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Victorian Law Reform Commission

Review of *Guardianship and Administration Act 1986*

SUBMISSION BY LEADERSHIP PLUS

(Formally Action for Community Living)

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About Leadership Plus

Leadership Plus is a consumer-controlled disability advocacy organisation that seeks to empower people with disabilities to play an active role in the process of making social and political changes that lead to a more inclusive society. A primary focus of our work is advocating for systemic change to enable people with disabilities to fully participate in all areas of community life.

Leadership Plus provides both individual and systemic advocacy, including specialist advocacy for people with acquired brain injury. Inclusive Leisure Victoria is a program of that seeks to promote and advocate for inclusive sport, recreation and leisure environments across Victoria. We also provide a program providing leadership development and training for people with disabilities.

Leadership Plus is the lead agency in **Disability Rights Victoria** (DRV), a consortium of cross-disability advocacy organisations that work together to provide individual and systemic advocacy for people with disabilities across regional and metropolitan Victoria. The DRV agencies are:

- *Leadership Plus*
- *Barwon disAbility Resource Council*
- *Disability Advocacy and Information Service*
- *Disability Resources Centre*
- *Gippsland Disability Resource Council*
- *Grampians Disability Advocacy Association*
- *Regional Information and Advocacy Council*
- *Southwest Advocacy Association*

Introduction

Leadership Plus welcomes the opportunity to provide this submission to the Guardianship Review.

Individual advocates from Leadership Plus and the Disability Rights Victoria agencies are often called on to provide advocacy support for people with disabilities in relation to guardianship and administration issues, including hearings of the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT). Advocates also regularly liaise with staff from the Office of the Public Advocate (OPA).

Our submission to the Review is informed by this advocacy work and focuses on areas in the Terms of Reference and Questions that have been highlighted by the advocates in the Disability Rights Victoria consortium and about which we

have particular experience or expertise. It should be noted that none of the DRV agencies provide legal advocacy.

[Please note: question numbers correspond to the questions in the Information Paper. Questions about which we have no comment have been omitted.]

GENERAL QUESTIONS

1. *Views about how the current law works*

The guiding principles of the current legislation (namely that the means that are the least restrictive of a person's freedom of decision and action should be adopted, the best interests of a person with a disability must be promoted and the wishes of a person with a disability should be followed wherever possible) mean that the law generally works well in balancing protection from abuse and neglect and the right to autonomy and self-determination. The emphasis on the least restrictive option and the use of guardianship and administration as 'last resort' measures should be retained in any new legislation. This would be enhanced by formal inclusion of some less restrictive options, e.g. co-decision-making (see below).

The use of an informal tribunal rather than a court is a positive feature of the current system which should be retained.

Concerns voiced by advocates about the current system tend to relate to the administration of the law rather than the law itself (see below).

Retention or introduction of the following in any new guardianship legislation would be particularly useful:

- complete consistency with the UN Convention on the Rights of People with Disabilities (UN Convention) and the Victorian Charter of Human Rights and Responsibilities;
- formal supported decision making principles and mechanisms;
- a requirement that that 'best interests' decision-making always include consultation with the represented person, careful consideration of their expressed wishes and incorporation of their wishes as far as possible;
- the capacity to have disputed decisions of substitute decision makers reviewed by VCAT quickly and easily.

To promote understanding of new legislation there should be an adequately funded community education strategy designed to raise awareness of the rights of people with disabilities and the purpose of guardianship legislation.

2. Is a system of guardianship and administration the best way to ensure the needs of people with impaired decision-making ability are met and their rights are protected? What other approaches might better achieve these goals?

Leadership Plus believes that there needs to be legislation in place that caters for the needs of people with impaired decision-making ability and ensures that their rights and interests are protected. Formal inclusion of supported decision making options would enhance the current system. The continuum of legal mechanisms (including co-decision making orders) contained in the *Adult Guardianship and Trusteeship Act* of Alberta seem worthy of particular consideration.

3. Is there an adequate understanding of guardianship laws in the community? What could be done to improve this?

There seems to be limited understanding (and often misunderstanding) of guardianship laws in the community, sometimes even amongst workers in the disability sector. While education campaigns may be useful, often people will only be ready to absorb information when confronted with a situation where such information becomes relevant. Easily accessible information and timely provision of advice through the Office of the Public Advocate and advocacy organisations are important elements in ensuring people can get information when they need it.

