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VICTORIA POLICE

Submission on the Victorian Law Reform Commission *Guardianship: Consultation Paper*

People with impaired decision-making capacity and policing

Victoria Police is committed to upholding the rights and dignity of people whose decision-making capacity is impaired due to their mental illness or disability.

Police routinely interact with people who have impaired decision-making capacity in their general contact with members of the public or with people who are victims, witnesses, suspects, or are in need of assistance. These interactions occur as part of the range of roles that police perform, including crime prevention, early intervention, crisis intervention, law enforcement, maintaining public safety (including situations where there are multiple risks, such as mental health crisis, drug or alcohol use, and the presence of a weapon) and supporting other agencies (including by referrals).

Victoria Police has policies, procedures and partnerships in place to enable these interactions, and seeks to enhance them through its implementation of the *Victoria Police Mental Health Strategy*.

However, Victoria Police has identified a legislative gap concerning the behaviour of decision-makers for persons with impaired decision-making capacity that may not meet the criminal standard, but which is considered to be abuse (such as financial or emotional abuse). In these cases, the role of police is unclear. In view of this issue, Victoria Police recommends that the Victorian Law Reform Commission consider recommending proposals for the introduction of additional criminal sanctions to address such behaviours.

In response to the Victorian Law Reform Commission consultation paper, Victoria Police provides the following comments relating to a number of the questions posed.

Comments on the *Guardianship: Consultation Paper*

Question 14 Do you agree with the Commission's proposal to introduce new supported decision-making arrangements?

Question 15 Do you agree with any or all of the proposed roles of supporters and co-decision makers?

Question 16 What steps would need to be taken in order to ensure that these appointments operated fairly and efficiently?

Police on occasion need to seek consent to act from a person who has an impaired decision-making capacity. Examples include seeking a person's consent for police to refer their contact details and perceived needs to a health, welfare or support agency for follow-up. It is therefore important that service providers such as police can determine whether a person is capable of providing consent, or whether they have a supporter or co-decision maker. Where a supporter or co-decision maker should be involved, they would need to be easily and promptly identifiable and accessible, in order to avoid unduly prolonging the person's involvement with police.

Question 21 Do you agree with the suggested training and monitoring roles for the Public Advocate? Are there any other functions the Public Advocate should perform in relation to supporters?

Question 22 What safeguards do you think are necessary to protect supported people from abuse?

Authorising another person to contribute to decision-making – whether as a supporter or co-decision maker or as a substitute decision maker – places a represented person in varying degrees of dependence on that person which, in some cases may make the represented person vulnerable to harm. Victoria Police therefore supports consideration of processes that provide a represented person with easily accessible means of raising concerns or making complaints, as well as monitoring mechanisms that ensure decisions and actions are appropriate and accountable.

Question 28 Should an online registration system be created for enduring powers?
Question 33 Who should have access to the register? What safeguards could be put in place to protect an individual's privacy while allowing appropriate people to access it?
Question 34 Should it be necessary to notify a public authority and/or various other people when a power of attorney is activated?

As the Consultation Paper notes, to be effective, service providers need to be able to identify where guardianship arrangements are in place and to be able to determine the limits of the authorised decision making. An online system that gives efficient, 24 hour and access to current (but limited) information on any guardianship arrangements would enable service providers such as police to quickly recognise a person's impairment and who is authorised to provide decision making support. It would also signal the need to activate other supports, such as to arrange for an independent third party to attend if police wish to interview the person.

The Victoria Police central database, LEAP, has the capacity to place a flag a person who has a mental disorder and is likely to have future contact with police and record information such as typical behaviours and triggers, effective communication strategies, any known risks, appropriate contact person and the source of the information. In response to requests from carers and people with mental disorders, Victoria Police policy also enables a person with a mental disorder, their parent or a guardian to volunteer information for a flag, and to request the removal of this information from LEAP at any time.

Question 39 Do you think it should be possible to make statutory instructional directives about things other than medical treatment?
Question 40 What types of things should it be possible to include in an instructional directive?
Question 46 Should there be an electronic registration system for advance directives?

As mentioned above, the availability of current and practical information enables service providers to respond appropriately and effectively to the needs of a person with impaired decision making, particularly where the nature of the circumstances or the person's impairment limit the person's ability to express their preferences. Victoria Police recognises that the information recorded should be the minimum that is required for the purpose and is appropriate for a service provider to access.

Question 51 Do you agree with the Commission's suggestions for capacity principles (Option A) and a legislative definition of incapacity (Option B) in order to provide legislative guidance on how to determine when a person is unable to make their own decisions? Are there additional or other ways to provide this guidance?

The capacity of a person to make their own decisions is significant for a range of interactions that a person may have with police. Victoria Police therefore recommends that any proposals to define capacity make a distinction between capacity to make decisions (such as to consent to procedures or participate in processes) and capacity to form a guilty mind (that is, *mens rea* in the committing of an offence). Questions of forensic capacity are dealt with separately and should not be unintentionally impacted by the proposals suggested by the Commission.

Question 53 Do you agree with the Commission's proposal (Option C) to lower the age limit of the *Guardianship and Administration Act 1986* (Vic) to 16 and to raise the age limit of the *Children, Youth and Families Act 2005* (Vic) to 18?

Amending the age limits in this legislation would expose individuals to all the provisions in these Acts. Victoria Police therefore recommends 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 precede any such amendment.

