsion in Mental Health Law: Capacity, Therapeutic Benefit and Dangerousness as Possible Criteria' (2003) 11 *Medical Law Review* 326; John Dawson and George Szmukler, 'The Fusion of Mental Health and Incapacity Legislation', above n 68, 504; John Dawson and George Szmukler, 'Why Distinguish "Mental" and "Physical" Illness in the Law of Involuntary Treatment?' in Michael Freeman (ed), *Law, Mind and Brain* (Ashgate, 2009) 173.

¹¹⁵ 'Special measures' are generally seen as an acceptable departure from the principle that people are entitled to equal protection of the law and should not be subject to discrimination on the ground of an irrelevant attribute: see *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4); *Equal Opportunity Act 2010* (Vic) s 12.

¹¹⁶ Rosenman, above n 66, 562.

¹¹⁷ See, eg, *Mental Health Act 1986* (Vic) s 6A.

¹¹⁸ In Chapters 5 and 10, the Commission recommends replacing the term 'enduring guardian' with 'enduring personal guardian'.

to deal with substitute decision-making for psychiatric treatment in way that is not consistent with the approach to taken to substitute decision-making for all other forms of medical treatment, other than the few matters that are 'special procedures' under the G&A Act.¹¹⁹

- 24.66 Some people who have experienced mental illness will have well-formed views about the types of treatment they are willing and unwilling to accept when they lack capacity to make their own decisions. Respect for human dignity suggests that when they are clearly capable of exercising capacity to plan for the future, they should be entitled to appoint another willing and capable person to make treatment decisions when they cannot do so themselves.
- 24.67 The role of an enduring personal guardian with these powers will not be easy. In some instances, a potential enduring personal guardian might decline the role before an appointment is made, while in others a guardian who has accepted an appointment might decide that the role is too onerous because of the strain it places on their relationship with the principal. The enduring personal guardian should be permitted to resign in these circumstances.

Principles of the Mental Health Act

- 24.68 Beneficence and a desire to protect the community from harm were major policies implemented by the Mental Health Act when it was first enacted in 1986. The significance of these policies is demonstrated by the criteria that must be satisfied when deciding whether a person is eligible for involuntary psychiatric treatment. The central criterion is that, because of a person's mental illness, involuntary treatment 'is necessary for his or her health or safety' or 'for the protection of members of the public'.¹²⁰
- 24.69 Over time, new policies—such as respect for autonomy and the desirability of patient participation in treatment decisions—have influenced the content of amendments to the Mental Health Act. In 1995, the Act was amended to include principles of treatment and care. Two of the many principles listed in the Act are that 'the provision of treatment and care for people with a mental disorder should promote and assist self-reliance' and that 'every effort that is reasonably practicable should be made to involve a person with a mental disorder in the development of an ongoing treatment plan'.¹²¹
- 24.70 Two of the important objectives of the current review of the Mental Health Act are to:
- provide greater opportunity and support for patients to participate, as far as they are able, in their treatment and care
 - deliver a more patient-centred, rights-orientated, least restrictive and recovery-focused approach to treatment and care for people with serious mental illness.

It will be a significant challenge for those people who are designing new mental health laws to give practical effect to these principles so that they become more than mere statements of aspiration.

- 24.71 The Commission believes that these important objectives can be advanced by allowing people with a mental illness to participate in their own treatment and care by giving them the same rights as everyone else with a disability that affects their decision-making ability. A person with capacity should be permitted to appoint another person as their enduring personal guardian with the power to make decisions

119 'Special procedures' are discussed in Chapter 13.

120 *Mental Health Act 1986* (Vic) s 8(1)(c).

121 *Ibid* ss 6A(d), (j).



about psychiatric treatment for them when they lack the capacity to make their own decisions. In some instances, the psychiatric treatment powers of the enduring personal guardian should continue to operate even when the principal becomes an involuntary patient under the Mental Health Act.

- 24.72 When the reason for a person becoming an involuntary patient is their own wellbeing rather than public safety, the psychiatric treatment powers of an enduring personal guardian should prevail over the treatment powers of an authorised psychiatrist, other than in exceptional circumstances. This change to the way in which guardianship and mental health laws interact would be an important way of giving real substance to the values of autonomy, dignity and participation which are now central aspects of disability policy.¹²²
- 24.73 There is still too much to learn about the causes of mental illness and the effects of the various drugs that are used to alleviate the symptoms of those illnesses to allow beneficence to be the dominant public policy—and psychiatrists to be the only substitute decision makers—when people with a mental illness lack the capacity to make their own treatment decisions. There are no objective tests to confirm a diagnosis of many mental illnesses¹²³ and our understanding of why various drugs used in psychiatry alleviate symptoms is still developing.¹²⁴ Some drugs have serious side effects.¹²⁵ It should be possible for a person with capacity to appoint a trusted family member or friend to make treatment decisions for them when they are unable to do so, just as they can appoint someone to make all other treatment decisions for them.
- 24.74 The Commission's proposals concerning the circumstances in which an enduring personal guardian can be authorised to consent to psychiatric treatment for a person without capacity who is an involuntary patient are one means of seeking to strike a new balance between beneficence and autonomy when dealing with non-consensual psychiatric treatment. While no other Australian jurisdiction has taken the step of permitting an enduring guardian to make decisions about psychiatric treatment when the principal becomes an involuntary patient, Tasmania allows a guardian appointed by a tribunal to make treatment decisions in these circumstances.
- 24.75 The broader debate about the complete fusion of mental health and guardianship law is important and will probably continue for some time in Australia if the experience in the United Kingdom is any guide.¹²⁶ The Commission encourages further discussion about this fundamental change to the way in which authority is given for some people to receive mental health services.

HUMAN RIGHTS ISSUES

The Charter of Human Rights and Responsibilities

- 24.76 Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) and the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention) both emphasise the dignity of all people and promote the equal protection of the law for people with a disability. As such, the Commission believes they provide a useful framework within which to consider whether guardianship laws should be used to authorise the compulsory treatment of a person with impaired decision-making capacity due to mental illness.

¹²² See Chapters 4 and 5 of this report in which the changing policy environment is discussed.

¹²³ Sidney Bloch, *Understanding Troubled Minds: A Guide to Mental Illness and its Treatment* (Melbourne University Press, 2nd ed, 2011) 25–34.

¹²⁴ David Copolov and Philip Mitchell, 'Biological Therapies' in Sidney Bloch and Bruce Singh (eds), *Foundations of Clinical Psychiatry* (Melbourne University Press, 3rd ed, 2007) 552–577.

¹²⁵ *Ibid.*

¹²⁶ See, eg, Amar Shar, 'Eight Years of Controversy: Has it Made any Difference? Will the Amendments Contained in the Mental Health Act 2007 (UK) Result in More Patients being Subject to Compulsion?' (2009)16 *Psychiatry, Psychology and the Law* 60.

- 24.77 Section 10 of the Charter stipulates that a person ‘must not be subjected to medical ... treatment without his or her full, free and informed consent’, while section 21 declares that ‘[e]very person has the right to liberty and security’.
- 24.78 Although a law may legitimately curtail the human rights in the Charter, a Charter right may be subject ‘only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.¹²⁷ Because both guardianship and mental health laws clearly limit the rights in sections 10 and 21 of the Charter, they must pass the test set out in section 7(2), which involves consideration of both reasonableness and proportionality, in order to comply with the Charter.
- 24.79 The Charter’s preamble recognises that ‘all people are born free and equal in dignity and rights’, and one of its founding principles is that that ‘human rights belong to all people without discrimination’.¹²⁸ Section 8 of the Charter recognises:
- the right of every person to recognition as a person before the law
 - the equality of every person before the law
 - the right of every person to equal protection of the law without discrimination, as well as equal and effective protection against discrimination.¹²⁹

The Convention on the Rights of Persons with Disabilities

- 24.80 The Convention, which Australia has signed and ratified, deals with human rights in the context of legal capacity and the provision of compulsory treatment.¹³⁰ The Convention’s preamble and general principles emphasise the dignity and equality of people with a disability, and their right to autonomy and freedom from discrimination.¹³¹ Further, as part of the general obligations of states parties, article 4(1)(b) requires Australia to ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’.¹³²
- 24.81 Most importantly for present purposes, article 12 of the Convention requires states parties to ‘recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’, and to take ‘appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’.¹³³
- 24.82 Although some people have argued that the Convention requires the abolition of mental health laws,¹³⁴ the federal¹³⁵ and Victorian¹³⁶ governments have not interpreted it this way. When Australia ratified the Convention, it stated:

127 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

128 *Ibid* preamble.

129 *Ibid* ss 8(1), (3).

130 See in particular *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 12, 15.

131 *Convention on the Rights of Persons with Disabilities*, preamble (h), (n), art 3.

132 *Ibid* art 4(1)(b).

133 *Ibid* arts 12(2), (3).

134 See, eg, Tina Minkowitz, ‘Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities’ in Bernadette McSherry and Penelope Weller (eds), *Rethinking Right-Based Mental Health Laws* (Hart Publishing, 2010) 151.

135 See Australia’s interpretative declaration to the Convention available at: United Nations Treaty Collection, *Chapter IV: Human Rights, 15. Convention on the Rights of Persons with Disabilities* <<http://treaties.un.org/doc/Publication/MTDSG/Volume%20IV/Chapter%20IV/IV-15.en.pdf>>.

136 See Department of Health (Victoria), *Review of the Mental Health Act: Consultation Paper – December 2008* (2008) 12–13. This paper did not directly consider whether the Convention should prohibit involuntary mental health treatment, but stated ‘it is intended that Victoria will maintain a scheme for involuntary treatment under separate mental health legislation’. This has been the approach of the Department of Health (Victoria) Exposure Draft Mental Health Bill 2010 (Vic), which retains involuntary mental health treatment orders.



Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.¹³⁷

Special measures

- 24.83 Those who suggest that a group of people who share an attribute (such as a mental illness) should be treated differently usually bear the onus of proving that the different treatment is a 'special measure' for the benefit of that group.¹³⁸ This approach seems appropriate when considering whether an enduring personal guardian should be unable to make decisions about the principal's psychiatric treatment when the principal is an involuntary patient under the Mental Health Act.
- 24.84 The arguments in favour of continuing to give the authorised psychiatrist legal primacy when making psychiatric treatment decisions for an involuntary patient under the Mental Health Act and for denying an enduring guardian any role in these decisions are difficult to identify because this issue has not been openly debated. The 2006 memorandum of understanding between the Chief Psychiatrist and the Public Advocate about substitute consent to treatment and other decisions for a person with a mental illness does not explain the reasons for the preferred use of Mental Health Act powers. Similarly, there was no parliamentary discussion of policy considerations when the Mental Health Act was amended in 2002 to give the authorised psychiatrist sole responsibility in relation to psychiatric treatment decisions for involuntary patients.¹³⁹
- 24.85 It is likely that clinical preference for early treatment and administrative expediency are the most significant reasons in favour of retaining the authorised psychiatrist as the only person who can authorise psychiatric treatment for a person who is an involuntary patient under the Mental Health Act. These reasons do not seem strong enough to maintain an argument that the current inability of an enduring guardian to make psychiatric treatment decisions for an involuntary patient is a 'special measure' that justifies different treatment of people with a mental illness.

Early intervention

- 24.86 The treatment principles in the current Mental Health Act refer to the need for 'timely and high quality treatment and care in accordance with professionally accepted standards'.¹⁴⁰ This goal could be enhanced by allowing an enduring personal guardian to make psychiatric treatment decisions. As Dawson and Szmukler have argued, early intervention is more likely to occur if clinical involvement can be authorised as soon as a person lacks capacity rather than awaiting an event that triggers the involuntary treatment processes of the Mental Health Act.¹⁴¹

Administrative expediency

- 24.87 While administrative expediency is not a matter that should be dismissed lightly, it does not justify giving an authorised psychiatrist sole decision-making power about psychiatric treatment for a person who is an involuntary patient. It is important that authorised psychiatrists have clear and workable choices when dealing with a person

¹³⁷ See United Nations Treaty Collection, *Chapter IV: Human Rights, 15. Convention on the Rights of Persons with Disabilities* <<http://treaties.un.org/doc/Publication/MTDSG/Volume%20IV/Chapter%20IV/IV-15.en.pdf>>.

¹³⁸ See, eg, *Equal Opportunity Act 2010* (Vic) s 12(6); *Gerhardy v Brown* (1985) 159 CLR 70.

¹³⁹ Section 3A of the *Mental Health Act 1986* (Vic) was inserted into that Act by section 29 of the *Guardianship and Administration (Amendment) Act 2002* (Vic).

¹⁴⁰ *Mental Health Act 1986* (Vic) s 6A(a).

¹⁴¹ Dawson and Szmukler, 'The Fusion of Mental Health and Incapacity Legislation', above n 68, 504.

who is seriously mentally ill and who is unable to make their own decisions about psychiatric treatment. The Commission believes that this outcome can be achieved without retaining the Mental Health Act as the only vehicle for substitute decision making for psychiatric treatment and by permitting a properly authorised enduring personal guardian to make psychiatric treatment decisions for a principal in some circumstances. Other branches of medicine have adapted over time to the need to seek consent from a substitute decision maker when a person is unable to consent to their own treatment.

The extent of an enduring personal guardian's authority

- 24.88 Many important matters arise when considering the extent to which an enduring personal guardian should be authorised to consent to psychiatric treatment for a person with a mental illness. The lack of emergency intervention processes and accountability mechanisms in guardianship laws suggests a measured and staged approach when recommending an expanded role for guardians in psychiatric treatment decisions.
- 24.89 Guardianship powers are seldom used coercively in Victoria. The extent of an enduring personal guardian's authority to use force in relation to a principal, or to permit another person to do so—such as when injecting medication—without a specific order from VCAT remains unclear. Section 26 of the G&A Act permits VCAT to order that a guardian, or another specified person, is entitled to use force in order to ensure that the principal complies with the guardian's decisions. The guardian or specified person is indemnified from any legal action for assault or false imprisonment if the use of force in these circumstances is reasonable and in the represented person's best interests.¹⁴² This relatively slow process for authorising the use of force, such as when removing a person from a place where they may be in serious danger, is poorly suited to mental health crises.
- 24.90 There is a strong body of opinion in Victoria that guardianship powers should only be used for the benefit of the represented person and not for the protection of the public. The Public Advocate has said that guardianship 'should never be used as a means of protecting society from dangerous individuals'.¹⁴³ The Commission agrees with this statement.¹⁴⁴
- 24.91 In some circumstances, protection of the public rather than beneficence is the primary reason for causing a person to become an involuntary patient under the Mental Health Act. As noted earlier, an authorised psychiatrist has a choice when considering the criteria that must be satisfied before confirming that a person should become an involuntary patient. The authorised psychiatrist can decide that involuntary treatment is required because of a person's mental illness, either 'for his or her health or safety' or 'for the protection of members of the public'.¹⁴⁵ The extent to which people become involuntary patients in order to protect the public from harm is unknown.
- 24.92 In keeping with the general principle that guardianship should not be used coercively to protect the public, the Commission does not believe that the psychiatric treatment powers of an enduring personal guardian should prevail over those of an authorised psychiatrist when a person becomes an involuntary patient in order to protect the public from harm. In these instances, a public official who operates under appropriate

¹⁴² *Guardianship and Administration Act 1986* (Vic) s 26(2).