It would be particularly beneficial if there was more awareness about enduring guardianship. Compared to other instruments (particularly financial powers of attorney) the capacity for people to appoint their own guardian through the enduring guardianship process is little known. Clear written information readily available in community venues as well as on-line would be useful in raising awareness. Lawyers should be encouraged to provide information about enduring guardianship to their clients, e.g. when discussing power of attorney arrangements.

4. How should developments in policies and practices for people with disabilities be reflected in guardianship and administration laws?

We note in the Terms of Reference and Information Paper that the Review process will ensure regard for Victoria's human rights obligations as outlined in the Victorian Charter of Human Rights and Responsibilities (the Charter) and the United Nations Convention on the Rights of Persons with Disabilities (the Convention). In this context Leadership Plus considers that an emphasis on supported decision making and inclusion of the formal mechanisms to back this up are an essential part of any reform.

5. People with age related disabilities and acquired brain injuries are now the main users of guardianship and administration. Do you think the system needs to change to reflect this situation and prepare for the future? If so how should it change?

While the system needs to deal with each individual case according to the specific circumstances, the over-arching principles that apply are the same, regardless of the reason why a person may be in need of protection. The guardianship and administration system must be sufficiently comprehensive and flexible to cater for all people with impaired decision-making capacity, regardless of the cause. It also needs to be able to cater for changes in capacity / intermittent incapacity, e.g. recovery of capacity over time following brain injury, episodic mental illness.

SPECIFIC QUESTIONS FROM TERMS OF REFERENCE

DISABILITY

6. Should it be necessary for a person to have a 'disability' before a guardian or administrator is appointed or is it preferable to rely on concepts such as lack of 'capacity' or 'vulnerability'?

Leadership Plus considers it discriminatory that guardianship and administration measures apply only to people who have impaired decision making capacity and also have a disability. It would be preferable to rely on concepts such as 'lack of capacity' or 'vulnerability' rather then 'disability' to ensure that the rights of all people in need of protection are catered for.

7. What are the best ways of assessing whether a person's decision-making capacity is impaired?

Given that such an important issue as the autonomy of the individual is at stake in guardianship and administration matters, specialist professional assessment relevant to the individual case (e.g. by neuropsychologists, psychologists who specialise in intellectual disability) would be the best way of determining whether a person's decision-making capacity is impaired.
In a system that included formal supported decision-making mechanisms it may be possible to use a simple assessment tool / checklist to give an indication of capacity, only proceeding to full assessment if guardianship and / or administration are being considered. The person making the assessment should be independent / without conflict of interest and take into account information from relevant others.

[Several advocates expressed concerns about poor assessments made by people unskilled for this role. One example:

As an advocate I witnessed a VCAT member request that a person with an intellectual disability perform several additions (sums) and this was the tool used by the member to determine if the client had capacity. On the VCAT file there was a letter stating the person had an intellectual disability, it said nothing about

capacity. Recent letters provided to VCAT included a financial counsellor's report stating that the client had capacity. The outcome was that under pressure the client failed the additions and the Administration order was not revoked].

BEST INTERESTS

8. Is 'best interests' a useful or appropriate guide for substitute decision-makers? Are there better approaches?
9. Does the notion of 'best interests' decision-making allow for the right of a person to take risks and make bad decisions? Should it?
10. To what extent should a guardian or administrator be required to try to identify the represented person's wishes and follow them wherever possible?

'Best interest' is certainly a useful guide however it can be subjective and tainted by a substitute decision maker's personal value judgements. It needs to be balanced by strong weighting being given to the person's wishes and values.

The current system (legislation and additional guidance provided by OPA) attempts to strike this balance. Promotion of the person's 'best interests' is only one of the broad principles on which the current legislation is based, the other two being:
• the means that are the least restrictive of a person's freedom of decision and action should be adopted
• the wishes of a person with a disability should be followed wherever possible.

Both guardians and administrators are required to assist people, as far as possible, to make decisions for themselves. The Public Advocate has suggested that promoting the best interests of a person with a disability means attempting to work out how that person's "interests and values are affected by their situation and weighing the relative importance of their different interests in the particular decision that must be made".

Additional features that would serve as balances to 'best interests' could include:

- Formal supported decision making mechanisms used in most situations which currently trigger guardianship and / or administration orders.
- A requirement that 'best interests' decision-making should always include consultation with the represented person, careful consideration of their expressed wishes and incorporation of their wishes as far as possible. (British Columbia's *Representations Agreements Act* seems to provide a good model on this issue.) It should inevitably follow from this that 'best interests' decision-making would allow for the right of a person to take risks. Enabling risk-taking should be balanced by consideration of the nature and degree of the consequences of the risk, the capacity of the person to understand and learn from the consequences and the possibility of building in 'safety nets' in case of negative consequences.
- A legislative capacity for represented persons and other sufficiently interested parties to request a formal review of a decision of a substitute decision maker.

