Victoria Legal Aid
Lawyers And Legal Services

Response to the Victorian Law Reform Commission's Guardianship Review Consultation Paper

A. Victoria Legal Aid

Victoria Legal Aid (VLA) is a major legal service provider in the areas of guardianship and administration and is the state's largest provider of legal advice and representation in matters relating to the *Mental Health Act 1986* (Vic) and the *Disability Act 2006* (Vic). VLA provides advice, advocacy and community education across guardianship, administration and related jurisdictions, as well as collaborating with other service providers to improve systems for clients with legal issues in these areas. Further detail about the services VLA provides to people under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMUIT Act) is set out in VLA's response to Questions 158-159 below.

VLA provides a duty lawyer service at VCAT in Melbourne, and prioritises assistance for (proposed) represented people in the Guardianship List. VLA also conducts case work on behalf of people in the above types of matters, assisting them to negotiate and resolve matters, obtain evidence to support their case and ultimately providing legal representation before VCAT and other courts and tribunals. The majority of these services are provided through VLA's Mental Health and Disability Advocacy team, a group of lawyers with particular experience and training in relation to assisting clients with mental health and disability issues.

VLA conducts an extensive community legal education (CLE) program. VLA's CLE program works with programs across VLA and with external organisations to design and deliver CLE strategies, including the distribution of up to 500,000 free legal publications a year. VLA regularly responds to requests from the community to provide lawyers and legal workers to deliver face-to-face legal information on a variety of topics. More recently, the CLE program has diversified its approach by using theatre, multimedia and community development activities to reach priority audiences. This includes people living with a disability and people experiencing a mental illness.

As part of the 2009-11 VLA Disability Action Plan, VLA has also identified the need to increase the accessibility of VLA's printed information and online legal information by ensuring the formats are accessible and that the content addresses the legal information needs of priority audiences. In the last two years, the CLE program has begun exploring the suitability of providing VLA legal information in Easy English formats as well as expanding the legal information VLA currently provides to include more information for people living with a disability.

With the Office of the Public Advocate (OPA), VLA publishes *Take Control*, a self help guide to powers of attorney, as well as *Securing Their Future*, a publication for parents of children with decision making disabilities. In 2009/2010 over 39,000 copies of *Take Control* were distributed to consumers, the community legal sector and other service providers. VLA is also currently developing a series of fact sheets about administration orders.

Lawyers at VLA regularly liaise with key bodies in the areas of guardianship and administration including VCAT, the OPA, Seniors Rights Victoria, the Mental Health Legal Centre and Villamanta Disability Rights Legal Service. VLA is also represented on the Disability and Elder

Law Committees of the Law Institute of Victoria and VCAT's Guardianship List Stakeholder Reference Group.

B. Submission

Part 2: The direction of new laws

Chapter 4: Structure of new laws

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?

VLA endorses the need to review the present laws relating to guardianship and administration, to take into account the needs of our community which differs substantially in demographic and other respects from the community which existed in 1986. VLA endorses the views of the Public Advocate as quoted on page 65 of the Consultation Paper.

Chapter 5: Principles of new laws

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

VLA supports the Commission's draft statement of purpose for the new guardianship laws.

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

VLA supports the Commission's draft general principles for new guardianship laws, subject to our response to Question 4.

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

VLA believes that cultural background is an important consideration and should be included in the list of general principles. Cultural background in this context is particularly important for indigenous Australians and persons from culturally and linguistically diverse (CALD) communities.

VLA also recognises the importance of preserving existing family relationships in this context and recommends that this should be included in the general principles.

VLA believes that the general principles should include a right to the provision of accessible information, which involves considerations of appropriate language, format, content and delivery. This stems from the responsibility of law and policy makers to ensure that all people including people with disabilities are properly equipped to navigate their way through the legal system. See also VLA's response to Questions 10-12 below.

If the age of application of these laws is lowered from 18 years to 16 or 17 years, VLA suggests that it would be more appropriate to refer to 'people' rather than 'adults' in the general principles.

Chapter 6: Clear and accessible laws

Question 5. Do you agree with the Commission's proposal that Victoria's various substituted decision making laws be consolidated into one single Act?

VLA supports the Commission's proposal that Victoria's substituted decision making laws be consolidated into a single Act. This would provide a principled framework around substituted decision making, as well as provide greater clarity and consistency of terminology and concepts, particularly in relation to assessing capacity.

Question 6. Do you agree with the Commission's proposal that the term 'medical decision maker' or 'health decision maker' should replace 'person responsible' in legislation? If so, which one do you prefer?

VLA supports the implementation of 'health decision maker' as preferable to 'person responsible' or 'medical decision maker', as this term clearly define the anticipated role and function to be undertaken. As stated under Questions 79-81 below, VLA believes that the definition of medical treatment should be broadened to cover all health care decisions.