¹⁴³ Submission IP 8 (Office of the Public Advocate).

¹⁴⁴ See further discussion in Chapter 12.

¹⁴⁵ *Mental Health Act 1986* (Vic) s 8(1)(c).



accountability requirements for the exercise of their powers should make decisions about compulsory psychiatric treatment rather than a private individual appointed by the person who receives the treatment. Those public officials can properly represent the interests of the state by requiring one person to have compulsory psychiatric treatment for the benefit of others in the community.

- 24.93 The most significant practical challenge with this proposal is to distinguish between instances where the primary reason for causing a person to become an involuntary patient is their own wellbeing and those where the primary reason is protection of the public.
- 24.94 The Commission believes that authorised psychiatrists can be given appropriate assistance with this task through guidelines developed by the Chief Psychiatrist in consultation with the Public Advocate. While those guidelines will assist authorised psychiatrists to distinguish between those cases where involuntary treatment is given to protect the public rather than primarily for the wellbeing of the person concerned, the success of this approach to striking a new balance between competing interests will probably be determined by the views of authorised psychiatrists. Even though it would be possible for an authorised psychiatrist who wishes to retain sole decision-making authority for psychiatric treatment to record in every case that a person has become an involuntary patient 'for the protection of members of the public', the Commission believes that professionalism and integrity of clinicians working in the state's hospitals should prevent this outcome.
- 24.95 Given the manner in which psychiatric hospitals and community treatment facilities operate, the Commission does not believe it is appropriate to allow an enduring personal guardian to make decisions about a principal's detention in a hospital or compulsory residence in a community facility. The authorised psychiatrist must continue to have exclusive authority to determine occupancy as demand for these 'beds' often outstrips supply. If an enduring personal guardian had compulsory residence powers there would be potential for conflict and possible harm to the represented person if the enduring personal guardian authorised compulsory residence in a hospital or community facility and the authorised psychiatrist did not believe this step to be an appropriate use of limited resources.

RECOMMENDATIONS

Power of an enduring personal guardian to make psychiatric treatment decisions

416. New guardianship legislation should expressly permit a person with capacity (the principal) to appoint an enduring personal guardian to make decisions about psychiatric treatment for the principal when they are unable to do so because of impaired decision-making capacity, including when the principal is an involuntary patient or a person subject to an involuntary treatment order under the *Mental Health Act 1986* (Vic).
417. It should be possible for the principal to give an enduring personal guardian decision-making powers in relation to psychiatric treatment that prevail over the powers of the authorised psychiatrist under the *Mental Health Act 1986* (Vic) when the principal is either an involuntary patient or is subject to an involuntary treatment order and 'involuntary treatment of the person is necessary for [the principal's] health or safety' and the authorised psychiatrist reasonably believes that there is no significant risk posed by the person to the public.

418. The Chief Psychiatrist should develop guidelines, in consultation with the Public Advocate, for use by authorised psychiatrists when determining whether the primary reason for taking action under the *Mental Health Act 1986* (Vic) is that 'involuntary treatment of the person is necessary for [the principal's] health or safety'.

419. Sections 3A(2)(c), 3A(2)(d) and 12AD of the *Mental Health Act 1986* (Vic) should be amended so that in the circumstances set out in recommendation 417, an enduring personal guardian with psychiatric treatment powers is able to make treatment decisions for the principal's mental illness when they are an involuntary patient or are subject to an involuntary treatment order and the powers of the enduring personal guardian prevail over the powers of the authorised psychiatrist under the Mental Health Act.

Tribunal power to appoint a personal guardian to make psychiatric treatment decisions

- 24.96 The Commission believes that, ordinarily, only an enduring personal guardian with appropriate powers should be permitted to make psychiatric treatment decisions that prevail over the powers of an authorised psychiatrist when the principal becomes an involuntary patient. It should not be possible for a tribunal to appoint a guardian with this power, other than in the very limited circumstances discussed below.
- 24.97 The highly personal nature of psychiatric treatment decisions produces a need for deep trust and understanding between the principal and the person who makes these decisions for them. Allowing only personally appointed enduring personal guardians to make psychiatric treatment decisions that prevail over those of the authorised psychiatrist is the best way of securing this outcome.
- 24.98 The Commission anticipates that some people who have experienced mental illness will seek to appoint an enduring personal guardian with psychiatric treatment powers. It is important that people with this experience are confident that well-meaning family members and friends are not 'imposed' upon them as guardians by a tribunal appointment.
- 24.99 If it is clear that when a person had capacity they intended, but failed, to appoint an enduring personal guardian with psychiatric treatment powers, the tribunal should have the power to appoint a personal guardian to make psychiatric treatment decisions that prevail over the powers of an authorised psychiatrist when that person becomes an involuntary patient. The tribunal would need strong evidence of the person's clear intention to appoint a particular person as their enduring personal guardian with psychiatric treatment powers before exercising this power.
- 24.100 Because a person's unrealised wish to appoint an enduring personal guardian with psychiatric treatment powers is likely to become evident during reviews and appeals conducted by the Mental Health Review Board, it is appropriate that the Board have the same power as the tribunal to appoint a personal guardian in these circumstances.

**RECOMMENDATIONS****Tribunal power to appoint a personal guardian to make psychiatric treatment decisions**

420. A person with an interest in the affairs of a person who is an involuntary patient or is subject to an involuntary treatment order under the *Mental Health Act 1986* (Vic) can apply to the tribunal for an order to appoint a personal guardian with the power to make decisions about psychiatric treatment for the person in the circumstances set out in recommendation 417.
421. The tribunal can appoint a personal guardian with prevailing psychiatric treatment powers in the circumstances set out in recommendation 417 if satisfied that:
- (a) the criteria for appointing a personal guardian are otherwise satisfied
 - (b) there is no enduring personal guardian with prevailing powers
 - (c) an appropriate person (other than the Public Advocate) is willing and able to perform the role of personal guardian with prevailing powers
 - (d) the represented person expressed the wish to make this appointment when they had capacity.
422. The Mental Health Review Board can, on the application of an interested person or on its own motion, appoint a personal guardian with prevailing psychiatric treatment powers when conducting an appeal or review involving an involuntary patient or a person subject to an involuntary treatment order if satisfied that:
- (a) the criteria for appointing a personal guardian are otherwise satisfied
 - (b) there is no enduring personal guardian with prevailing powers
 - (c) an appropriate person (other than the Public Advocate) is willing and able to perform the role of personal guardian with prevailing powers
 - (d) the represented person expressed the wish to make this appointment when they had capacity.

WITNESSING REQUIREMENTS FOR THE APPOINTMENT OF AN ENDURING PERSONAL GUARDIAN

- 24.101 Two important issues associated with the proposal that it should be possible for a person to appoint an enduring personal guardian with psychiatric treatment powers are the capacity of the principal at the time of the appointment and the willingness and preparedness of the enduring personal guardian for the role. The Commission believes that both of these issues can be dealt with by introducing special witnessing requirements for the appointment of an enduring personal guardian with psychiatric treatment powers.
- 24.102 In Chapter 10, the Commission proposes some changes to witnessing requirements for all enduring appointments in order to strengthen the process and generate more confidence in the integrity of these appointments. The Commission recommends that two adults, one of whom is authorised to witness an affidavit, should witness enduring appointments.
- 24.103 Because it is likely that questions will sometimes be raised about a person's capacity at the time of appointing an enduring personal guardian with psychiatric treatment powers, it is important that there be an expert, independent evaluation of the principal's capacity at the time of the appointment. A medical practitioner is a suitable

and reasonably accessible person to undertake this evaluation. While some people might see this recommendation as unnecessarily paternalistic, it is a practical means of responding to later disputes about a person's capacity at the time they made the appointment.

- 24.104 The role of an enduring personal guardian with psychiatric treatment powers will be very challenging in some circumstances. The principal may behave very differently when they do not have capacity to make their own treatment decisions to how they behave at other times. The enduring personal guardian could face a conflict between the instructions or wishes of the principal and advice from clinicians about treatment.
- 24.105 While the Commission believes that an enduring personal guardian can fulfil their role by applying the substitute decision-making principles set out in Chapter 17, it is highly desirable that both the principal and the potential enduring personal guardian consider the challenges they might face if the principal loses capacity and the enduring personal guardian is asked to make psychiatric treatment decisions.
- 24.106 A medical practitioner is a suitable and reasonably accessible person to advise both the principal and the proposed enduring personal guardian about the possible consequences of making the appointment.

RECOMMENDATIONS

Witnessing requirements for the appointment of an enduring personal guardian

423. An appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment for the principal in the circumstances set out in recommendation 417 should comply with additional witnessing requirements in order to be valid. Instead of the witnessing requirements that apply to all other enduring appointments, the document should be witnessed by a medical practitioner who certifies that they:
- assessed the principal shortly before witnessing the document and believe that the principal had the capacity to appoint an enduring personal guardian with the power to make decisions about psychiatric treatment for the principal when they are unable to do so because of impaired decision-making capacity
 - explained to the principal and the enduring personal guardian the possible consequences of giving the enduring personal guardian powers which prevail over those of the authorised psychiatrist in the circumstances set out in recommendation 417.

CHALLENGING PSYCHIATRIC TREATMENT DECISIONS BY AN ENDURING PERSONAL GUARDIAN

- 24.107 The Commission's proposal concerning a person's ability to appoint an enduring personal guardian with psychiatric treatment powers seeks to strike a new balance in principle between beneficence and autonomy when dealing with non-consensual treatment for mental illness. There will be occasions, however, when it should be possible for a public body to consider whether the balance struck in a particular instance is appropriate.



- 24.108 It is possible that an enduring personal guardian with psychiatric treatment powers will reject all clinical advice about treatment and, by doing so, jeopardise the principal's wellbeing. In these circumstances, an authorised psychiatrist, or a person with an interest in the affairs of the principal, should be permitted to apply to a tribunal to consider the psychiatric treatment decisions made by the enduring personal guardian and for it to decide whether that person should continue to exercise powers in relation to psychiatric treatment which prevail over those of an authorised psychiatrist.
- 24.109 In view of the context in which challenges to the psychiatric treatment decisions of an enduring personal guardian are likely to arise, it is desirable that both VCAT and the Mental Health Review Board have jurisdiction to deal with these applications. In some instances, there might be a disagreement between the authorised psychiatrist and the enduring personal guardian about the precise nature of the treatment that should be given to the principal. The Mental Health Review Board will often be the preferable venue for cases of this nature because of its expertise in dealing with matters of psychiatric treatment.
- 24.110 While both tribunals should be able to set aside the psychiatric treatment powers of an enduring personal guardian, this step should be taken in exceptional circumstances only. The Commission believes that it should be possible to set aside the powers of an enduring personal guardian when that person is making psychiatric treatment decisions that are harmful to the principal and that the principal would have found unacceptable if they had capacity to make them.
- 24.111 A decision by the Mental Health Review Board to set aside the psychiatric treatment powers of an enduring personal guardian would ordinarily result in the authorised psychiatrist becoming the sole decision maker in relation to matters of psychiatric treatment when the principal is an involuntary patient under the Mental Health Act.
- 24.112 The Mental Health Review Board should be permitted to set aside the psychiatric treatment powers of an enduring personal guardian only when it is satisfied that:
- the criteria in section 8(1) of the Mental Health Act apply to the principal
 - decisions made by the enduring personal guardian about psychiatric treatment for the principal have been or are likely to be harmful to the personal health and wellbeing of the principal
 - those decisions are likely to have been unacceptable to the principal if they had the capacity to make decisions about treatment for mental illness
 - decisions likely to be made by the authorised psychiatrist about psychiatric treatment for the principal are likely to promote the personal health and wellbeing of the principal.
- 24.113 A decision by VCAT to set aside the appointment of an enduring personal guardian with psychiatric treatment powers might result in the need for a new guardian or result in the authorised psychiatrist becoming the sole decision maker in relation to matters of psychiatric treatment if the principal is an involuntary patient under the Mental Health Act. VCAT should be permitted to set aside the appointment of an enduring personal guardian with psychiatric treatment powers only when it is satisfied that:
- decisions made by the enduring personal guardian about psychiatric treatment for the principal have been or are likely to be harmful to the personal health and wellbeing of the principal
 - those decisions are likely to have been unacceptable to the principal if they had the capacity to make decisions about treatment for mental illness.

RECOMMENDATIONS

Challenging psychiatric treatment decisions by an enduring personal guardian

424. An authorised psychiatrist should be permitted to apply to the Mental Health Review Board for an order setting aside the appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment in the circumstances set out in recommendation 417 so that the involuntary psychiatric treatment order powers of the authorised psychiatrist can be invoked.
425. Upon hearing an application by the authorised psychiatrist in these circumstances, the Mental Health Review Board may set aside the power of an enduring personal guardian to make decisions about psychiatric treatment in the circumstances set out in recommendation 417 when satisfied that:
- (a) the criteria in section 8(1) of the *Mental Health Act 1986* (Vic) apply to the principal
 - (b) decisions made by the enduring personal guardian about psychiatric treatment for the principal have been or are likely to be harmful to the personal health and wellbeing of the principal
 - (c) those decisions are likely to have been unacceptable to the principal if they had the capacity to make decisions about treatment for mental illness
 - (d) decisions likely to be made by the authorised psychiatrist about psychiatric treatment for the principal are likely to promote the personal health and wellbeing of the principal.
426. An authorised psychiatrist, or any other person with an interest in the affairs of the principal, should be permitted to apply to VCAT for an order setting aside the appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment for the principal in the circumstances set out in recommendation 417.
427. Upon hearing an application in the circumstances set out in recommendation 417, VCAT may set aside the appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment in the circumstances set out in recommendation 417 when satisfied that:
- (a) decisions made by the enduring personal guardian about psychiatric treatment for the principal have been or are likely to be harmful to the personal health and wellbeing of the principal
 - (b) those decisions are likely to have been unacceptable to the principal if they had the capacity to make decisions about treatment for mental illness.
428. If VCAT sets aside the appointment of an enduring personal guardian with the power to make decisions about psychiatric treatment in the circumstances set out in recommendation 417 it may appoint another suitable person as the personal guardian or it may decline to make any further appointment, thereby permitting the authorised psychiatrist to invoke their treatment powers under the *Mental Health Act 1986* (Vic) if the authorised psychiatrist chooses to do so.



