



Disability  
Services  
Commissioner

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Submission No. 61

**Victorian Law Reform Commission Review of Guardianship Legislation:  
Consultation Paper 10**

**Submission May 2011**

**SUBMISSION - 31 May 2011**

**Attention: Victorian Law Reform Commission**

Email: law.reform@lawreform.vic.gov.au

Mail: Victorian Law Reform Commission  
PO Box 4637  
Melbourne VIC 3001

**Disability Services Commissioner Victoria**

Level 30 / 570 Bourke Street  
Melbourne VIC 3000

Email [complaints@odsc.vic.gov.au](mailto:complaints@odsc.vic.gov.au)

Phone 1300 728 187

Fax (03) 8608-5785

Mr Laurie Harkin

Disability Services Commissioner

## **Victorian Disability Services Commissioner – May 2011**

### **1. Background**

The Victorian Disability Services Commissioner (DSC) commenced on 1 July 2007 under the *Disability Act* 2006 (Act) to improve services for people with a disability in Victoria.

This independent statutory office works with people with a disability and disability service providers in Victoria to resolve complaints.

Our complaints resolution process is free, confidential and supportive and we encourage and assist the resolution of complaints in a variety of ways including discussions, conciliation processes, or under certain circumstances through investigations.

After some four years since establishment of this office we are able to compare the experiences we have gained in responding to circa 2000 matters to date.

Victorian disability service providers readily contribute to our growing body of knowledge by reporting each year on the number and types of complaints they received and how they were resolved. This information is used to identify systemic issues and inform the ongoing development of the disability service system.

Informing our submission to the Victorian Law Reform Commission's (Commission) review of Guardianship are both the themes and conclusions we draw from disability service provider's complaint reporting data and our own experience of the complaints brought to our office. We put forward the following comments and areas for further consideration in this review with the aim of achieving better outcomes for people with disabilities.

### **2. Summary of key areas addressed by this submission**

We note the extensive nature of considerations and recommendations contained in Consultation Paper 10, and commend the breadth and depth of work undertaken by the Commission which is evident in the consultation paper. We have focused on aspects related to the work and experiences of this office, and limited our comments to the following areas of the paper:

- Structure of New Laws (Chapter 4)
- Principles of Laws (Chapter 5)
- Supported Decision Making (Chapter 7)
- Personal Appointments (Chapter 8)
- Responsibilities (Chapter 17)
- The Public Advocate (Chapter 20)
- The *Disability Act* 2006 (Chapter 22)

### **3. Response to specific areas and recommendations:**

Below are responses provided by DSC in relation to questions posed by the Law Reform Commission in the Guardianship Consultation Paper 10.

The comments and examples have been drawn from the experience of the office in dealing with enquiries and complaints.

#### *Structure of New Laws (Chapter 4)*

*Question 1: Do you have any general comments about the matters identified by the Commission as influencing the need for change? Are there any other important matters that should affect the content of future guardianship laws?*

The Commission's analysis of the factors influencing the need for change in the existing guardianship laws accords with our analysis of some of the underlying issues and systemic causes of complaints that are made to this office. In particular, DSC agrees with the Commission's identification of the need to maximise people's participation in decision making, to recognise a presumption of capacity and a more realistic view of capacity as being on a continuum and time and context specific, and the need to reassess and address some of the presumptions about informal and formal arrangements under current laws.

Approximately half of all enquiries and complaints to this office are made by family members, most often parents of a person with an intellectual disability. DSC has identified that many of these complaints revolve around disputes between families and service providers about decision making in relation to the nature of supports provided to a person, and the lack of a common understanding or approach to supported or collaborative decision making. Many complaints are also about the level of communication and involvement family members have in day to day service provision.