Question 7. Do you agree with the Commission's proposal that the term 'guardian' should be replaced with 'adult guardian'?

and

Question 8. Do you agree with the Commission's proposal that the term 'administrator' should be replaced with 'financial guardian'?

VLA supports Option D ('personal decision maker' and 'financial decision maker'). The term 'guardian' is not clearly or consistently understood by the community as it may have different meanings in different contexts. 'Decision maker' is far more readily understood. The terms 'personal decision maker and financial decision maker' more clearly describe the roles and functions to be undertaken by each substituted decision maker and accordingly will allow for better understanding by all parties and the broader community.

If the age of application of the laws is lowered from 18 years to 16 or 17 years, VLA also suggests that the term 'adult guardian' would be inappropriate and confusing.

Question 9. Should the terminology used for powers of attorney be better integrated with the terminology for guardianship and administration? What terms should be used?

VLA supports the integration of terminology used for powers of attorney with that used for guardianship and administration. This would allow for clearer understanding of the nature and scope of the functions to be undertaken by the various roles.

Question 10. Do you have any specific ideas about how to better target education about guardianship laws towards:

- **People with disabilities**
- **Family, friends and carers of people with disabilities**
- **CALD groups**

- **Indigenous communities**
- **Older people**
- **Young people**
- **Health and community sector professionals**
- **Lawyers?**

and

Question 11. Should the Public Advocate play a greater role in producing community education materials and educating the community about substitute decision making? What other bodies could play a role?

and

Question 12. Would an education and awareness campaign assist the community to better understand and make use of guardianship laws?

VLA strongly endorses the need for CLE to support the introduction of new legislation and any new or modified terminology.

VLA unequivocally believes that any person affected by a guardianship or administration order, or an application for such an order, should be provided with information and education about the law and processes, from when the application is lodged, during key points throughout any hearings and afterwards.

VLA believes it is important for the OPA to be involved in educating the public, but also sees a role for other organisations such as VLA, the Law Institute of Victoria, community legal centres and other advocacy organisations. VLA further articulates a role for OPA in providing training for decision makers at Questions 18, 127-129 below.

A strategic approach

Further, VLA believes that Community Legal Education (CLE) should be delivered as a strategy that considers:

- **aims –** the broad aim for CLE is to educate people who may be affected by these laws about their rights and responsibilities
- **consultation** – the affected people and key people around them should be consulted when a CLE strategy is devised (more ideas about this are outlined in the next section)
- **methodology** – the approach would be largely information-based, supplemented by good training of workers and support people
- **format** – any information for (proposed) represented people should be provided in ways which best suit their needs and abilities for example, image-based materials and face-to-face strategies

- **distribution** – information should be centrally distributed and be promoted directly to people who may be affected by the laws and to their support workers, family and friends. Legal professionals and community service organisations should also receive information and training, as it is likely affected people may contact these organisations for help
- **responsibility** – it is the responsibility of many agencies to ensure that effective education happens but there should be one lead agency, to ensure one central contact in co-ordinating CLE.
- **funding** – the Victorian Government needs to allocate funds to properly resource an education strategy around the new laws.

The methods of delivery of guardianship and administration CLE should depend upon the target group.

People living with disabilities

As the Commission would know, people with a disability experience barriers to accessing information. One of these – especially for people with cognitive disability and at times for those experiencing mental illness – is the reduced capacity to process and retain information. Victoria's Office of Disability suggests Easy English as an accessible format. In VLA's consultations with many workers and advocates, opinions about the effectiveness of Easy English have been mixed. Some feel that Easy English information only caters to people with a higher functioning capacity. The level of technical difficulty (eg language, image and format) in publications promoted as 'Easy English' can also vary widely. It is VLA's opinion that Easy English is a valid format, but should not be relied upon as the only tool for communicating with people with a cognitive disability. Particular consideration needs to be given to strategies that involve face-to-face education and capacity building.

Consultation with the target audience underpins best practice in regards to any CLE strategy. To ensure accessibility, consideration should be given to focus testing resources with the intended audience any resources that require reading comprehension (both hardcopy and website information, including navigation tools).

Family, friends and carers of people with disabilities

The assumption that carers, supporters, co-decision makers and substitute decision makers always act in the best interests, or on the instructions, of the person with a disability is unfortunately not always correct. Education campaigns can help supporters and decision makers to understand their legal or informal roles in relation to the person with a disability. Education needs to promote the presumption of capacity and reinforce the message that needing support to make a decision does not mean the person with a disability necessarily lacks capacity. Promoting the rights of the person with a disability includes their right to take risks and make decisions that others may not agree with. Non-judgmental discussion groups could be an effective tool for examining these issues (and others such as the conflict between personal and social wellbeing). Supporters and carers should also be provided with information about services which can support them with their challenging role. Information resources could also be provided to family, friends and carers through their relevant associations and member groups.