Chapter 25
**Crimes (Mental Impairment
and Unfitness to be
Tried) Act**

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Crimes (Mental Impairment and Unfitness to be Tried) Act

INTRODUCTION

25.1 This chapter considers the relationship between the *Guardianship and Administration Act 1986* (Vic) (G&A Act) and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIUT Act). The CMIUT Act deals with cases where a person charged with a criminal offence is unfit to stand trial because their 'mental processes are disordered or impaired' or is not guilty because of mental impairment.

25.2 The first major issue that arises when considering the interaction between guardianship legislation and the CMIUT Act is the need for a guardian or an advocate when a court is determining whether a person is fit to be tried for a criminal offence, or should be found not guilty of a crime because of mental impairment. The second major issue concerns the need for a guardian or an advocate to assist people detained under the CMIUT Act when a release or leave decision is being considered.

CURRENT LAW

25.3 The CMIUT Act has three major purposes:

- It defines the circumstances in which a person is unfit to stand trial for an offence.
- It defines the defence of mental impairment.
- It contains detailed procedures for dealing with people who are found unfit to stand trial or not guilty of a crime because of mental impairment.

25.4 A finding that a person is unfit to stand trial concerns their mental capacity at the time of the trial, whereas the defence of mental impairment is concerned with a person's mental state at the time the alleged offence occurred.

25.5 People who are unfit to stand trial or who are found not guilty of a criminal offence because of mental impairment are usually, but not always, ordered to be detained in a mental health facility under a supervision order.¹ The key principle in the CMIUT Act that courts are directed to apply when making decisions about detention under that Act is 'that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community'.²

UNFITNESS TO STAND TRIAL

25.6 A person may be found unfit to stand trial if their 'mental processes are disordered or impaired' and because of it they are, or at some time during the trial will be, unable to:

- understand the nature of the charge
- enter a plea to the charge and to exercise the right to challenge jurors or the jury
- understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence)
- follow the course of the trial
- understand the substantial effect of any evidence that may be given in support of the prosecution, or
- give instructions to their legal practitioner.³

¹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) pt 5.

² *Ibid* s 39. This principle must be applied when deciding whether to make, vary or revoke a supervision order, to remand a person in custody, to grant a person extended leave or to revoke a grant of extended leave under the Act.

³ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6(1). Memory loss is not, of itself, sufficient to make a person unfit to stand trial: at s 6(2).

25.7 If the issue of unfitness to stand trial arises, an investigation is conducted in order to determine whether the person is fit to stand trial.⁴ If the person is found fit to stand trial, the trial is commenced or resumed in accordance with usual criminal procedures.⁵ If the person is likely to become fit within the next twelve months, the trial is adjourned for a specified period and the accused person will be granted bail, remanded in custody in an ‘appropriate place’, or remanded in custody in prison.⁶

25.8 If a person is unfit to stand trial and they are unlikely to become fit within the next twelve months, then a special hearing must be held within three months.⁷

Special hearing

25.9 A special hearing determines whether the person:

- is not guilty of the offence
- is not guilty of the offence because of mental impairment
- committed the offence charged (or some other offence that is available as an alternative charge).⁸

25.10 Because the defendant has been found unfit to stand trial, they are unable to enter a plea of guilty or not guilty. The special hearing is conducted as if the person had pleaded not guilty.⁹

MENTAL IMPAIRMENT

25.11 A person is not guilty of a crime because of mental impairment if, at the time of the alleged offence, they had a mental impairment that caused them not to know:

- the nature and quality of what they were doing, or
- that what they were doing was wrong.¹⁰

EFFECT OF FINDINGS UNDER THE CMIUT ACT

25.12 If a person who is unfit to plead is found at a special hearing to have committed the offence, or if a person is found not guilty of an offence because of mental impairment, they must either be released unconditionally¹¹ or placed under a supervision order.¹²

Supervision order

25.13 A supervision order can mean one of three things:

- a custodial supervision order for custody in prison¹³
- a custodial supervision order for custody in an ‘appropriate place’¹⁴
- a non-custodial supervision order releasing the person into the community on certain conditions.¹⁵

4 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) pt 2.

5 *Ibid* s 12(1).

6 *Ibid* ss 11(4)(b), 12(2).

7 *Ibid* s 12(5).

8 *Ibid* ss 15, 17. A finding that a person committed the offence is a ‘qualified finding of guilt’, it does not constitute a basis in law for any conviction for the offence to which the finding relates and constitutes a bar to further prosecution in respect of the same circumstances: at s 18(3).

9 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 16(2).

10 *Ibid* s 20(1).

11 *Ibid* ss 18(4)(b), 23(b).

12 *Ibid* ss 18(4)(a), 23(a). If the Magistrates’ Court finds a person not guilty because of mental impairment of a summary offence or an indictable offence heard and determined summarily, the Magistrates’ Court must discharge the person: at s 5(2). There is a special list at the Melbourne Magistrates’ Court—the Assessment and Referral Court List—that seeks to address the needs of people with a mental impairment.

13 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26(2)(a)(ii). The court may only make a custodial supervision order for custody in prison if it is satisfied that there is no practicable alternative in the circumstances: at s 26(4).

14 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26(2)(a)(i). Section 3(1) defines an appropriate place as: (a) an approved mental health service; or (b) a residential treatment facility; or (c) a residential institution. A court may only make a custodial supervision order for custody in an appropriate place if it has received a certificate made under s 47 stating that the facility necessary for the order is available: at s 26(3).

15 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26(2)(b).

Crimes (Mental Impairment and Unfitness to be Tried) Act

- 25.14 Custody in an 'appropriate place' for a person with a mental illness means an approved mental health service.¹⁶ The person becomes a 'forensic patient' under the *Mental Health Act 1986* (Vic).¹⁷ The Victorian Institute of Forensic Mental Health (Forensicare) is responsible for managing all forensic patients. At present, all forensic patients under custodial supervision orders are detained in Thomas Embling Hospital, a 116-bed secure facility in Melbourne.¹⁸ The Community Forensic Mental Health Service of Forensicare manages forensic patients on non-custodial supervision orders or those on extended leave from Thomas Embling Hospital on an outpatient basis.¹⁹
- 25.15 An appropriate place for a person with an intellectual disability would be a residential institution²⁰ or residential treatment facility.²¹ The person is a 'forensic resident' under the *Disability Act 2006* (Vic).²²

Review and appeal of supervision orders

- 25.16 A person may appeal to the Court of Appeal against a supervision order. A number of public officials, including the Director of Public Prosecutions, can also appeal to the Court of Appeal against a supervision order if they consider it in the public interest to do so.²³
- 25.17 Supervision orders operate for an indefinite period.²⁴ However, the court must set a 'nominal term' for the supervision order.²⁵ The court must make a major review of the supervision order at least three months before the end of the nominal term and after that, at least every five years.²⁶
- 25.18 An application can be made to vary a custodial supervision order, or vary or revoke a non-custodial supervision order by:
- the person subject to the order
 - a person having custody, control, care or supervision of the person
 - the Director of Public Prosecutions or the Attorney-General.²⁷

16 Ibid s 3(1) defines an 'approved mental health service' to have the same meaning as in the *Mental Health Act 1986* (Vic). Section 3(1) of the *Mental Health Act 1986* (Vic) provides that 'approved mental health service' means premises or a service: (a) proclaimed to be an approved mental health service under s 94, including the Victorian Institute of Forensic Mental Health; or (b) declared to be an approved mental health service under s 94A.

17 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 3 (1); *Mental Health Act 1986* (Vic) s 3(1).

18 Victorian Institute of Forensic Mental Health, *Report of Operations 2009–2010* (2010) 8. The Department of Justice (Victoria), *Justice Mental Health Strategy* (2010) 19, identifies access to forensic mental health beds at Thomas Embling Hospital as a key issue. In 2008–09, there were 72 forensic patients under custodial supervision orders made under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) detained at Thomas Embling Hospital: Victorian Institute of Forensic Mental Health, *Annual Report 2008–2009* (2009) 24.

19 Submission IP 48 (Victorian Institute of Forensic Mental Health).

20 *Disability Act 2006* (Vic) s 86. The institutions named in the Act are Sandhurst, Colanda and Kew Residential Services. Since the Disability Act came into law, Plenty Residential Services has also been proclaimed as a residential institution: see Governor of Victoria, 'Intellectually Disabled Persons' Services Act 1986: Disability Act 2006—Revocation and Proclamation of Residential Institution Long Term Rehabilitation Program' in Victoria, *Victoria Government Gazette*, No G 26, 28 June 2007, 1302. Further, the proclamation of one of these residential institutions—Kew Residential Services—has now been revoked: see Governor of Victoria, 'Disability Act 2006 (Vic)—Revocation of Proclamation' in Victoria, *Victoria Government Gazette*, No G 35, 28 August 2008, 2060. Although the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) allows for placement within any of these facilities, the Department of Human Services considers that the only appropriate option within disability services is the Long Term Residential Program at Plenty Residential Services: see Department of Human Services (Victoria), *Disability Services Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Practice Guidelines* (2007) 31.

21 The Intensive Residential Treatment Facility within the Disability Forensic Assessment and Treatment Service is deemed to have been proclaimed as a residential treatment facility under the *Disability Act 2006* (Vic) s 151(6). It provides assessment and treatment in a secure facility for a small number of adults with an intellectual disability who have met the criteria for admission under s 152 of the *Disability Act 2006* (Vic).

22 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 3(1); *Disability Act 2006* (Vic) s 3(1).

23 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28A.

24 Ibid s 27(1). When it makes a supervision order, the court may direct that the matter be brought back to the court for review at the end of the period specified by the court: at s 27(2).

25 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28.

26 Ibid s 35(1). The court must vary a custodial supervision order to a non-custodial supervision order, unless satisfied that the safety of the person subject to the order or members of the public will be seriously endangered as a result of the release of the person on a non-custodial supervision order: at s 35(3)(a)(i). If it is a non-custodial supervision order, it may confirm the order, vary the conditions of the order or revoke the order: at s 35(3)(b).

27 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 31.

COMMUNITY RESPONSES

A POSSIBLE ROLE FOR GUARDIANS

- 25.19 In both the information paper and consultation paper, the Commission asked what role (if any) guardians should have for people affected by the CMIUT Act. It could be argued, for example, that it should be possible to appoint a guardian for every person who might be unfit to stand trial or who might wish to consider pleading not guilty on the ground of mental impairment in order to provide instructions to the legal practitioners acting for that person.
- 25.20 The Commission received only a small number of responses to this question, but those who did respond agreed that guardians should not have a substitute decision-making role in proceedings under the CMIUT Act.²⁸
- 25.21 There was also agreement that guardians should have a role under the CMIUT Act only where a typical guardianship decision needs to be made, such as in relation to accommodation or health care.²⁹
- 25.22 The Public Advocate considered that:
- guardians should only have a role under the Crimes (Mental Impairment and Unfitness to be Tried) Act where a guardianship-type decision needs to be made (regarding, for instance, accommodation or health care). Aside from this, guardians should have no specific role in relation to this Act. OPA may, in certain circumstances, have an advocacy role in relation to a person who is subject to this legislation.³⁰
- 25.23 The Health Services Commissioner submitted that ‘guardians should be engaged as partners in treatment and care for the represented person’.³¹
- 25.24 Forensicare made a detailed submission in which it considered the role of guardians under the CMIUT Act at two points: first, in judicial proceedings under the Act and secondly in assisting people detained under the Act during their detention. Forensicare argued that a guardian should not have a role in judicial proceedings under the CMIUT Act because the Act contains a number of mechanisms designed to provide protection and ‘to advance the rights and interests of mentally ill offenders during the course of judicial proceedings under the CMIUT Act’.³²
- 25.25 These mechanisms include:
- the person’s entitlement to be legally represented
 - special hearings for people who are unfit to stand trial
 - the ability to raise fitness to stand trial at any time
 - the principle that must be applied by the court that ‘restrictions on a person’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’.³³

28 Submission CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

29 Submissions IP 8 (Office of the Public Advocate), IP 43 (Victoria Legal Aid) and CP 73 (Victoria Legal Aid).

30 Submission IP 8 (Office of the Public Advocate).

31 Submission IP 42 (Office of the Health Services Commissioner).

32 Submission IP 48 (Victorian Institute of Forensic Mental Health).

33 Ibid.

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- 25.26 In light of these safeguards, Forensicare considered that the ‘appointment of a guardian to make decisions in relation to any such proceeding is ... unnecessary and superfluous’.³⁴
- 25.27 Forensicare suggested that advocates (provided by the Public Advocate) may have an important role to play in assisting people who are involved in legal proceedings under the CMIUT Act:
- while the decision-making role of a guardian in [CMIUT Act] proceedings is considered unnecessary, the provision of an advocate may be helpful in assisting forensic patients in the navigation of the legal process, including the attainment of legal representation and the communication of instructions to the legal representative.³⁵
- 25.28 The majority of forensic patients detained at Thomas Embling Hospital do not have a guardian or administrator appointed in an ongoing role.³⁶ Forensicare argued that there is a role for guardians in assisting people detained under the CMIUT Act. People detained as forensic patients under the CMIUT Act have significant decision-making power removed from them, in many cases for long periods. For example, the authorised psychiatrist may consent to treatment for a mental illness and may also provide treatment for non-psychiatric medical complaints.³⁷
- 25.29 Forensicare considered that, in some situations, the appointment of a guardian would be beneficial, noting that there is
- potential for the appointment of guardians to provide an important check on the way in which the broader day-to-day treatment and management of forensic patients is undertaken (beyond the confines of the judicial process), ensuring that the interests and wishes of forensic patients are taken into account. Examples of instances where the independent oversight of a guardian may be useful include the timing of leave applications and applications for reduced CMIA supervision, and decisions regarding the appropriateness of accommodation placements on discharge (such as aged care residential services or continuing care units).³⁸
- 25.30 Forensicare indicated that, at times, it has sought the appointment of a guardian but this has ‘been resisted by the Public Advocate on the basis that, in relation to involuntary patients under the *Mental Health Act 1986* (Vic), it is less restrictive for the authorised psychiatrist to act on their behalf’.³⁹

A POSSIBLE ROLE FOR ADVOCATES

Review of custodial supervision orders

- 25.31 Supervision orders under the CMIUT Act operate for an indefinite term.⁴⁰ Some people detained under these orders spend substantial time in custody without any external review of their progress, including the need for ongoing confinement. A court must set a nominal term when it detains a person under a supervision order.⁴¹ The court must undertake a major review of the order at least three months before the end of the nominal term.⁴² In the case of murder, the nominal term is 25 years, while the

34 Ibid. The submission refers to the decisions of *In the Matter of R* (unreported, VCAT, Deputy President Sandra Davis, 13 October 1999) and *PL (Guardianship)* [2007] VCAT 2485. These decisions determined that the G&A Act does not provide for substitute decision making in criminal matters and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) does not confer power on VCAT to appoint a substitute decision maker in the context of proceedings under that Act.

35 Submission IP 48 (Victorian Institute of Forensic Mental Health).

36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.

40 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27.

