

Submission No. 18

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The Manager

Victorian Law Reform Commission

GPO Box 4637, Melbourne Vic 3001

Re Public Submission – Inquiry into Guardianship and Administration

I wish to make a public submission to your Guardianship and Administration Inquiry. I attended your Consultation Roundtable for people with disabilities, carers, advocates and service providers held in Bendigo on 30 March 2011. I possess and have read the supporting papers provided by your Commission, including the Guardian Consultation Paper (458 pages).

I am retired from the workforce and the ageing parent of a 25 year old daughter with Down syndrome. My daughter × lives with her parents and all decisions to date for her have been made by us in consultation with our daughter. × by any measure would not be considered capable of having legal capacity. Yet × currently enjoys a good quality of life and has had for all her life with all manner of social, sporting and educational stimulation. We are very well aware of our daughter's likes, dislikes and preferences. Over time our daughter has tried a number of activities some of which she has discarded and some of which she still maintains **As a parent I am only too well aware that under Victoria's current guardianship and administration legislative provisions all decisions we have made for our daughter after she turned 18 years of age are in fact illegal.** This is notwithstanding all decision making has her best interests at heart.

We are not her guardians under Victoria's legal system, nor have we attempted to apply for guardianship. But we are and always will remain her moral guardians. Like the majority of Victorian parents of mature children with intellectual disability we have not previously considered that we should become legal guardians for our own offspring. Our natural love and affection for our daughter ensures that we always have her best interests at heart when we make decisions affecting her life and wellbeing. Our view is supported by many in the legal profession whose general advice is to let sleeping dogs lie.

We are only too well aware that we are not getting any younger and our daughter's life will be somewhat uncertain after we are no longer part of her life. We do not want to constrain our daughter's future in any way. Her preferred option and ours is to set her up in an independent living arrangement whilst we are still alive and not be completely dependent on the social welfare system. Independent living is high on our daughter's own preference list. Setting this up will take some time.

We are very aware that one size does not fit all. Our daughter lives in a loving and supportive environment. Whilst most families of adult disabled children have similar types of circumstances not all do. There is potential for abuse of vulnerable people due to the lack of safeguards. In addition many vulnerable people do not have supportive families.

Recommendation: Intellectual Disability where adult person with limited legal capacity still living with parents

Refer to question 24 of Guardianship Consultation Paper Summary at page 23 which states "Should parents and carers of children with disabilities be able to file a document with VCAT that states their wishes about future guardianship or administration arrangements?"

That parents of adult Victorian children still living with them who meet the criteria for support under the Disability Act 2006 (Vic) or the United Kingdom Act (see below) have a streamlined Guardianship process for approval as the supported decision maker. Provided the disability is of a permanent nature and therefore is not time-specific, temporary or decision-specific.

[Note the definition of "incapacity" in section 3(1) of United Kingdom's Mental Capacity Act 2005 is a much better criteria to use in this instance than the Victorian Act because it provides – a person is unable to make a decision for himself if he is unable to 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 in some way (whether by talking, using sign language or any other means)]

That the approval process has incorporated checks and balances to deter abuses which include a mechanism to appoint another supported decision maker, by the Public Advocate where necessary.

That the approval covers personal, medical and financial decisions.

That guardianship is granted on maximum 5 year term only and renewable after expiry by fresh renewal applications.

That all approvals be registered on a Guardianship Register, (with VCAT? or Public Advocate?) that is available for public access which includes minimum essential information informing who is able to make legal decisions on behalf of the affected disabled person.

That supported decision making aids and procedures be available to enhance ability of persons with limited decision ability to make appropriate decisions for themselves.

Conclusion: The current Guardianship and Administration raft of legislative powers are onerous, little understood even by most legal practitioners, and do not protect all the vulnerable persons they were designed to safeguard.

Yours sincerely

Paul Prendergast