Question 68 Should new guardianship laws permit VCAT to authorise a guardian, or other person, to use some force to ensure that a represented person complies with the guardian's decisions?

Question 69 If yes to Q 68, do you agree with the additional safeguards proposed by the Commission?

Victoria Police recognises that there are situations that require police to assist guardians or other nominated persons to carry out the requirements of a VCAT order. However, in order to minimise unnecessary contact with police and to avoid fostering a perceived link between impaired capacity and criminality or danger, Victoria Police endorses the introduction of safeguards that limit police involvement to an option of last resort and where there are safety risks.

Question 88 Does the law currently strike the right balance between following the wishes of the person, including those that involve risk or danger, and other important considerations such as the right of a person to be protected from harm?

Victoria Police respects the right of a person with impaired capacity to make decisions that may involve a degree of risk, danger or imprudence. However, Victoria Police suggests that considerations of a guardian's duty of care are also relevant, particularly in circumstances where a person with an impaired capacity may not be able to appreciate the full consequences of their decisions. It could be argued that certain interventions constitute crime prevention and harm minimisation if, for example, they prevent the person from entering the criminal justice system.

Question 99 Do you think that private guardians and attorneys should be required to lodge periodic reports about their activities with a public official?

Question 100 Should people exercising substitute decision-making powers be required to provide periodic declarations of compliance with their responsibilities?

Question 102 Do you think that substitute decision makers should declare an oath or sign a statement agreeing to comply with their responsibilities before they undertake their roles?

Question 103 Should there be random audits of the way substitute decision makers perform their responsibilities?

As stated in response to Questions 21 and 22, it is important that there is a capability to raise, identify and address inappropriate decision making by guardians and administrators, particularly where the actions may constitute criminal behaviour. Furthermore, the risks may differ slightly according to who fulfils these roles. For example, as the Public Advocate and State Trustees are public bodies and substitute decision makers of last resort, their clients may be vulnerable due to their lack of other supports who could identify inappropriate decision making. Alternatively, private guardians and administrators may be able to make decisions that are detrimental or inappropriate for the represented person without independent oversight. Victoria Police therefore recommends that monitoring and oversight mechanisms should apply to both public and private guardians and administrators.

Question 106 Is there a need for more specific penalties for substitute decision makers who misuse or abuse their powers?

Question 107 If yes, what types of conduct should warrant a specific penalty?

Question 108 Should penalties for substitute decision makers who misuse or abuse their powers be increased?

Question 109 Should penalties be the same, regardless of whether the substitute decision makers have been personally appointed or appointed by VCAT?

Question 110 Should civil penalties be introduced for substitute decision makers who misuse or abuse their powers?

Question 111 Do you agree with the Commission's proposal (Option B) that new guardianship laws should permit merits review of decisions made by the Public Advocate as a guardian and by State Trustees as an administrator?

Question 112 Who should be entitled to apply for merits review of a guardian's or administrator's decision?

Question 118 Do you believe the Public Advocate's investigation function should extend beyond cases concerning guardianship and administration?

Question 119 Do you think the Public Advocate's investigatory powers should be clarified so that she can require people and organisations to provide her with documents and attend her offices to answer questions?

Question 120 Do you think the Public Advocate should have the power to enter private premises with a warrant issued by a judicial officer when there are reasonable grounds for suspecting that a person with a disability who has been neglected, exploited or abused is on those premises?

Question 121 Do you think it is necessary to protect the anonymity of people who provide the Public Advocate with information about the possible abuse, neglect or exploitation of people with a disability?

Question 122 Should the Public Advocate be able to take civil penalty proceedings against people who have allegedly breached guardianship legislation?

Question 133 Do you think the Public Advocate should be given any responsibilities to deal with possible misuses of power by a person who is automatically appointed by legislation to make decisions for another person?

Victoria Police recommends that the legislation establish a delineation of responsibility for reporting, investigating and prosecuting matters by police and by other authorities (such as the Public Advocate). In order to uphold the rights of people with impaired capacity and for the broader public good, allegations of harm or inappropriate actions or decision making should not be minimised or treated differently because the victim has impaired capacity. Delays in reporting allegations to police may result in loss or contamination of evidence, continued harm to the victim and a perceived lack of transparency and fairness in the administration of justice. There are already examples of effective arrangements whereby police and other investigations occur in parallel or in sequence.

Question 156 Do you agree with the Commission's previous recommendation that the compulsory treatment provisions in the *Disability Act 2006* (Vic) be extended to people with a cognitive impairment other than intellectual disability?

As stated in response to Question 53, it is important to note that any broadening of the application of the compulsory treatment provisions to people with other forms of cognitive impairment would expose them to the full range of provisions, including provisions that authorise police to apprehend a person who is absent without leave from a specified service. To ensure that any such expansion is feasible and practical, it would also be important to determine that appropriate compulsory treatment service providers exist for such persons.

Question 157 Do you agree with the Commission's proposal (Option C) that it should be possible, in some circumstances, for guardianship to be used as a mechanism for authorising psychiatric treatment and place of residence decisions for a person who is unable to make their own decisions due to mental illness?

Victoria Police acknowledges the Commission's recognition that there are occasions when service providers such as police need to provide an emergency response to a person believed to have a mental illness and it may not be practical or appropriate to delay this response in order to consult a guardian.