41 Ibid s 28.

42 Ibid s 35.

maximum penalty for the offence is the nominal term for other serious offences.⁴³ After conducting a major review, the court may confirm a supervision order and then not review it again for a period of up to five years.⁴⁴

- 25.32 Even though they are not mandatory, in practice reviews of custodial supervision orders often occur at intervals of between one and three years.⁴⁵ These reviews can be ordered by a court at the time it makes a supervision order.⁴⁶
- 25.33 Without mandatory and regular reviews it is possible, however, that some people are being detained in circumstances that restrict their freedom and personal autonomy without this being necessary for the safety of the community.⁴⁷

The need for an advocate

25.34 The need for an advocate may arise during legal proceedings or during a period of detention under the CMIUT Act. The role may include assisting and supporting people in determining if they should apply for a review to vary the order. An advocate could also assist the person during a review hearing.

25.35 In the consultation paper, the Commission proposed that it might be desirable to provide people detained under the CMIUT Act with an advocate at particular times. Those times could include:

- at regular intervals during a period that a person is detained on a custodial supervision order
- during a special hearing under the CMIUT Act to assist the person in navigating the legal process
- during hearings such as major reviews of a supervision order, or applications to vary a custodial supervision order
- when decisions about accommodation placements after discharge are being made.⁴⁸

25.36 Community consultations and submissions supported advocacy for people who are subject to the CMIUT Act.⁴⁹ The Mental Health Legal Centre stressed the importance of advocacy:

the availability of advocacy is critical to the person's ability to exercise their rights to apply for variation to their order and navigate towards greater liberty, privacy and freedom.⁵⁰

25.37 Forensicare argued that an advocate could assist people detained under the CMIUT Act to move toward least restrictive conditions and greater freedom. It suggested that advocates could help prevent 'feedback loops' that discourage forensic patients from applying for leave:

An advocate who is independent of the treating team could assist with this; they could be more objective and free from assumptions about things like the standard length of stay for a forensic patient.⁵¹

43 Ibid s 28(1).

44 Ibid s 35(1)(b).

45 Submission CP 73 (Victoria Legal Aid).

46 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 27(2).

47 Ibid s 39.

48 Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011).

49 Consultation with Victorian Institute of Forensic Mental Health (Forensicare) (25 February 2011) and Mental Health Legal Centre (28 April 2011); Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 24 (Autism Victoria), CP 46 (Victorian Coalition of ABI Service Providers) and CP 47 (Dr Michael Murray).

50 Submission CP 78 (Mental Health Legal Centre).

51 Consultation with Victorian Institute of Forensic Mental Health (Forensicare) (25 February 2011).

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25.38 Forensicare also suggested that there is a ‘further role for independent advocates to act as a bridge between the treating team and the courts’:

This would help encourage and challenge courts to take an earlier interest in the case, to consider leave options and encourage review of cases. Courts can be conservative and this may affect the timing of an application for leave and whether a leave application is put forward at all as a treating team may consider a leave application is unlikely to succeed and therefore not encourage a patient to apply.⁵²

25.39 Other submissions emphasised the need for independent advocacy based on the level of disability, cognitive impairment and communication disorders among those detained under the CMIUT Act.⁵³ The ageing nature of the prison population was also noted:

Cognitive impairment as an issue in older prisoners is increasing. There can be a complex interplay of intellectual, mental health and degenerative cognitive decline which increases unpredictability over time during incarceration.⁵⁴

25.40 In view of high levels of impairment among detainees, it was suggested that a range of triggers would need to be built into the provision of access to advocates. For example, an advocate could be made available:

- upon a patient’s request
- upon the request of a service, or
- as part of a program of visiting advocates.⁵⁵

25.41 Given the high levels of impairment among many people detained under the CMIUT Act, the need for advocates to be appropriately trained and experienced in working with people with disability and communication disorders was emphasised by some organisations.⁵⁶

25.42 The Commission also suggested that the most obvious agency to meet these advocacy needs is the Public Advocate. In the past, the Public Advocate has provided advocacy to some people involved in CMIUT proceedings.⁵⁷ The Commission also suggested that the role of the Public Advocate in providing advocacy services should be set out in legislation and appropriately resourced.

A formal advocacy role for the Public Advocate for people subject to the CMIUT Act

25.43 The Public Advocate advised the Commission that she would welcome a formal advocacy role for people subject to the CMIUT Act. The Public Advocate felt the role would encompass:

- arranging, where appropriate, for the person to receive services
- assisting the person to receive appropriate legal counsel
- assisting the person in their instruction of counsel.⁵⁸

25.44 Although there were some differing views, a number of organisations supported the Public Advocate assuming a more formal advocacy role.⁵⁹

52 Ibid.
 53 Submissions CP 24 (Autism Victoria), CP 27 (Catholic Archdiocese of Melbourne), CP 35 (Ursula Smith) and CP 59 (Carers Victoria).
 54 Submission CP 47 (Dr Michael Murray).
 55 Ibid.
 56 Consultation with Victorian Institute of Forensic Mental Health (Forensicare) (25 February 2011); Submission CP 24 (Autism Victoria). See also Submission CP 59 (Carers Victoria).
 57 For example, in *PL (Guardianship)* [2007] VCAT 2485 (10 December 2007) [14], reference is made to the provision of advocacy services to PL by the Office of the Public Advocate to help him apply to Victoria Legal Aid for legal representation.
 58 Submission CP 19 (Office of the Public Advocate).
 59 Consultation with Victorian Institute of Forensic Mental Health (Forensicare) (25 February 2011); Submissions CP 24 (Autism Victoria), CP 27 (Catholic Archdiocese of Melbourne), CP 35 (Ursula Smith) and CP 59 (Carers Victoria).

- 25.45 Forensicare argued that the quality of legal advocacy provided to forensic patients varies, and suggested that the ‘best solution would be to have legal representatives who are better educated on the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*’.⁶⁰
- 25.46 Forensicare suggested that a way of achieving this might be through specialisation at the Bar.⁶¹
- 25.47 Both Victoria Legal Aid and the Mental Health Legal Centre stated they do not believe that the Public Advocate is the appropriate body to provide the kind of advocacy required for people detained or otherwise restrained under the CMIUT Act.⁶² Victoria Legal Aid argued:
- VLA does not believe that there is requirement for the Public Advocate to be given a formal role as an advocate for people involved in proceedings or detained under the CMIUT Act. Where a person is able to provide instructions as to their wishes regarding care and accommodation, VLA believes that they are entitled to receive legal representation from a lawyer who will [act] on those instructions. The Public Advocate is not the appropriate representative in these circumstances as they have a duty to act in the person’s best interests, which may conflict with their stated wishes and instructions.⁶³
- 25.48 Victoria Legal Aid noted that, together with the Mental Health Legal Centre and the Villamanta Legal Service it already provides extensive legal services to people involved in proceedings or detained under the CMIUT Act.⁶⁴ Therefore, they are collectively well-placed to assume a formal advocacy role.
- 25.49 At present, Victoria Legal Aid advises that its Mental Health and Disability Advocacy team provides a visiting service to Thomas Embling Hospital on a fortnightly basis. It provides legal assistance about a wide range of civil matters including guardianship and administration, debt, discrimination and victims of crime matters during those visits.⁶⁵
- 25.50 Victoria Legal Aid also notes that it assists clients in reviews of custodial supervision orders, applications for extended leave, applications for non-custodial supervision orders and applications for discharge from non-custodial supervision orders under the CMIUT Act.⁶⁶ Grants of legal assistance for these matters are not subject to a means test and are allocated to either in-house Victoria Legal Aid lawyers or the Mental Health Legal Centre.⁶⁷
- 25.51 The Mental Health Legal Centre also conducts community legal education sessions for people detained in the Thomas Embling Hospital. In 2006 it published a handbook on mental illness and the criminal justice system.⁶⁸
- 25.52 Concurring with Victoria Legal Aid, the Mental Health Legal Centre argued that both organisations’ proven expertise in providing legal advocacy to people with a mental illness—and in particular forensic patients—should be drawn upon and developed as part of a more formal advocacy role. The Mental Health Legal Centre also suggested that formal advocacy should only be recommended on the condition that adequate funding is provided to meet the additional, as yet unmet needs of this particular client group.⁶⁹

60 Consultation with Victorian Institute of Forensic Mental Health (Forensicare) (25 February 2011).

61 Ibid.

62 Submissions CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

63 Submission CP 73 (Victoria Legal Aid).

64 Ibid.

65 Ibid.

66 Ibid.

67 Ibid.

68 Submission CP 78 (Mental Health Legal Centre).

69 Ibid.

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NEED FOR A LEGISLATIVE REQUIREMENT FOR REVIEW

25.53 Victoria Legal Aid submitted that consideration should be given to mandating a review of each custodial supervision order under the CMIUT Act at least every two years.⁷⁰

OTHER JURISDICTIONS

25.54 The Commission reviewed the way in which other jurisdictions have responded to the need for advocacy of those detained under similar legislative arrangements to the CMIUT Act. There have been significant developments in overseas jurisdictions, most notably the United Kingdom and Canada.

NEW SOUTH WALES

25.55 The New South Wales Public Guardian advised the Commission that the Public Guardian regularly appears before the Mental Health Review Tribunal in matters involving forensic mental health patients.⁷¹ The Public Guardian believes it can play a 'constructive role both in ensuring a person complies with Mental Health Review Tribunal orders and by providing advocacy for the person in relation to obtaining services'.⁷²

THE UNITED KINGDOM

25.56 Since the late 1990s, independent advocacy has been introduced for involuntary patients in mental health facilities throughout the United Kingdom. The role of advocacy under mental health legislation differs from the role of guardians appointed under capacity statutes.

25.57 The following sections outline advocacy provisions and services in the different United Kingdom jurisdictions.

England

25.58 In England, section 130A of the *Mental Health Act 1983* (UK) provides that patients who are subject to compulsory orders have the right to access advocacy services.⁷³ This legislatively mandated independent advocacy is available in all special hospitals and medium secure units across the United Kingdom.⁷⁴

25.59 Advocates have the right to meet patients in private. They also have access to patient records when a patient with capacity gives consent, and may meet and discuss the patient with professionals, such as doctors involved in their care.⁷⁵

25.60 New independent mental health advocacy services provided by commissioned non-government organisations have been available since mid 2009.⁷⁶ Some, like the advocacy service at Broadmoor Hospital, a major security hospital accommodating forensic patients, have been operating longer.⁷⁷

70 Submission CP 73 (Victoria Legal Aid).

71 Consultation with Graeme Smith—Public Guardian, New South Wales (16 March 2011). In NSW decisions about leave for and release of forensic patients are made by the Mental Health Review Tribunal: see *Mental Health (Forensic Provisions) Act 1990* (NSW) pt 5.

72 Consultation with Graeme Smith—Public Guardian, New South Wales (16 March 2011). Mental Health Review Tribunal orders are binding on the person, but not service providers.

73 *Mental Health Act 1983* (UK) c 20, s 130A. See also Claire Barcham, 'Understanding the Mental Health Act Changes – Challenges and Opportunities for Doctors' (2008) 1(2) *British Journal of Medical Practitioners* 16.

74 Karen Addie, *Independent Advocacy for People with Mental Disorder*, draft report prepared for the Royal College of Psychiatrists (Northern Ireland) (12 July 2011), 23 <http://static.actionforadvocacy.org.uk/opendocs/college_report_on_advocacy_latest_version_26_may_2011.pdf>.

75 Claire Barcham, 'Understanding the Mental Health Act Changes – Challenges and Opportunities for Doctors' (2008) 1(2) *British Journal of Medical Practitioners* 16.

76 *Mental Health Act 1983 (Independent Mental Health Advocates) (England) Regulations 2008*: <<http://www.legislation.gov.uk/uksi/2008/3166/contents/made>>. Information concerning Independent Mental Health Advocacy services in England is also available online at Independent Mental Health Advocacy: <<http://www.asist.co.uk/imha.html>>.

77 Together Services, *Broadmoor Advocacy Service* (2011) <<http://www.together-uk.org/services/service/broadmoor-advocacy-service>>.

25.61 The Independent Mental Health Advocacy Service at Broadmoor offers a free, confidential and impartial service to all hospital patients. Advocates meet with all new patients on arrival at the hospital to introduce the service and to explain the advocacy role. The advocates visit all wards every week and patients can ring or write to the service in confidence.⁷⁸ Advocates provide information and discuss options with patients to help them make decisions for themselves.⁷⁹

Wales

25.62 The *Mental Health (Wales) Measure 2010* (Wales) includes provisions that amend the 1983 Act to expand the scope of Wales' Independent Mental Health Advocacy scheme to include people who are discharged from hospital and are under supervision in the community.⁸⁰ The scheme now also includes individuals detained in hospital under certain 'short term' sections of the 1983 Act and those receiving assessment or treatment for mental ill health on a voluntary or informal basis.⁸¹

25.63 As in England, the advocates provide an important new safeguard for qualifying patients, including forensic patients. Importantly, the advocates help a qualifying patient to move through the system and access information more effectively.

Scotland

25.64 Under section 259(4) of the *Mental Health (Care and Treatment) (Scotland) Act 2003* (Scot), anyone with a mental disorder who is subject to the Act has the right to access an independent advocate.⁸² An independent advocate can give support and assistance to enable a person to express their own views about their care and treatment.⁸³

25.65 Under the Act, the local authorities and health boards are jointly responsible for making independent advocacy services available free of charge. As in England and Wales, detained people have a right to both advocacy and to legal representation.

CANADA

25.66 Since the 1990s, many Canadian jurisdictions have introduced a requirement for advocacy into mental health statutes. Two examples are the mental health statutes in Ontario and Alberta.⁸⁴ Both statutes mandate the provision of rights advice and advocacy for both civil and criminal patients, whether they are in hospital or in a community setting.

25.67 The statutes and regulations mandating the Psychiatric Patient Advocate Office and functions of the Mental Health Patient Advocate have recently been extended to include people subject to community treatment.

78 Ibid.

79 Ibid.

80 *Mental Health (Wales) Measure 2010* (Wales) nawm 7, pt 4.

81 Ibid.

82 *Mental Health (Care and Treatment) (Scotland) Act 2003* (Scot) asp 13, s 259(4).

83 The Scottish Government, *The New Mental Health Act: A Guide to Independent Advocacy for Services Users and their Carers* (2005) <<http://www.scotland.gov.uk/Resource/Doc/47121/0020427.pdf>>.

84 *Mental Health Act*, RSA 2000, c M-13; *Mental Health Act*, RSO 1990, c. M-7.

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25.68 In Ontario, the Psychiatric Patient Advocate Office provides advocacy, rights advice and education to people with mental illness.⁸⁵ There are eight mandatory rights advice ‘situations’, including change in legal status.⁸⁶ The Rights Adviser must meet the patient in hospital, or in the case of community treatment orders, provide rights advice to the person in the community.⁸⁷ The Rights Adviser must explain the significance of the change of the person’s legal status and the options if the person disagrees with it.⁸⁸ At the person’s request, the Rights Adviser will assist with an application to the Consent and Capacity Board for a hearing, to obtain a lawyer, and to apply for Legal Aid.⁸⁹

THE COMMISSION’S VIEWS AND CONCLUSIONS

ROLE OF GUARDIANS

25.69 After considering community responses, particularly those of expert bodies such as the Public Advocate, the Mental Health Legal Centre and Victoria Legal Aid, the Commission maintains the view expressed in the consultation paper that people who are subject to the CMIUT Act should be treated no differently to other people when their guardianship needs are considered.