Unresolved and ongoing conflicts of this nature can have negative impacts and outcomes for the person receiving disability services. Our office is aware of guardianship applications being made by family members or service providers in an attempt to determine an outcome in respect to disability service provision, where the key issue isn't the capacity of the person but rather the lack of a common person centred approach to planning, decision making and resolving disagreements about the nature of supports provided to a person. Families may for instance seek a guardianship order in order to access information about the family member in supported accommodation, to make decisions for the family member in areas of medical treatment, associations with other people, acquiring personal belongings, attending events and participating in activities. At times there is a dispute about fundamental issues such as whether the service provider should be assisting the person to gain greater autonomy and to exercise choice. Service providers may also apply for an independent guardian to be appointed in the context of unresolved disputes with family members about service provision. We note that where guardianship is granted, it rarely eases the tensions between family and service providers or resolves the disputes regarding the nature of supports provided.

On the basis of the experiences of this office particularly in dealing with complaints made on behalf of a person with an intellectual disability or cognitive impairment, DSC supports the Commission's proposal for new legislative principles to guide the new system which are drawn from the Convention<sup>1</sup> and the *Victorian Charter of Human Rights and Responsibilities Act 2006*, and which support and assist people to participate in decisions which affect their lives by providing a continuum of responses including supported decision making, guidance for substitute decision makers and improved safeguards and accountability mechanisms.

In respect to other important matters that should affect the content of future guardianship laws, we would also put forward **the importance of person centred approaches**<sup>2</sup> for underpinning the implementation of the proposed new legislative principles (see discussion below), and the availability of dispute resolution mechanisms and approaches for addressing disagreements and conflicts that can arise through both substitute and supported decision making processes.

### *Principles of Laws (Chapter 5)*

*Question 2: Do you agree with the Commission's draft statement of purpose for new guardianship laws?*

On the basis of our experience applying the *Disability Act 2006*, DSC would put forward the merits of including detailed objectives in the proposed new legislation, in addition to the proposed statement of purpose and guiding principles.

*Question 3: Do you agree with the Commission's draft general principles for new guardianship laws?*

The proposed general principles which are appropriately drawn from the Convention and the *Victorian Charter of Human Rights and Responsibilities Act 2006* will offer important alignment with the principles of the *Disability Act 2006*. Such alignment will be helpful when decisions are being made about disability service provision and will enable all parties to have a common framework for working through issues and decisions.

*Question 4: Are there principles you think should be added or removed from these general principles?*

The proposed principles would be strengthened by references to person-centred approaches<sup>3</sup> to assessments of a person's decision making capacity, supported decision making and decisions that are made on a person's behalf. Person

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<sup>1</sup> United Nations Convention on the Rights of Persons with Disabilities

<sup>2</sup> See discussion on person centred approaches and references in Chapter 8 of ' *Good practice guide and self audit tool: Developing an effective person centred complaints management culture and system*' Office of the Disability Services Commissioner 2009  
<http://www.odsc.vic.gov.au/publications.htm#guide>

<sup>3</sup> See 'Supported Decision Making. A guide for supporters' Paradigm 2008 for application of person centred approaches to supported decision making <http://www.paradigm-uk.org/>  
See also n2 above;

centred approaches promote understanding the individual's unique perspective and his/her capacity to exercise autonomy and control in their lives. These approaches and tools enable others to understand and to learn about what is important to the person in a way that keeps the person at the centre of decision making and promotes their ability to direct their own life as much as possible. Without such a focus on communicating with, and understanding, the person who needs assistance with decision making, there is a risk that proposed principles will not be given full effect in their application. (See further discussion on these approaches in relation to Supported Decision Making).