(For this to be an effective mechanism VCAT would need to deal promptly with requests for decisions to be reviewed).

SUBSTITUTE DECISION-MAKING

11. Is there a continuing need for substitute decision-making laws?

Article 16 of the Convention obligates signatory countries to take appropriate steps to protect people with disability from exploitation, violence and abuse. In some cases this may require substitute decision-making in order to protect the rights and interests of people who lack capacity and/or are vulnerable to exploitation and abuse. However substitute decision making should be an absolute last resort only used if supported decision making mechanisms are not a viable alternative.
Article 12 of the Convention provides good guidance about supported decision making.

12. Do we need to have two types of substitute decision-makers (administrators and guardians) for financial and personal decisions? Would it be preferable for VCAT to have a range of different financial, medical and lifestyle powers it could provide to one decision-maker?

While it may be less complicated and often preferable to have one substitute decision maker there are also disadvantages. It may not be possible to find the appropriate skills, values and expertise needed for a represented person in one substitute decision maker and there are risks associated with one person having such a significant degree of control over decisions. Leadership Plus believes that the system should retain the possibility of appointing more than one substitute decision maker if needed, with a requirement for appropriate co-ordination between the substitute decision makers.

13. Should plenary guardianship and administration orders be retained? Or, should VCAT be required to identify in each case the range of decisions which can be made on a person's behalf?

In the vast majority of cases substitute decision-making orders should be limited, specific and tailored to the individual circumstance in accordance with the 'least restrictive option' principle. If plenary orders are to be retained, the legislation should contain, as does the current Act, the stipulation that plenary orders should only be made if a more limited order will not meet the needs of the represented person.

14. Are there any decisions substitute decision-makers cannot make at the moment that you think they should be able to? Are there some decisions that substitute decision-makers should not be able to make?

Leadership Plus supports the current stipulation that only VCAT can give consent to perform a special procedure (i.e. a procedure intended to, or reasonably likely to, cause permanent infertility, termination of pregnancy, or involve any removal

of human tissue for a transplant to another person) upon an adult person who is incapable of giving consent.

15. Is there a need for new laws that formally recognise supported decision-making? How should any supported decision-making laws operate?

Leadership Plus believes that formally recognised supported decision making is an 'appropriate step' in line with Article 12 of the Convention. Laws should comply with the principles outlined in Article 12:

- people who support them respect the rights, choices and preferences of the person with disability;
- people who support them are free from conflict of interest;
- people who support them do not pressure the person with disability into making a certain decision;
- the person with disability is given only as much help as they need and for the time they need it;
- the support given is checked by a court or other authority that is not biased; and
- any safeguards reflect the level of interference with the person's rights.

As mentioned above the Canadian experience (Alberta, British Columbia) seems worthy of particular examination as a guide for development of supported decision making laws in Victoria.

REVIEW

16. Should VCAT have the power to review individual decisions made by guardians and administrators? If so, who should be able to ask for a review of a decision?

To make substitute decision making more accountable VCAT should definitely have the power to review individual decisions made by guardians and administrators. Represented persons, substitute decision makers and any other party deemed to have a genuine and relevant interest should be able to request a review of a decision.
Formalised supported decision making mechanisms (such as co-decision making along the lines of the Alberta model) would substantially reduce the need for such reviews.

17. What powers, if any, should VCAT have to deal with substitute decision makers who abuse their power?

In order to better protect the rights and interests of represented persons, there should be a range of appropriate penalties that VCAT can use to deal with substitute decision-makers who deliberately abuse their power. These penalties

could include revocation of substitute decision-making authority, monetary fines, and referral to law enforcement authorities for investigation.

It may also be advantageous to install a default mechanism that, for decisions that are consistently disputed, to revert to the 'best interest' model.

PUBLIC ADVOCATE

18. Should there be any changes to the functions and powers of the Public Advocate?

Leadership Plus 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.

At a systemic level there should be a requirement that all government departments have formal involvement of OPA in any activity that impacts on groups of people who may be vulnerable to abuse of their human rights and are unable to advocate for themselves, e.g. the population of younger people with disabilities in residential aged care.

VCAT

19. Should there be any changes to the functions, procedures or powers of VCAT?

As mentioned above we believe that VCAT should have the power to review specific decisions of guardians and administrators and that this should be a simple, clear and timely process. They should also have the power to impose penalties on substitute decision makers who abuse their power.