25.70 In many cases, a person detained under the CMIUT Act will retain capacity to make some decisions, while other decisions will be made for them under mental health legislation.⁹⁰ In appropriate cases, a guardian may be appointed to make decisions but the Commission believes that this should not include substitute decision making about legal proceedings under the CMIUT Act. Although it is sometimes difficult for legal practitioners to obtain instructions about fitness to plead or the defence of not guilty on the grounds of mental impairment when acting for a person with impaired decision-making ability, there is, in practice, nothing useful that a guardian appointed solely to instruct lawyers could add that would benefit such a person in criminal proceedings if they are represented by competent lawyers.

25.71 Similarly, there is no clear benefit in appointing a guardian to act for a person detained under a custodial supervision order in subsequent proceedings under the CMIUT Act, such as major reviews or leave applications. Competent advocacy is far more important than substitute decision making in these circumstances.

RECOMMENDATION

The role of guardians

429. The role of guardians should not include substitute decision making about legal proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

85 Psychiatric Patient Advocate Office (Ontario), *Psychiatric Patient Advocate Office* <<http://www.sse.gov.on.ca/mohltc/ppao/en/Documents/ppaobrochure.pdf>>.

86 Ibid.

87 Ibid.

88 Ibid.

89 Ibid.

90 A person admitted to a mental health facility under a supervision order made under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) is a ‘forensic patient’ for the purposes of the *Mental Health Act 1986* (Vic). The authorised psychiatrist at a mental health service can consent to both psychiatric and non-psychiatric treatment for a forensic patient: at ss 17A(2), 84(1).

NEED FOR ADVOCACY

- 25.72 It is desirable, however, to provide people detained under the CMIUT Act with an advocate at particular times including:
- at regular intervals during the period that a person is detained under a custodial supervision order
 - during hearings such as major reviews of a supervision order, or applications to vary a custodial supervision order
 - when leave decisions are made by the Forensic Leave Panel
 - when decisions about accommodation placements after discharge are being made.
- 25.73 There is little point in having the CMIUT Act specify that courts ‘must apply the principle that restrictions on a person’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’ unless people detained in custody under a supervision order receive assistance from a skilled advocate.
- 25.74 The Commission believes that the role of providing advocacy to people subject to the provisions of the CMIUT Act should be statutorily mandated and appropriately resourced.
- 25.75 In the consultation paper, the Commission suggested that an obvious agency to meet these advocacy needs is the Public Advocate. In the past, the Public Advocate has provided advocacy to some people involved in CMIUT Act proceedings.
- 25.76 There are also other agencies—most notably Victoria Legal Aid and the Mental Health Legal Centre—with advocacy experience in this field. The Commission sees value in some or all of these organisations providing advocacy services for people detained in custody under a supervision order.

RECOMMENDATION

The need for advocacy

430. The role of providing advocacy for people detained under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be included in the legislation and appropriately resourced.

REVIEW OF CUSTODIAL SUPERVISION ORDERS

- 25.77 The Commission noted earlier that without mandatory and regular reviews of people detained under custodial supervision orders made under the CMIUT Act, it is possible that some people are being detained in circumstances that restrict their freedom and personal autonomy without being necessary for the safety of the community. Although in practice courts often order regular reviews of custodial supervision orders, this step is not mandatory.
- 25.78 In other similar jurisdictions, such as New South Wales, legislation requires regular reviews of people detained in custody following a finding of unfitness to plead or a verdict of not guilty on the ground of mental impairment. In New South Wales, the Mental Health Review Tribunal must review each forensic patient in custody at least every six months.⁹¹

91 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 46.

Crimes (Mental Impairment and Unfitness to be Tried) Act



25.79 The Commission believes that a similar legislative requirement should be introduced in Victoria. The most suitable body to conduct these reviews is the Forensic Leave Panel. If the Panel is not given determinative powers in these cases, it could report its findings to the court that made the supervision order. It seems appropriate that reviews take place at least every two years, with the supervising body having the power to order earlier reviews if required.

RECOMMENDATION

Review of custodial supervision orders

431. There should be a legislatively required regular, automatic review of each custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* at an interval of no longer than every two years.



Chapter 26

Litigation guardians

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INTRODUCTION

26.1 This chapter deals with the ability of substitute decision makers to conduct legal proceedings for represented persons and their personal liability for costs when doing so.

CURRENT LAW

- 26.2 Sometimes there will be a need for a substitute decision maker, or some other person, to bring or defend legal proceedings on behalf of a person with impaired decision-making ability.
- 26.3 A litigation guardian is an adult appointed under court rules through whom a person under 18 years of age or a 'handicapped person' conducts litigation.¹ A person with a disability may need a litigation guardian if they cannot instruct their solicitor or manage their affairs in relation to the proceeding.² A litigation guardian usually has to employ a lawyer to conduct the proceeding.³
- 26.4 A person must consent to act in the role of litigation guardian, unless the court exercises its power to appoint a litigation guardian itself.⁴ Many people are reluctant to act as a litigation guardian because they may be personally liable for costs if the proceedings are unsuccessful. The courts have decided, however, that a litigation guardian is generally entitled to be indemnified by the represented person for any costs order made against them when they have acted properly and in good faith.⁵
- 26.5 The interaction between an administrator's statutory powers to conduct litigation on behalf of a represented person and the requirements of the Supreme Court Rules concerning the need for a litigation guardian for a 'person under disability' is not completely clear. Section 58B (2)(l) of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) permits an administrator (with appropriate powers) to 'bring and defend actions and other legal proceedings in the name of the represented person'.⁶ The scope of this power is unclear because it is unlikely that an administrator is empowered to bring or defend any proceedings on behalf of a represented person. Proceedings that are unrelated to the estate of the represented person would appear to fall beyond this power.
- 26.6 The recent Victorian Court of Appeal case of *State Trustees Ltd v Andrew Christodoulou*⁷ suggests that an administrator may be required to seek appointment as a litigation guardian to exercise the power granted by the G&A Act to conduct litigation in the name of a represented person. In this case, the court refused State Trustees' application for leave to appeal against the trial judge's decision to make a costs order against State Trustees in its personal capacity rather than in its capacity as administrator for a represented person and not to provide it with an indemnity against the estate of the represented person.⁸

1 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 15; *County Court Civil Procedure Rules 2008* (Vic) O 15; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) O 15.

2 See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 15.01, 15.02; *County Court Civil Procedure Rules 2008* (Vic) rr 15.01, 15.02; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) rr 15.01, 15.02.

3 See *Supreme Court (General Civil Procedure Rules) 2005* (Vic) r 15.02(3); *County Court Civil Procedure Rules 2008* (Vic) r 15.02(3).

4 *Supreme Court (General Civil Procedure Rules) 2005* (Vic) r 15.03(6)(a); *County Court Civil Procedure Rules 2008* (Vic) r 15.03(6)(a).

5 *Anthony v Vaclav [No 2]* [2009] VSC 626, [7]–[8]; *Slaveski v State of Victoria and Others* (2009) 25 VR 160, citing *Pryor v Hennessy* [1973] VR 221, 222–3.

6 *Guardianship and Administration Act 1986* (Vic) s 58B(2)(l).

7 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86. The issue at trial was whether a transfer of property by Mrs Christodoulou to her son was vitiated by his undue influence and unconscionable dealing. Justice Kaye ruled that Mrs Christodoulou transferred the property independently and not because of any undue influence. Nor was she 'affected by any special disadvantage or disability' which would make the transfer unconscionable: *Christodoulou v Christodoulou* [2009] VSC 583, [105], [111] (Kaye J).

8 *Christodoulou v Christodoulou* [2009] VSC 583 (Kaye J).

- 26.7 The Court of Appeal stated that:
it is arguable that once State Trustees decided to commence the proceedings in the name of Mrs Christodoulou and to conduct the litigation on her behalf, it ought to have taken the requisite steps under rule 15 ... to have itself appointed as Mrs Christodoulou's litigation guardian.⁹
- 26.8 The Court referred to rule 15.03(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), which provides that:
Where a person is authorised by or under any Act to conduct legal proceedings in the name of or on behalf of a handicapped person, that person shall, unless the Court otherwise orders, be entitled to be litigation guardian of the handicapped person in any proceeding to which that person's authority extends.¹⁰
- 26.9 This rule does not sit comfortably with rule 15.02(1), which provides that '[e]xcept where otherwise provided by or under any Act, a person under disability shall commence or defend a proceeding by his or her litigation guardian'.¹¹ Section 58B(2)(l) of the G&A Act is clearly a provision that empowers an administrator to bring and defend actions and other legal proceedings in the name of the represented party.
- 26.10 In *Christodoulou*, the Court of Appeal determined, however, that, in spite of section 58B(2)(l), 'the rules relating to litigation guardians ... continue to be applicable, at least in this case'.¹² It seems desirable that the Supreme Court consider the apparent tension between rules 15.02(1) and 15.03(2).
- 26.11 The Court of Appeal upheld the decision by the trial judge to award costs personally against the administrator, State Trustees, and not to provide the administrator with an indemnity against the estate of the represented person. The outcome of this case might add to the reluctance of administrators to conduct litigation on behalf of a represented person because of their fear of exposure to an adverse costs order.
- 26.12 The issues under discussion in this chapter apply to civil matters only. If a person with impaired capacity is involved in a criminal proceeding, and is unable to participate in the process because of their mental impairment, the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) is applicable. This Act is discussed in more detail in Chapter 25.

COMMUNITY RESPONSES

- 26.13 In the consultation paper, the Commission observed that the risk of adverse costs orders and lack of clarity about who is available to conduct litigation on behalf of people with impaired decision-making ability is highly undesirable because it affects their capacity to assert and defend their legal rights.
- 26.14 We sought community views on who should conduct litigation for a represented person and whether courts or tribunals should have the power to order costs against guardians and administrators when they conduct litigation for a represented person.

WHO SHOULD ACT AS LITIGATION GUARDIAN?

- 26.15 There was no clear consensus in responses to the consultation paper about who should act as a litigation guardian. Some submissions noted that the answer depends on the potential cost implications of acting in the role.

9 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86 [21].

10 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.03(2).

11 *Ibid* r 15.03(2).

12 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86 [21].

- 26.16 Carers Victoria said that litigation should be one of the functions of guardians and administrators and that the Victorian Civil and Administrative Tribunal (VCAT) should decide who is the most appropriate person to conduct proceedings.¹³ However, the Federation of Community Legal Centres recommended that new legislation should set out when such an appointment might be necessary.¹⁴ It makes the point that:
- with the proposed legislative shift to a continuum of capacity and ongoing processes of assessment, there may be some legal contexts in which the represented person does not need the equivalent of a litigation guardian.¹⁵
- 26.17 Where the represented person is a defendant in a case, Victoria Legal Aid suggested that guardians and administrators should have a duty to act as litigation guardian where the matter comes within the scope of their appointment. In cases where a person wishes to initiate proceedings, Victoria Legal Aid argued that there should be an obligation to investigate the claim:
- where an administrator or guardian becomes aware (either through the represented person or other information) that the represented person may have a claim or action to pursue that falls within or is connected to the scope of the guardianship or administration order, they should have a statutory duty to make enquiries and assess the merits of pursuing that claim. Both the substantive merits of the matter as well as the likely cost/benefit implications should be considered.¹⁶
- 26.18 Seniors Rights Victoria¹⁷ and Eastern Health¹⁸ favoured the establishment of a dedicated public body to conduct litigation for individuals with diminished capacity. The Victorian Equal Opportunity and Human Rights Commission noted that, where it falls within their area of ‘expertise’, the Public Advocate should act as litigation guardian, but otherwise a dedicated body should be created to conduct proceedings.¹⁹ The submission noted that ‘[t]he fundamental issue is to ensure that the rights of the represented person are not breached merely because there is no one available to conduct litigation on their behalf’.²⁰
- 26.19 The Public Advocate suggested that new guardianship legislation should describe those cases guardians should pursue and those cases that administrators should undertake.²¹ State Trustees also supported legislation clarifying that guardians may act in matters that are outside an administrator’s responsibilities.²²
- 26.20 Neither the Public Advocate nor State Trustees wished to act as a litigation guardian under compulsion. The Public Advocate emphasised the point made in her submission to the information paper that a court should seek her consent to act before appointing her as a litigation guardian.²³ State Trustees suggested that new guardianship legislation should provide that administrators with appropriate powers should not be required to seek formal appointment as a litigation guardian under court rules.²⁴

13 Submission CP 59 (Carers Victoria).

14 Submission CP 75 (Federation of Community Legal Centres (Victoria)).

15 Ibid.

16 Submission CP 73 (Victoria Legal Aid).

17 Submission CP 71 (Seniors Rights Victoria).

18 Submission CP 33 (Eastern Health).

19 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

20 Ibid.

21 Submission CP 19 (Office of the Public Advocate).

22 Submission CP 70 (State Trustees Limited).

23 Submission CP 19 (Office of the Public Advocate).

24 Submission CP 70 (State Trustees Limited).

SHOULD COURTS OR TRIBUNALS HAVE THE POWER TO ORDER COSTS AGAINST LITIGATION GUARDIANS?

- 26.21 There was broad acceptance of the principle that guardians or administrators should not be liable for the costs of conducting proceedings on behalf of another person, except where they have acted improperly. The Public Advocate suggested that a court should have the power to order costs where
- the litigation guardian's involvement in the litigation has not been in the interests of the represented person's personal and social wellbeing, or where the conduct of the litigation is in breach of appropriate professional standards.²⁵
- 26.22 Some submissions recognised that the potential for litigation guardians to be personally responsible for costs discourages people from acting in the role. Operating in a separate jurisdiction, but with similar rules relating to costs, the New South Wales Public Guardian noted that there are situations where they could initiate proceedings but decline to do so because of 'the risk of adverse cost awards'.²⁶ The Disability Discrimination Legal Service also noted that the potential financial liability is an inhibiting factor for those who might otherwise assume the role of litigation guardian, and observed that 'this leaves the represented person in limbo without any enforceable rights'.²⁷
- 26.23 Victoria Legal Aid²⁸ and the Law Institute of Victoria²⁹ both recommended that litigation guardians be entitled to an indemnity from the estate of those they represent.
- 26.24 State Trustees also suggested that new legislation should state that, where VCAT has directed an administrator to initiate legal action, they are not responsible for costs.