The following are some suggestions on ways in which references to person centred approaches could be incorporated into the principles:

- The assessment of an adult's decision-making capacity must take into account the following:
  - *a person centred approach to understanding the person and ways in which he or she can be best supported to exercise choice and control;*
  - *capacity is specific to each decision to be made and the context of the decision; and*
  - *the need for assistance in decision making can fluctuate over time and may be temporary.*
- Where a person is deemed to be unable to make a decision *on their own*, 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, *based on a person centred approach to understanding what is important to that person.*

### ***Supported Decision Making (Chapter 7)***

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

DSC supports the Commission's proposal to introduce new supported decision making arrangements. Such 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. As outlined above, such arrangements from DSC's perspective would need to be informed by person centred approaches which promote understanding the person's unique perspective and his/her capacity to exercise autonomy and control in their lives. We refer to the useful guide produced by Paradigm in the United Kingdom, in collaboration with Helen Sanderson and Associates on '*Supported Decision Making. A guide for supporters*', which outlines the role of person centred approaches in supported decision making:

*"Good support is all about really understanding people. Giving people support in a way that is right for them can only be done if we work alongside them and really listen. Understanding a person's unique perspective on life can be difficult. It is, however, an essential requirement of a good supporter. In developing good relationships with people, we share information about ourselves to deepen our understanding of each other. Person centred approaches and tools can*

*help us learn about people in a way that keeps them in control. The tools can help us build a rich picture of who a person is and how they choose to live their life. [and]*

*Our responsibility, when supporting people adopting a person centred approach, is a commitment to continually listen to, and learn with, the person. This includes striving to support the person's communication, ensuring they can direct their own life, interact with us and other people, and make their contribution as an equal citizen."<sup>4</sup>*

In respect to the consideration of co-decision making arrangements, DSC is not in a position to comment on the efficacy of such arrangements, but would put forward the need for such arrangements to also be underpinned by the proposed legislative principles and person centred approaches. Such co-decision making arrangements would also need safeguards to ensure that the decisions covered by the arrangements are clearly specified, and the person is not otherwise restricted from taking actions or exercising their right for instance to make a complaint on his/her own behalf.

DSC agrees with the Commission's view on the need for training and guidance to be available for substitute decision makers, supporters and co-decision makers so that they understand their responsibilities and exercise their roles in accordance with the proposed legislative principles.

DSC would also encourage the Commission to consider the importance of training and support being provided for people with disabilities to enhance their own decision making skills and their understanding of the various options for assistance. Articulating a role for self-advocacy groups to provide such information and training would also be consistent with the proposed legislative principles.

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

In relation to the proposed civil penalty regime for substitute decision makers who are found to have abused their power, DSC highlights the need to give careful consideration to the question of who would enforce the proposed regime, and how any such abuses of power would be reported.

### ***Personal Appointments (Chapter 8)***

*Question 24: 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?*

Concerns and fears expressed by aging parents/carers about who will care for their son or daughter or look after their interests when they are unable can be a feature of complaints to DSC. The ability to file such a document that outlines their wishes for future decision making arrangements would assist to allay some of these fears, and enable this information to be kept by an independent body

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<sup>4</sup> n2 above p7 & p 11

rather than a service provider. Decisions about future decision making arrangements would however still need to be made in accordance with the legislative principles and requirements of the proposed new legislation.

*Question 28: Should an online registration system be created for enduring powers?*

DSC would support the introduction of an online registration system for the creation of enduring powers. It would assist DSC staff in the role the office plays in resolving disputes between complainants and disability service providers, and clarifying who should be providing relevant consent or be involved in decision making and agreements.

*Question 30: Should registration be voluntary or compulsory?*

For a system of this nature to be most effective, compulsory registration would be most beneficial.

*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?*

Organisations like DSC who would seek the information in order to perform statutory functions should have access to the register. DSC is bound by relevant legislative requirements to protect the privacy of individuals whose personal information form part of the register.

### ***Responsibilities (Chapter 17)***

*Question 89: Do you think there should be a general set of decision making principles that should apply to all types of substituted and supported decision making?*

DSC supports the Commission's proposal for a consistent set of decision making principles to apply to all types of substituted and supported decision making and refers to the discussion provided in relation to the draft general principles for new guardianship laws ( Chapter 5).