Advocates made the following points about the operation of VCAT:

- Appointment of skilled panel members with experience in the issues they are hearing is imperative.
- Informality of hearings is important to reduce anxiety of people with disabilities and other participants.
- Several advocates voiced concerns about the current application system / form. Family members, carers, health / allied health professionals and other people applying for Guardianship and / or Administration need to be better informed about what they are applying for. The current tick box system is not clear.
- Often Guardianship hearings are acrimonious and emotionally demanding for all involved. Would it be possible for the panel member to order participants, on both sides to attend mediation or loss and grief counselling before coming up with a final order?

AGE

20. Should VCAT have the power to appoint a guardian or administrator for a person under 18 years old?

In order to address the current legislative 'gap' between the Children, Youth and Families Act and guardianship legislation VCAT should have the power to appoint substitute decision makers for people 17 years of age and older.

CONFIDENTIALITY

21. Should there be any changes to the way the law operates to ensure the right balance is struck between privacy and transparency?

While rights to privacy are important and should never be disregarded privacy constraints can sometimes work against the interests of the disadvantaged people. There needs to be a sensible working balance between principles of privacy, transparency and rights to information. Privacy constraints should be applied in the interests of individuals not bureaucracy.

As a general rule there should be a presumption that people who are subject to applications to VCAT have a right to know what material is submitted in support of an application that may result in the loss or restriction of some of their most fundamental rights and freedoms. Information should only be withheld where there is very good reason and whether information should be withheld should be determined by VCAT on a case by case basis.

MEDICAL TREATMENT

23. Do the 'medical treatment' provisions in the G&A Act work effectively?

The hierarchy of persons who are designated to act as Person Responsible under current guardianship legislation seems to work reasonably well in most situations.

INTERACTION OF LAWS

MEDICAL TREATMENT

24. Do the medical treatment provisions in the G&A Act and the MT Act work together effectively? If not, how could the law be improved?

As outlined in the Information Paper the overlap between the G&A Act and the Medical Treatment Act and also distinctions drawn between 'withdrawal of consent' and 'refusal of treatment' in the two Acts create confusion amongst medical practitioners and the community. The review of the Guardianship legislation would seem to offer the opportunity to address this confusion.

ENDURING POWERS

25. Do the laws concerning enduring powers of guardianship, enduring powers of attorney (financial) and enduring powers of attorney (medical treatment) work effectively? Do these powers operate in harmony with VCAT appointments of guardians and administrators?

Advocates generally report that these work effectively and complement the system of VCAT appointments of substitute decision makers. However, as mentioned above there seems to be little public awareness about enduring guardianship and there is often confusion about the distinctions between the various types of power of attorney and the difference between powers of attorney and administration orders. There also seems to be confusion about when / under what circumstances someone can appoint an enduring power of attorney, i.e. person has to have capacity to make such an appointment. Advocates reported instances of people who lack capacity being 'manoeuvred' into signing an enduring power of attorney form with subsequent exploitation by the person holding power of attorney. They also reported instances of VCAT overturning such appointments.

It would be advantageous to have the various types of power of attorney streamlined and simplified as far as possible and some community education work done in relation to these instruments.

26. Directions provided by people in enduring powers or other documents are generally not legally binding. Should 'advance directives' about personal, medical or financial matters have more authority?

Leadership Plus believes that 'advance directives' made when a person has capacity should be legally binding but should also be subject to challenge or review by parties with a sufficient interest.

MENTAL HEALTH ACT

28. Should there be separate mental health and guardianship laws?

Leadership Plus considers that there needs to be separate laws, however the two pieces of legislation should be consistent, complementary and clear in their applications and demarcations.

29. How should mental health and guardianship laws overlap?

Advocates report that the current balances / overlap work reasonably well. Recommendations for improvement include:

- When a represented person is treated as an involuntary patient under the Mental Health Act, the treating mental health service should be required by legislation to keep an appointed substitute decision maker or the 'person responsible' for health care informed of significant treatment decisions.

- An appointed substitute decision maker or the 'person responsible' should be able to activate any relevant review or complaint procedures that apply to the represented person.

30. Should guardians be able to consent to some psychiatric treatment in some circumstances?

The current system provides safeguards and it would seem that people lacking capacity would have anything to gain if substitute decision makers were to be allowed to consent to psychiatric treatment.

Thank you for the opportunity to lodge this submission to the Review. If you require further information or clarification please contact advocate Paul Hume

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