THE COMMISSION'S VIEWS AND CONCLUSIONS

CONDUCTING LEGAL PROCEEDINGS FOR A REPRESENTED PERSON

- 26.25 The Commission believes that new guardianship laws should clarify the role of guardians and administrators in conducting legal proceedings on behalf of a represented person. The power to conduct litigation with sound legal advice provides an important (and currently under-utilised) mechanism for people with impaired decision-making capacity to advance or protect their rights.
- 26.26 At present, the G&A Act does not specifically provide for guardians to conduct litigation on behalf of a represented person, while the extent of an administrator's power to conduct litigation is unclear. New guardianship legislation should remedy these deficiencies.
- 26.27 When appointing a personal guardian or financial administrator,³⁰ VCAT should be able to order that one of their powers is to conduct legal proceedings, either generally or of a specified kind, on behalf of the represented person. The Commission proposes that new guardianship legislation should expressly state that a personal guardian or financial administrator can be given the power to conduct litigation on behalf of a represented person.

25 Submission CP 19 (Office of the Public Advocate).

26 Submission CP 79 (NSW Trustee and Guardian).

27 Submission CP 56 (Disability Discrimination Legal Service).

28 Submission CP 73 (Victoria Legal Aid).

29 Submission CP 77 (Law Institute of Victoria).

30 In Chapter 5, the Commission recommends replacing the term 'guardian' with 'personal guardian' and 'administrator' with 'financial administrator'.

- 26.28 In many cases, it may not be appropriate for VCAT to give a personal guardian or financial administrator the power to conduct litigation. Guardians and administrators are often unremunerated individuals who might find the stress of conducting legal proceedings unduly burdensome. However, not every type of legal action involves heavily contested litigation in the Supreme Court and there may be a range of less complex matters in which a personal guardian or financial administrator may be able to assist.
- 26.29 In its *Review of Guardianship Laws*, the Queensland Law Reform Commission recommended that a court have the power to appoint the Adult Guardian and Public Trustee as litigation guardian without their consent.³¹ They also recommended that litigation guardians not be liable for costs except in cases of negligence or misconduct.³²
- 26.30 On occasion, courts have appointed the Public Advocate as a litigation guardian where no other person was available to act. While the Commission understands the challenges faced by a court when an unrepresented litigant appears to be a person who lacks capacity to conduct their own proceedings, we do not believe that the Public Advocate, or State Trustees, should be appointed as a litigation guardian without their consent. Such an appointment subjects a public body to a potentially substantial and unbudgeted costs order. It also requires them to conduct litigation they might not consider advisable or to discontinue that litigation, thereby exposing the represented person or a public body to the risk of an adverse costs order.
- 26.31 There is clearly a need to establish a mechanism for assisting some people with impaired decision-making ability to locate a suitable litigation guardian. It might be possible to establish a pool of suitable volunteer litigation guardians and to create a fund which could be used to indemnify these people from adverse costs orders. The Commission suggests that the Attorney-General might wish to pursue this idea in conjunction with the Law Institute of Victoria, the Public Advocate and the Federation of Community Legal Centres.

RECOMMENDATION

Conducting legal proceedings for a represented person

432. New guardianship legislation should provide that VCAT may give a personal guardian and/or a financial administrator the power to conduct legal proceedings on behalf of the represented person.

THE DIFFERENT ROLES OF GUARDIANS AND ADMINISTRATORS

- 26.32 New guardianship legislation should specify the type of proceedings that can be conducted by a personal guardian or a financial administrator. In broad terms, it is appropriate to permit a personal guardian to conduct litigation that does not involve 'financial or property matters' and to permit a financial administrator to conduct litigation about 'financial or property matters'.
- 26.33 There is clearly overlap between litigation involving 'financial or property matters' and other matters. If a person has both the Public Advocate and State Trustees as substitute decision makers, the two bodies should liaise and determine the appropriate organisation to conduct the litigation. In other instances of overlap or lack of clarity, VCAT should determine who is authorised to conduct litigation on behalf of the represented person.

31 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, cxxxiii, recs [28–1], [28–2(b)].

32 Ibid cxxxiv, recs [28–4(a)].

RECOMMENDATIONS

The different roles of guardians and administrators

433. New guardianship legislation should provide that a financial administrator may be given the power to conduct legal proceedings on behalf of the represented person where the matter relates to the person's financial or property interests.
434. New guardianship legislation should provide that a personal guardian may be given the power to conduct legal proceedings on behalf of the represented person where the matter does not relate to the person's financial or property interests.

LIABILITY FOR COSTS

- 26.34 New guardianship legislation should state that personal guardians and financial administrators should not be required to seek formal appointment as litigation guardians under the relevant court rules when conducting legal proceedings on behalf of a represented person within the confines of their authority. There is an unnecessary duplication of effort in requiring a formally appointed substitute decision maker to seek appointment as a litigation guardian to conduct litigation on behalf of a represented person when a VCAT order has already granted that power. While third parties are clearly entitled to notice of the fact that litigation in which they are involved is being conducted on behalf of a represented person by a personal guardian or financial administrator, court and tribunal rules should require that other parties to the proceedings be given appropriate notice of this role as early and as clearly as possible.
- 26.35 Despite this proposed general rule, courts and tribunals should retain a discretionary power to require a personal guardian or a financial administrator to seek appointment as a litigation guardian in exceptional circumstances. This power might be used when, for example, it is highly unlikely that the estate of a represented person would be able to cover an adverse costs order and the court or tribunal believes that the personal guardian or a financial administrator should be made aware of the possibility of a costs order against them personally.
- 26.36 The Commission also recommends that new guardianship laws should provide that a personal guardian or financial administrator who conducts legal proceedings on behalf of a represented person should not be personally liable for costs, in lieu of a costs order against the estate of the represented person, except where they have been negligent or engaged in misconduct. There is no reason why a personal guardian or financial administrator, who acts on sound advice to advance the interests of the represented person, should bear the costs of an unsuccessful legal action if there is sufficient money in the person's estate to cover those costs.

Litigation guardians



RECOMMENDATIONS

Liability for costs

- 435. New guardianship legislation should provide that a personal guardian or financial administrator who conducts legal proceedings on behalf of a represented person need not seek appointment as a litigation guardian, unless the court or tribunal directs that this course is necessary in a particular case.
- 436. New guardianship legislation should provide that, ordinarily, a court or tribunal should not make an order for costs against a personal guardian or financial administrator in lieu of a costs order against the estate of the represented person, unless the court or tribunal is satisfied that the personal guardian or financial administrator has acted negligently or engaged in misconduct in conducting the proceedings.



Chapter 27

Interstate operation

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INTRODUCTION

- 27.1 While Australians now move around the country with increasing regularity, many of the laws that affect how they interact with other people are state and territory laws that do not operate beyond the boundaries of a particular state and territory. Devising workable ways of ensuring that many important laws operate nationally is one of the great public policy challenges facing our federal system of government in the 21st century.
- 27.2 Ideally, appointments made under state guardianship laws should operate nationally for the ease of people with impaired decision-making ability who travel or move interstate. Now, however, a guardian appointed by the Victorian Civil and Administrative Tribunal (VCAT) to make health and residential decisions for a Victorian who moves interstate is not entitled to make those decisions while the represented person lives in another part of the country. Similarly, an enduring attorney appointed under Victorian law to make financial decisions for another person when they are unable to make their own decisions, has no power to enter into financial transactions on behalf of the principal outside Victoria.
- 27.3 In many instances, a Victorian-appointed substitute decision maker can take steps to have their authority recognised in another state or territory by applying to a tribunal—the interstate equivalent of VCAT—to have the appointment registered in the jurisdiction where the represented person lives. If the application for registration is successful, the Victorian appointment operates as if it were an appointment made under the law of the jurisdiction where the represented person now lives. However, the law in other Australian jurisdictions is not uniform and not all Victorian appointments are recognised in other parts of the country.
- 27.4 There are similar provisions in Victorian guardianship legislation for recognising appointments of substitute decision makers made under the laws of another Australian state or territory.
- 27.5 In 2007, the Australian Parliaments' Standing Committee on Legal and Constitutional Affairs recommended the Australian Government encourage the Standing Committee of Attorneys-General (SCAG)¹ to work towards implementing uniform legislation on powers of attorney across states and territories.² SCAG committed to 'take on projects to achieve the national recognition of court orders and substitute decision-making instruments such as powers of attorney'.

CURRENT LAW IN VICTORIA AND OTHER AUSTRALIAN JURISDICTIONS

TRIBUNAL APPOINTMENTS

- 27.6 Part 6A of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) allows VCAT to register a guardianship order or an administration order made under a corresponding law³ of any other Australian state or territory.⁴ Orders may be registered in Victoria if the subject of the order is travelling to Victoria or has property in Victoria,⁵ and the guardian, administrator or the Public Advocate applies to VCAT for the registration.⁶

1 SCAG transitioned to the Standing Council on Law and Justice (SCLJ) on 17 September 2011.

2 House Standing Committee Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law* (2007) 77–9.

3 The Governor in Council, on the recommendation of the Minister, has declared that the following Acts are 'corresponding laws' for the purposes of Part 6A: *Adult Guardianship Act 1988* (NT); *Guardianship Act 1987* (NSW) and *NSW Trustee and Guardian Act 2009* (NSW); *Guardianship and Administration Act 2000* (Qld); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1990* (WA); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Management of Property Act 1991* (ACT); Victoria, *Victoria Government Gazette*, No G 43, 28 October 2010, 2701–2.

4 *Guardianship and Administration Act 1986* (Vic) ss 63A, 63E.

5 *Ibid* s 63A.

6 *Ibid* s 63E(1).

- 27.7 An interstate order registered by VCAT has the same force and effect as if it were an order made under the G&A Act.⁷ If the guardian in the other jurisdiction is a person who holds an equivalent position to the Victorian Public Advocate, VCAT may appoint the Public Advocate as the guardian of the represented person in Victoria.⁸
- 27.8 There are reciprocal provisions in corresponding legislation in other Australian states and territories.⁹

PERSONAL APPOINTMENTS

- 27.9 Victorian law permits an enduring power of attorney made in another state or territory to operate in Victoria, but there is no equivalent provision for interstate enduring guardianship appointments.
- 27.10 The *Instruments Act 1958* (Vic) recognises an enduring power of attorney made in another Australian jurisdiction 'to the extent that the powers it gives could validly have been given' by an enduring power of attorney in the recognising jurisdiction.¹⁰ For an interstate enduring power of attorney to be effective in Victoria, it must comply with the requirements in the jurisdiction in which it was made. It will then be treated as an enduring power of attorney made under Victorian legislation to the extent that it gives powers that could validly have been given by an enduring power of attorney under the Instruments Act.
- 27.11 The law across other states is inconsistent. Queensland, New South Wales, the Northern Territory and the Australian Capital Territory have similar provisions to the Victorian legislation.¹¹ In Tasmania, an enduring power of attorney made in another jurisdiction may be registered if it is 'substantially the same' as an enduring power of attorney made in Tasmania, and if it was executed in accordance with the law of the other jurisdiction.¹² In Western Australia, an attorney appointed in another jurisdiction must apply to the State Administrative Tribunal to have their powers recognised.¹³ There are no provisions in the South Australian legislation relating to recognition of enduring powers of attorney from other jurisdictions.
- 27.12 While these processes permit the interstate operation of appointments made under guardianship laws, they are not uniform and they place additional demands on substitute decision makers.

OTHER MEANS OF SECURING INTERSTATE OPERATION

- 27.13 It is useful to consider whether there are any other possible means of facilitating recognition of appointments made under Victorian guardianship laws in other parts of Australia.

⁷ *Ibid* s 63E(4).

⁸ *Ibid* s 63E(2).

⁹ *Guardianship and Administration Act 1990* (WA) ss 44A, 83D; *Guardianship Act 1987* (NSW) pt 5A; *Guardianship and Administration Act 2000* (Qld) s 167; *Guardianship and Administration Regulation 2000* (Qld) sch 1; *Guardianship and Administration Act 1993* (SA) ss 34, 48; *Guardianship and Administration Act 1995* (Tas) s 81; *Guardianship and Management of Property Act 1991* (ACT) s 12; *Adult Guardianship Act* (NT) s 30.

¹⁰ *Instruments Act 1958* (Vic) s 116.

¹¹ *Powers of Attorney Act 1998* (Qld) s 34; *Guardianship Act 1987* (NSW) s 6O; *Guardianship Regulation NSW* (2010) s 8; *Powers of Attorney Act 2003* (NSW) s 25; *Powers of Attorney Act* (NT) s 6A; *Powers of Attorney Act 2006* (ACT) s 89.

¹² *Powers of Attorney Act 2000* (Tas) ss 43, 47(1). An enduring power of guardianship made outside Tasmania may also be recognised as made under a corresponding law, and recognised to the extent it confers a power which could be made under Tasmanian law: *Guardianship and Administration Act 1995* (Tas) s 81A.

¹³ *Guardianship and Administration Act 1990* (WA) ss 104A(1), 1100.

Application of Victoria's laws in other states and territories

- 27.14 It is highly unlikely that the Victorian Parliament can legislate so that appointments made under Victorian guardianship laws operate throughout Australia. Victoria laws can operate extraterritorially when there is a 'real connexion—even a remote or general connexion—between the subject matter of the legislation and the State'.¹⁴ This connection can occur when a person has some relationship with Victoria, such as by usual residence or by ownership of property.¹⁵
- 27.15 However, difficulties arise if a Victorian law that seeks to operate in another part of Australia is inconsistent with the law of another state or territory. Once a person resides in another jurisdiction, it may be difficult to argue that they have more of a connection with Victorian guardianship laws than with those of their new state of residence. Gerard Carney argues that the state legislature where a person resides is 'the most appropriate polity to provide protection and to regulate'.¹⁶ Accordingly, it is possible that Victoria could seek to have its guardianship laws apply to a person visiting another state or territory for a limited time, but once that person becomes a resident elsewhere, the guardianship laws of that new state or territory would apply.
- 27.16 Unless each state and territory adopts consistent legislation, it is unlikely that appointments made under Victorian guardianship laws could operate in other jurisdictions without a registration process. Three mechanisms have been used to secure nationally consistent legislation about matters where the states and territories have primary law-making responsibilities.

UNIFORM LAWS**State or territory referral of a matter to the Commonwealth**

- 27.17 Australian states may refer their legislative power to make laws about any matter to the Commonwealth Parliament. Section 51(xxxvii) of the Commonwealth Constitution allows the Commonwealth Parliament to legislate about matters referred by the states, but those laws can only apply to those states that have referred their powers. This power has been used in relation to some aspects of family law and control of terrorism.¹⁷ Victoria also referred its powers to make employment laws to the Commonwealth in 1996.¹⁸

Mirror legislation

- 27.18 A model law could also be developed by one state or territory, and each other state and territory could subsequently mirror that law by enacting its own version of that law.¹⁹ This is an appropriate mechanism for achieving legislative consistency when absolute uniformity is not required across all jurisdictions.²⁰ The process usually involves model legislation being developed by a ministerial council, such as the Standing Council on Law and Justice²¹, and drafted by Parliamentary Counsel.²²

14 *Pearce v Florenca* (1976) 135 CLR 507, 518 (Gibbs J).