*Question 90: Do you agree with the Commission's proposal (Option C) that substituted judgement should be the paramount consideration for decision makers? Or, do you think that substituted judgement should be just one guiding principle to consider?*

DSC supports the Commission's proposal to replace the notion of best interests of the represented person and notes the two proposed alternatives of 'promotion of the personal and social well being of the person' and 'substituted judgment'. In DSC's view and experience, a person centred approach to substitute decision making would involve both of these considerations. DSC therefore recommends that the Commission consider ways in which these two legislative directions for substitute decision makers could be amalgamated.

## *The Public Advocate (Chapter 20)*

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

DSC welcomes the Commission's considerations of ways in which issues of abuse, neglect or exploitation of people with a disability can be addressed and the improvements in the safeguards which can protect people from such infringements of their rights. DSC notes that the Commission's discussion about the scope of the Public Advocate's current investigative functions (paragraphs 20.37-20.44) refer to requests to address potential abuse, neglect or exploitation of people with a disability in situations which do not involve a potential guardianship application, such as physical abuse of a physically frail older person, as well as addressing concerns about the way in which the powers of personal appointments are exercised. In these scenarios the proposed expansion of the Public Advocate's investigation function clearly reflects the proposed objectives and purpose of the proposed new guardianship laws.

DSC receives enquiries and complaints about alleged abuse, neglect or exploitation of people with a disability living in private accommodation, supported residential services or family arrangements which are outside the jurisdiction of the Commissioner under current legislation, and for which there are limited referral options to address serious concerns raised. There would be obvious benefits in being able to refer such matters to the Public Advocate to investigate the alleged circumstances and take necessary actions and referrals to protect the rights and interests of the individuals concerned.

Any expansion of the role of the Public Advocate will however need to carefully consider the implications and interactions it will have with other statutory offices, such as DSC. Any proposed legislation should ensure that the roles of various statutory offices (such as OPA and DSC) **are not overlapping in any way, instead complementing each other.**

Under the *Disability Act 2006*, the Disability Services Commissioner has the function and substantive powers to investigate complaints relating to disability service provision, including the power under s114(4)(a) to refer a matter directly to investigation if the Commissioner considers that to not do so *the health, safety or welfare of the person accessing the disability may be affected.*

The investigation powers set out in s118- s124 of the *Disability Act 2006* include the powers to compel attendance, call for evidence and documents and issue warrants to enter and inspect premises. Given the existence of these powers and the DSC's statutory role in relation to complaints about disability service provision, any proposals to expand the Public Advocate's investigation functions to service provision contexts would **need to take into account these existing statutory provisions.** Any proposals for the Public Advocate to investigate alleged abuse or neglect by staff of any service would also need to carefully consider the interactions with the role of regulatory bodies dealing with matters



of alleged misconduct. Given these questions, DSC recommends that the Commission gives more detailed consideration to the proposed scope, function and target groups for extended investigative powers for the Public Advocate.

### *The Disability Act 2006 (Chapter 22)*

DSC notes that the Commission's discussion on the interaction between guardianship laws and the *Disability Act 2006* has not considered the function and powers of the Disability Services Commissioner. The potential interaction between the Disability Services Commissioner's role in investigating complaints about disability service provision and the proposed expansion of the Public Advocate's investigation function has been discussed in the previous section.

In relation to the safeguards regarding admissions to residential institutions, DSC notes that whilst the external review by VCAT is limited to the initial decision, a complaint could be made to DSC if it was felt the criteria used for admission was no longer met.

In relation to the Commission's consideration and questions regarding the legislative gaps in relation to restrictive interventions and compulsory treatment regimes, DSC agrees that the issues raised warrant further consideration and suggests these issues would be most appropriately addressed through a review of the relevant provisions in the *Disability Act 2006* which can taken into account both the issues identified in the Commission's review and broader considerations and experiences of the operation of the *Disability Act 2006* to date.

## **5. Conclusion**

In conclusion, we commend the Commission's consideration to the advice we have provided in this submission.