15 For example in *Union Steamship*, the High Court found that the fact a ship was owned or registered in New South Wales was a sufficient nexus with the State of New South Wales: *Union Steamship Co Australia Pty Ltd v King* (1988) 166 CLR 1, 14.

16 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 229.

17 Parliamentary Counsel's Committee, *National Uniform Legislation: Acts of Jurisdictions Implementing Uniform Legislation* (August 2008) ('*National Uniform Legislation*').

18 *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

19 John Wanna et al, *Common Cause: Strengthening Australia's Cooperative Federalism*, Final Report to the Council for the Australian Federation (Council for the Australian Federation, 2009) 20.

20 Anne Twomey, 'Federalism and the Use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia' (2007) 2(3) *Public Policy* 211, 215. Note that Twomey does not refer to this as 'uniform legislation', but 'mirror'. She uses the term 'uniform legislation' to refer to complementary applied law schemes, discussed below.

21 Formerly the Standing Committee of Attorneys-General (SCAG).

22 Twomey, above n 20, 215.

27.19 Areas of law currently governed by mirror legislation include registration of births, deaths and marriages, registration of sex offenders, commercial arbitration, Crown proceedings, forensic procedures, interstate transfer of prisoners, and wills.²³ This approach was proposed by SCAG²⁴ in relation to domestic and family violence orders in early 2011.²⁵ This would remove the requirement for a person protected by an order to register the order in another jurisdiction for it to be recognised and enforced in that jurisdiction.²⁶

Complementary applied legislation or ‘template’ legislation

27.20 A state or territory may also enact a ‘template Act’, which is adopted and applied ‘as in force from time to time’ by other participating jurisdictions.²⁷ Under this scheme, the law remains a law of each particular jurisdiction, even though its content is changed every time the lead Parliament amends the original template.²⁸ This type of scheme ensures total uniformity, because any amendments automatically apply to all participating jurisdictions.²⁹ In practice, amendments are usually agreed upon in advance by the participating governments.³⁰

27.21 Areas of law currently governed by complementary applied legislation include those relating to air navigation and civil aviation, the national gas and national electricity schemes and human embryo research.³¹

RECOGNITION OF INTERNATIONAL GUARDIANSHIP LAWS

27.22 A private international law convention—the *Hague Convention on the International Protection of Adults* (Hague Convention)—deals with recognition of guardianship laws across international borders.³² The Hague Convention provides that while ordinarily the laws of the country the person is in should apply, there may be circumstances where a power of attorney or protective measure made in one country should be considered or applied in another.³³ Australia has not signed the Hague Convention. It has been signed by 14 countries and ratified by six, all of which are in Europe.³⁴

23 Ibid 215–16.

24 SCAG transitioned to the Standing Council on Law and Justice (SCLJ) on 17 September 2011.

25 Attorney-General Robert McLelland and Minister for the Status of Women Kate Ellis MP, ‘New National Register for Domestic and Family Violence Orders’ (Joint Media Release, 4 March 2011).

26 Ibid.

27 Carney, above n 16, 18.

28 Twomey, above n 20, 214.

29 Ibid 215.

30 Ibid. Note Western Australia does not generally adopt the legislation of other jurisdictions in this way. When the other states have decided to subscribe to a complementary applied laws scheme, Western Australia has enacted its own complete, consistent legislation and kept it up to date by making its own amendments: Parliamentary Counsel’s Committee, *Protocol on Drafting National Uniform Legislation* (July 2008, 3rd ed) 2.

31 *National Uniform Legislation*, above n 17.

32 *Hague Convention on the International Protection of Adults*, opened for signature 13 January 2000 (entered into force 1 January 2009). For general background discussion of the Convention see David Hill, ‘The Hague Convention on the International Protection of Adults’ (2009) 58 *International Comparative Law Quarterly* 476; Hague Conference on Private International Law, *The Hague Convention of 13 January 2000 on the International Protection of Adults* (2008) <<http://www.hcch.net/upload/outline35e.pdf>>.

33 *Hague Convention on the International Protection of Adults*, opened for signature 13 January 2000 (entered into force 1 January 2009) arts 13, 15.

34 The Convention has been signed by Cyprus, Czech Republic, Greece, Ireland, Italy, Luxembourg, Netherlands and Poland, and has been ratified by Estonia, Finland, France, Germany, Finland and the United Kingdom (Scotland only).



COMMUNITY RESPONSES

27.23 While the Commission did not specifically discuss extraterritorial application of Victorian guardianship laws in the consultation paper, a number of people raised this issue during consultations,³⁵ with most seeking nationally consistent laws.³⁶ It was noted that people's interests, and in particular their financial interests, may cross borders.³⁷ Some submissions supported the creation of a national register of personal appointments.³⁸

THE COMMISSION'S VIEWS AND CONCLUSIONS

- 27.24 The Commission believes it highly desirable that appointments made under the guardianship laws of any Australian state or territory be recognised in every other Australian jurisdiction and operate, as far as possible, as if they were appointments made under the laws of the other state or territory.
- 27.25 This mutual recognition of appointments appears to be the simplest and most practical way of assisting people with impaired decision-making ability when they move to another part of the country.
- 27.26 The Commission acknowledges the calls by many people for uniform guardianship laws throughout Australia. Australian legal history demonstrates, however, that uniformity is often difficult to achieve and sometimes stifles innovation. It would be unfortunate if the modernisation of Victoria's guardianship laws were inhibited by a preference for national uniformity. Nonetheless, the Commission encourages the Attorney-General to consider appropriate means of promoting uniformity of guardianship laws throughout Australia.
- 27.27 Some steps can be taken in the short term to enhance Victorian recognition of appointments made in other jurisdictions. It is hoped that other Australian states and territories will amend their laws to enhance recognition of appointments made under Victorian guardianship laws.

ENDURING APPOINTMENTS

- 27.28 It is desirable to recognise enduring appointments made in other Australian jurisdictions that have an equivalent under Victorian law. At present, Victoria recognises enduring powers of attorney made under the laws of another state or territory but does not recognise interstate appointments of enduring guardians.
- 27.29 This deficiency should be remedied. New guardianship legislation should recognise personal appointments made under the laws of another state or territory that are broadly equivalent to the new personal appointments proposed by the Commission. The interstate appointment should be recognised as an appointment made under Victorian legislation if it complies with the requirements of the other state or territory. It should operate to the extent that it gives powers that could have been validly given under Victorian guardianship legislation.

35 For example, carers raised concerns about how Victorian orders would be recognised if they travelled interstate: roundtable with metropolitan carers (in partnership with Carers Victoria) (24 March 2011).

36 For eg, consultations with the Australian Bankers' Association (16 March 2011), service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (22 March 2011) and Victorian Section of the College of Clinical Neurophysiologists of the Australian Psychological Society (23 March 2011); Submission CP 71 (Seniors Rights Victoria).

37 Submission CP 23 (Dr Kristen Pearson).

38 Consultations with the Australian Bankers' Association (16 March 2011), service providers in Shepparton (in partnership with Regional Information & Advocacy Council) (22 March 2011) and Victorian Section of the College of Clinical Neurophysiologists of the Australian Psychological Society (23 March 2011); Submission CP 71 (Seniors Rights Victoria). The Commission's recommendations for a new Victorian online register are discussed in Chapter 16.

27.30 In Chapter 16, the Commission recommends the establishment of an online register for all personal appointments made under Victorian guardianship legislation. Interstate personal appointments should be included in this register in order to have effect in Victoria.

TRIBUNAL APPOINTMENTS

27.31 Part 6A of the G&A Act allows VCAT to register a guardianship order or an administration order made under a corresponding law of any other Australian state or territory.³⁹ Upon registration by VCAT, an interstate order has the same force and effect as if it were an order made under the G&A Act.⁴⁰

27.32 The Commission understands that these provisions operate satisfactorily and recommends that they be included in new guardianship legislation.

RECOMMENDATIONS

Recognition of appointments made in other Australian states and territories in Victoria

437. A personal appointment made under and compliant with the guardianship laws of another Australian state or territory should be registrable in Victoria to the extent that the powers it gives could have been validly given by a personal appointment made under Victorian guardianship legislation. The appointment should operate upon registration as if it had been made under Victorian law.

438. New guardianship legislation should provide that a personal appointment made in another state or territory must be included on the new online register in order to have effect in Victoria.

439. The provisions of Part 6A of the *Guardianship and Administration Act 1986* (Vic) should be included in new guardianship legislation.

Uniformity of guardianship laws throughout Australia

440. The Attorney-General should consider appropriate means of promoting uniformity of guardianship laws throughout Australia.

³⁹ *Guardianship and Administration Act 1986* (Vic) ss 63A, 63E.

⁴⁰ *Ibid* s 63E(4).

Appendices

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Appendix 1

CONSULTATIVE COMMITTEE MEMBERS

Ms Julie Anderson, Consumer Consultant, Mental Illness Fellowship Victoria
Ms Ruth Dwinger, Counsellor, Alzheimer's Australia Vic
Mr Martin Healy, Advocate, Youth Disability Advocacy Network
Ms Sharon Granek, Coordinator, Disability Advocacy Resource Unit
Ms Deidre Griffiths, Principal Lawyer & Executive Officer, Villamanta Disability Rights Legal Service
Ms Catherine Leslie, Lawyer/Policy worker, Mental Health Legal Centre
Ms Licia Kokocinski, former Executive Director, Advocacy, Disability, Ethnicity, Community
Ms Jeni Lee, former Principal Solicitor, Seniors Rights Victoria
Ms Jenny Blakey, Manager, Seniors Rights Victoria
Ms Lyn MacDonald, Project Worker, Brain Injury Matters Inc
Ms Tricia Malowney, Chair, Women with Disabilities Victoria
Ms Margaret McLaren, Policy Council Member, Council on the Ageing Victoria
Ms Cath McNamara, former Policy Officer, Action for Community Living
Mr Marc Paradin, Policy Officer, Victorian Coalition of ABI Service Providers
Ms Penny Paul, Coordinator: Carer Consultations, Carers Victoria
Mr Kevin Stone, Executive Officer, The Victorian Advocacy League for Individuals with Disability Inc (VALID)

Appendix 2

REFERENCE COMMITTEE MEMBERS

Mr John Billings, former Deputy President, Victorian Civil and Administrative Tribunal

Professor Terry Carney, Faculty of Law, University of Sydney

Mr Matthew Carroll, President, Mental Health Review Board of Victoria

Dr Jeffrey Chan, former Senior Practitioner, Disability Services, Department of Human Services

Mr Alistair Craig, Senior Corporate Lawyer, State Trustees Limited

Ms Anne Coghlan, Deputy President, Human Rights Division, Victorian Civil and Administrative Tribunal

Associate Professor Leanna Darvall, Faculty of Medicine, Nursing & Health Sciences, Monash University

Professor Peteris Darzins, Professor of Geriatric Medicine, Monash Medical School & Director of Geriatric Medicine, Eastern Health

Mr Julian Gardner, former Public Advocate and holder of other public offices

Professor Ian Freckelton SC, Victorian Bar, Professor, Faculties of Law and Humanities, Monash University

Mr John Lesser, Magistrate, Magistrates' Court of Victoria

Professor Danuta Mendelson, Chair in Law (Research), Faculty of Law, Deakin University

Ms Colleen Pearce, Public Advocate, Victoria

Professor Loane Skene, Faculty of Law, The University of Melbourne

Professor Bernadette McSherry, Faculty of Law, Monash University

Ms Fiona Smith, former Chairperson of the Victorian Equal Opportunity and Human Rights Commission, former member of the Guardianship Board

Dr Ruth Vine, Chief Psychiatrist, Department of Health

Appendix 3

INFORMATION PAPER SUBMISSIONS

No	Submitter / Organisation	Date Received
1	Carers Victoria	28 May 2010 (revised)
2	Anonymous	13 October 2009
3	Stephanie Mortimer	13 January 2010
4	Confidential	29 March 2010
5	Southwest Advocacy Association	12 April 2010
6	Mark Lacey	21 April 2010
7	Stephanie Mortimer	27 April 2010
8	Office of the Public Advocate (Victoria)	7 May 2010
9	Royal District Nursing Service	7 May 2010
10	Gippsland Carers Association Inc.	10 May 2010
11	Tony and Heather Tregale	11 May 2010
12	Katherine Haggarty	11 May 2010
13	Anonymous	11 May 2010
14	Anthony J Walsh	13 May 2010
15	Confidential	13 May 2010
16	Mark Feigan	13 May 2010
17	Psychiatric Disability Services of Victoria (VICSERV)	13 May 2010
18	BMC Ministries Inc	13 May 2010
19	Scope (Vic) Ltd	13 May 2010
20	Dying With Dignity Victoria Inc	13 May 2010
21	BENETAS	13 May 2010
22	Epworth Foundation	13 May 2010
23	Mental Illness Fellowship Victoria	14 May 2010
24	St Kilda Legal Service	14 May 2010
25	Eve Kinnear	14 May 2010
26	The Alfred	14 May 2010
27	Marillac	14 May 2010
28 a, b	People with Disability Australia (PWD)	14 May 2010
29	Australian Association of Social Workers (AASW)	14 May 2010
30	Victorian Aboriginal Legal Service (VALS)	14 May 2010
31	Pamela Faulkner	14 May 2010
32	NSW Guardianship Tribunal	14 May 2010
33	Trustee Corporations Association of Australia	14 May 2010
34	Anonymous	14 May 2010
35	Loddon Campaspe Community Legal Centre	14 May 2010
36	Royal College of Nursing Australia	14 May 2010
37	Victorian Equal Opportunity and Human Rights and Commission (VEOHRC)	14 May 2010
38	Dr John B Myers	14 May 2010
39	Aged Care Assessment Service in Victoria (ACAS)	14 May 2010
40	Australian & New Zealand Society for Geriatric Medicine	14 May 2010

No	Submitter / Organisation	Date Received
41	Anonymous	14 May 2010
42	Office of the Health Services Commissioner	17 May 2010
43	Victoria Legal Aid (VLA)	18 May 2010
44	Australian Bankers' Association (ABA)	19 May 2010
45	Victoria Police	19 May 2010
46	Troy Huggins	20 May 2010
47	Law Institute of Victoria Ltd (LIV)	21 May 2010
48	Victorian Institute of Forensic Mental Health	24 May 2010
49 a, b	Council on the Ageing (COTA) Victoria and Seniors Rights Victoria	24 May 2010
50	Action for Community Living	26 May 2010
51	Confidential	28 May 2010
52	Spectrum Migrant Resource Centre	28 May 2010
53	Anita Smith	31 May 2010
54	PILCH Homeless Persons' Legal Clinic	31 May 2010
55	The Australian Psychological Society Ltd	31 May 2010
56	JacksonRyan Partners	15 June 2010
57	Alfred Hospital Ethics Committee and General Ethical Issues Sub-Committee	23 September 2010
58	Mental Health Legal Centre (MHLC)	20 October 2010
59	State Trustees Limited	1 November 2010
60	Guardianship Board of South Australia	3 November 2010

Appendix 4

INFORMATION PAPER CONSULTATIONS

No	Name	Date
1	The Victorian Advocacy League for Individuals with Disability Inc (VALID) Western Regional Client Network	2 March 2010
2	VALID Northern Regional Client Network	3 March 2010
3	State Trustees Limited	9 March 2010
4	Debra Parnell – Council on the Ageing (COTA) Victoria	9 March 2010
5	Office of the Public Guardian, Alberta, Canada	16 March 2010
6	Dr Jeffrey Chan – Senior Practitioner at Department Human Services, Victoria	16 March 2010
7	Office of the Public Advocate	16 March 2010
8	John Billings	17 March 2010
9	Australian Bankers' Association (Sydney – phone)	18 March 2010
10	Fiona Smith	18 March 2010
11	Seniors groups roundtable (Aged and Community Care Victoria; COTA Victoria; Seniors Information Victoria; Seniors Rights Victoria; Elder Rights Advocacy; National Seniors (Victoria); Housing for the Aged Action Group)	26 March 2010
12	Julian Gardner	26 March 2010
13	Roundtable with people with disabilities, carers and advocates in Morwell (in partnership with Gippsland Disability Resource Council)	29 March 2010
14	Roundtable with service providers in Morwell (in partnership with Gippsland Disability Resource Council)	29 March 2010
15	NIDUS Personal Planning Resource Centre and Registry, British Columbia, Canada	31 March 2010
16	Respecting Patient Choices Team — Austin Hospital	6 April 2010
17	Mental Health Legal Centre	7 April 2010
18	Roundtable with mental health consumers (in partnership with Mental Health Legal Centre Inc (MHLC) and Victorian Mental Illness Awareness Council (VMIAC))	7 April 2010
19	Roundtable with carers in Hastings (in partnership with Carers Victoria)	8 April 2010
20	Roundtable with trustee organisations (ANZ Trustees Ltd; Equity Trustees Ltd; Trust Company Ltd (in partnership with Trustee Corporations Association))	9 April 2010
21	Ruth Vine – Chief Psychiatrist, Department of Health, Victoria	9 April 2010
22	Law Institute Victoria	13 April 2010
23	FTL Judge and Papaleo	14 April 2010
24	Mental Illness Fellowship Victoria	14 April 2010
25	Roundtable with carers, people with disabilities and service providers in Ballarat (in partnership with Grampians Disability Advocacy)	15 April 2010
26	Alzheimer's Australia Vic	19 April 2010
27	Villamanta Disability Rights Legal Service	19 April 2010
28	VAILD Southern Regional Client Network	20 April 2010
29	David Green	21 April 2010
30	Action on Disability within Ethnic Communities (now Advocacy Disability Ethnicity Community)	21 April 2010
31	Roundtable with carers and service providers in Shepparton (in partnership with Regional Information & Advocacy Council (RIAC))	22 April 2010
32	Roundtable with service providers in Mildura (in partnership with RIAC)	27 April 2010

No	Name	Date
33	Roundtable with carers and people with disabilities in Mildura (in partnership with RIAC)	27 April 2010
34	Mallee Family Care, Mildura	28 April 2010
35	Oasis Aged Care, Mildura	28 April 2010
36	Principal Aged Care Mildura	28 April 2010
37	Centrelink (Canberra – phone)	30 April 2010
38	Roundtable with people with acquired brain injuries (in partnership with Brain Injury Matters)	3 May 2010
39	Roundtable with Federation of Community Legal Centres – Elder Law Group	3 May 2010
40	Roundtable with Self Advocacy Resource Unit (SARU)	4 May 2010
41	Margaret Ryan and Max Jackson	4 May 2010
42	Roundtable with Disability Advocacy Resource Unit (DARU)	5 May 2010
43	Victorian Aboriginal Legal Service	6 May 2010
44	Roundtable with metropolitan carers (in partnership with Carers Victoria)	6 May 2010
45	Family members – guardians and administrators	7 May 2010
46	Tony and Heather Tregale	7 May 2010
47	Mary Dight	7 May 2010
48	State Trustees client	7 May 2010
49	Roundtable with Royal District Nursing Service	10 May 2010
50	Spectrum Migrant Resource Centre	12 May 2010
51	Aged and Community Care Victoria	12 May 2010
52	Forum with Gippsland Carers Association	25 May 2010
53	Victorian Civil and Administrative Tribunal Members	2 June 2010

Appendix 5

CONSULTATION PAPER SUBMISSIONS

No	Submitter / Organisation	Date Received
1	Confidential	11 November 2010
2	Stephanie Mortimer	18 March 2011
3	Anna Kure	22 March 2011
4a	Judi-ann Leggetts	28 March 2011
4b		3/4 March 2011
5a	Michael Dalton	28 March 2011
6a	Marianne Dalton	28 March 2011
6b		31 March 2011
7a	Peter and Ruth Den Brinker	31 March 2011
7b	Confidential	31 March 2011
7c	Confidential	4 April 2011
7d	Confidential	19 April 2011
8	Leonie Chirgwin	13 April 2011
9	Stephen Lake	29 April 2011
10a	Bruce Levy	3 May 2011
10b	Confidential	
11	John Mills	3 May 2011
12	Lisa Brumtis	3 May 2011
13	Dying with Dignity Victoria	9 May 2011
14	BENETAS	10 May 2011
15	Ombudsman Victoria	12 May 2011
16	Victoria Police	12 May 2011
17	Inclusion Melbourne	13 May 2011
18	P. G. Prendergast	16 May 2011
19	Office of the Public Advocate	17 May 2011
20	Epworth HealthCare	17 May 2011
21	Action for More Independence & Dignity in Accommodation (AMIDA)	17 May 2011
22	Alzheimer's Australia Vic	18 May 2011
23	Dr Kristen Pearson	18 May 2011
24	Autism Victoria	19 May 2011
25	Confidential	19 May 2011
26	Katherine Haggarty	19 May 2011
27	Catholic Archdiocese of Melbourne	19 May 2011
28	Financial Ombudsman Service Limited	19 May 2011
29	STAR Victoria Inc	19 May 2011
30	Karyn Macdonell	19 May 2011
31	Australian Christian Lobby	20 May 2011
32	Ethnic Communities' Council of Victoria Inc	20 May 2011
33	Eastern Health	20 May 2011
34	Confidential	20 May 2011

No	Submitter / Organisation	Date Received
35	Ursula Smith	20 May 2011
36	Berry Street	20 May 2011
37	Mildura Base Hospital – Social Work Department	20 May 2011
38	Aged Care Crisis (ACC)	20 May 2011
39	Peninsula Community Legal Centre Inc	20 May 2011
40	Confidential	20 May 2011
41	June Walker	20 May 2011
42a 42b	Helen Siomos	20 May 2011
43	Alfred Health	20 May 2011
44	Leadership Plus	20 May 2011
45	Scope (Vic) Ltd	20 May 2011
46	Victorian Coalition of ABI Service Providers Inc	20 May 2011
47	Dr Michael Murray	20 May 2011
48	Centre for the Advancement of Law and Mental Health—Monash University	20 May 2011
49	Respecting Patient Choices Program—Austin Health	20 May 2011
50	Margaret Brown	20 May 2011
51	Dr John B Myers	23 May 2011
52	Ad Hoc Interfaith Committee	20 May 2011
53	Plunkett Centre for Ethics	23 May 2011
54	JacksonRyan Partners	23 May 2011
55	Office of the Health Services Commissioner	23 May 2011
56	Disability Discrimination Legal Service	23 May 2011
57	Aged Care Assessment Service in Victoria (ACAS)	23 May 2011
58	The Australian Psychological Society Ltd	26 May 2011
59	Carers Victoria	27 May 2011
60	Office of the Victorian Privacy Commissioner	27 May 2011
61	Disability Services Commissioner	1 June 2011
62	St Kilda Legal Service	1 June 2011
63	Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)	1 June 2011
64	Women with Disabilities Victoria	3 June 2011
65	Council on the Ageing (COTA) Victoria	3 June 2011
66	Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	3 June 2011
67	Trustee Corporations Association of Australia	3 June 2011
68	Australian Nursing Federation	3 June 2011
69	Australian Medical Association (Victoria) Limited (AMA)	3 June 2011
70	State Trustees Limited	3 June 2011
71	Seniors Rights Victoria	3 June 2011
72	Confidential	6 June 2011
73	Victoria Legal Aid (VLA)	6 June 2011
74	PILCH Homeless Persons' Legal Clinic (PILCH)	7 June 2011

Appendix 5

CONSULTATION PAPER SUBMISSIONS

No	Submitter / Organisation	Date Received
75	Federation of Community Legal Centres (Victoria) Inc	7 June 2011
76	Professor Rinaldo Bellomo	8 June 2011
77	Law Institute of Victoria Ltd (LIV)	8 June 2011
78	Mental Health Legal Centre (MHLC)	27 June 2011
79	NSW Trustee and Guardian	30 June 2011
80	Victorian Civil and Administrative Tribunal	1 July 2011
81	The Elder Law and Succession Committee, Law Society of NSW	8 July 2011
82	Communication Rights Australia	5 August 2011
83	Chris Borthwick	3 September 2011
84	Law Institute of Victoria Ltd (LIV)—Supplementary Submission	9 September 2011
85	Victoria University	9 September 2011
86	Anne Kennedy	26 September 2011

Appendix 6

CONSULTATION PAPER CONSULTATIONS

No	Name	Date
1	Victorian Registry of Births, Deaths and Marriages	16 February 2011
2	Victorian Civil and Administrative Tribunal	16 February 2011
3	Office of the Disability Services Commission	21 February 2011
4	Victoria Advocacy League for Individuals with Disability Inc (VALID) Eastern Regional Client Network	21 February 2011
5	Anita Smith – President, Guardianship and Administration Board, Tasmania	21 February 2011
6	John Billings – former Deputy President, VCAT	23 February 2011
7	Office of the Public Advocate	24 February 2011
8	Ruth Vine – Chief Psychiatrist, Department of Health, Victoria	24 February 2011
9	Victorian Institute of Forensic Mental Health (Forensicare)	25 February 2011
10	Aged Care Assessment Service in Victoria (ACAS)	28 February 2011
11	VALID Western Regional Client Network	1 March 2011
12	VALID Northern Regional Client Network	2 March 2011
13	Alfred Hospital Ethics Committee & General Ethical Issues Sub-Committee	3 March 2011
14	Roundtable with Trustee Corporations Association of Australia; ANZ Trustees Ltd; Equity Trustees Ltd; Trust Company Ltd; Perpetual Trustees (in partnership with Trustee Corporations Association of Australia)	4 March 2011
15	Alzheimer's Australia Vic and roundtable with people caring for parents with dementia	8 March 2011
16	Royal District Nursing Service	9 March 2011
17	Women with Disabilities Victoria	11 March 2011
18	VALID Southern Regional Client Network	15 March 2011
19	Trustee Corporations Association of Australia	15 March 2011
20	Professor Ron McCallum AO	15 March 2011
21	Graeme Smith – Public Guardian, New South Wales	16 March 2011
22	Malcolm Schyvens – Deputy President and Esther Cho – Legal Officer, New South Wales Guardianship Tribunal	16 March 2011
23	Australian Bankers' Association Inc	16 March 2011
24	Roundtable with people with acquired brain injuries (in partnership with Brain Injury Matters)	16 March 2011
25	Roundtable with people with disabilities, carers, advocates and service providers in Morwell (in partnership with Gippsland Disability Resource Council)	18 March 2011
26	State Trustees Limited	21 March 2011
27	Roundtable with service providers in Shepparton (in partnership with Regional Information & Advocacy Council Inc, RIAC)	22 March 2011
28	Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society	23 March 2011
29	Roundtable with metropolitan carers (in partnership with Carers Victoria)	24 March 2011
30	Scope (Vic) Ltd	25 March 2011
31	Max Campbell – Association of Independent Retirees	25 March 2011
32	Roundtable with service providers (in partnership with National Disability Services (Victoria))	28 March 2011

Appendix 6

CONSULTATION PAPER CONSULTATIONS

No	Name	Date
33	Roundtable with carers in Hastings (in partnership with Carers Victoria)	29 March 2011
34	Julian Gardner	29 March 2011
35	Roundtable with carers, advocates and service providers in Bendigo (in partnership with Regional Information & Advocacy Council Inc)	30 March 2011
36	Victoria Legal Aid	1 April 2011
37	Dianne Pendergast – Adult Guardian, Queensland	4 April 2011
38	Roundtable with mental health consumers (in partnership with Mental Health Legal Centre (MHLC) and Victorian Mental Illness Awareness Council (VMIAC))	5 April 2011
39	Mental Illness Fellowship of Victoria	6 April 2011
40	Australian & New Zealand Society for Geriatric Medicine	7 April 2011
41	Roundtable with seniors groups (Aged and Community Care Victoria; Council on the Ageing (COTA) Victoria; Seniors Information Victoria; Elder Rights Advocacy; National Seniors (Victoria))	8 April 2011
42	Roundtable with disability advocates (in partnership with Disability Advocacy Resource Unit (DARU))	13 April 2011
43	Carers Victoria	15 April 2011
44	Gippsland Carers Association Inc	19 April 2011
45	Mental Health Legal Centre (MHLC)	28 April 2011
46	Seniors Rights Victoria	2 May 2011
47	Bruce Levy JP	3 May 2011
48	John McKenna	3 May 2011
49	Lois Quick	3 May 2011
50	Associate Professor Nicholas Tonti-Filipini	3 May 2011
51	Peter Sherman	3 May 2011
52	Judi-ann Leggetts – DSP Australia Inc	3 May 2011
53	Robyn Brown	3 May 2011
54	John Mills	3 May 2011
55	Stephen Baumgartner	3 May 2011
56	Law Institute of Victoria Ltd (LIV)	4 May 2011
57	Roundtable with seniors (in partnership with Council on the Ageing (COTA) Victoria)	5 May 2011
58	Roundtable with self advocates (in partnership with Self Advocacy Resource Unit (SARU))	6 May 2011
59	Roundtable with Turkish and Vietnamese groups organised (in partnership with Advocacy Disability Ethnicity Community (ADEC))	10 May 2011
60	Australian Medical Association (Victoria) Limited (AMA)	18 May 2011
61	Roundtable with members of Migrant communities (in partnership with Spectrum Migrant Resource Centre)	19 May 2011
62	Teleconference with Brenda Lee Doyle – Provincial Director, Office of the Public Guardian, Alberta Canada	19 May 2011
63	Kevin Stone – Victorian Advocacy League for Individuals with Disability Inc (VALID)	2 June 2011
64	Jody Saxton – Barney, Project Coordinator 2009–2011, Victorian Aboriginal Disability Network	3 August 2011

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