CALD people

In VLA's experience, consultations and partnerships have proved most effective in developing and delivering CLE with and for CALD communities. Partnering with ethnic specific agencies and groups (such as CALD seniors and parents) is key for information sharing and also 'piggybacking' onto ongoing group meetings (ensuring accessibility to the target audience as well as resource savings). Key sector agencies, such as the Ethnic Communities Council of Victoria, have facilitated elder abuse prevention workshops for workers, and these agencies should be consulted about guardianship and administration CLE, both for guidance and to avoid duplication of effort.

Indigenous people

Relationship building and partnership is key, regardless of which agency is responsible for facilitating CLE with the Victorian Koori community. Any strategy must start with consultation and input regarding both format and provision of education from key Koori agencies, such as indigenous justice and health sector services. The Victorian Aboriginal Legal Service, in partnership with VEOHRC, has done a great deal of work to promote human rights 'victories' in regional areas using CLE. The Aboriginal Family Violence Prevention Legal Service run excellent 'Sisters' Day Outs' throughout Victoria, aimed at promoting the wellbeing of Koori women including non-threatening CLE around family violence. A similar 'elders celebration' day, including guardianship and administration CLE, could be aimed at seniors, or 'strong families' days aimed at friends, families and carers of Koori people living with a disability.

Older people

Seniors Rights Victoria, through the Office of Senior Victorians and the Department of Planning and Community Development, is the lead agency for the provision of advice and information for seniors. As with CALD and indigenous communities, partnering with service providers and existing groups may prove the most effective way to access older Victorians, for example, local councils' elder care services, senior citizens groups, aged care facilities and related workers.

Young people

The current guardianship and administration laws apply to people aged 18 years or older, so young people between the ages of 18-30 may be affected by a guardianship or administration order. There may also be a need to educate young people aged under 18 who are at risk of being placed on an order, especially if the age of application of these laws is lowered to 16 or 17 years.

In VLA's experience, young people tend to seek information from peers and the internet, and they tend to be more proactive in finding information. Accordingly, VLA recommends that the CLE strategy takes this into account by ensuring information is available through relevant workers at youth-based services, through schools, universities and TAFEs, at relevant youth events and on websites that young people access.

Health and other community services

Most people with a disability or mental illness access health and other community services for treatment and support. VLA sees a tremendous benefit in ensuring that workers within these services are equipped with information to provide to their clients, as well as being offered training in relation to administration and guardianship laws. VLA could collaborate with peak bodies and

associations within these sectors to develop suitable training and present information at relevant events. VLA has undertaken such work in the past and continues to do so on a regular basis. VLA also sees a significant opportunity for the Department of Health to disseminate information to their funded service providers, who provide services to people with a disability or mental illness.

Lawyers

Whilst VLA provides continuing professional development (CPD) for VLA and community legal centre lawyers, it would be helpful for free or low cost CPD to be available for small regional and suburban private practitioners, who are likely to come into contact with family members seeking to make applications or persons with a disability who may be the subject of such an application. Workshops or 'road shows' could perhaps be facilitated by the Law Institute of Victoria or the Victoria Law Foundation.

Other matters

Many elderly people, especially CALD people, use accountants, banks and Centrelink for help with managing money.[1] Accordingly, CLE strategies should look at educating such organisations and services to minimise the risk of financial abuse.

Question 13. What type of data do you think needs to be collected and made available and from what bodies?

Data collection and analysis is important to identify underlying trends and inform the development of policy and future law reform in relation to alternative decision making regimes. In addition to the information currently provided by VCAT, VLA suggests that more extensive data such as that collected by the Mental Health Review Board would assist. This includes:

- the number of hearings listed
- the number of hearings adjourned at first instance
- the results of hearings
- the percentage of clients with legal representation
- the percentage of clients with legal representation for whom the order was revoked, compared to revocation rates for people with no legal representation, and
- the number and languages of interpreters provided.

The following information would also help to identify trends and assist with case management:

- information about how and by whom applications are initiated
- information about how often cases return to VCAT and why they are returned
- the age and gender of the people the subject of the applications

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[1] Wainer, Jo, Owada, Kei, Lowndes, Georgia, Darzins, Peteris, *Diversity and financial elder abuse*, Monash University, February 2011.

- whether the people the subject of the applications are from CALD or indigenous communities, and
- the nature of the disability that resulted in the order.

Part 3: Supported decision making

Chapter 7: Supported decision making

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

VLA agrees with the Commission's proposal to introduce new supported decision making arrangements, consistent with the requirements of the *Convention on the Rights of Persons with Disabilities*. Such an approach promotes autonomy and dignity.

VLA suggests there needs to be a standardisation of the terms to be used when concepts of supported decision making are introduced. This is particularly important to minimise confusion among the beneficiaries of supported decision making frameworks and those who will be assisting them. VLA also recommends consistency in terminology between the new guardianship, administration and mental health laws.

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

VLA supports the proposed role of personally appointed 'supporters'. Such a person could, by providing and explaining information, help improve the person's capacity to make their own decisions.

VLA has some concerns about the proposed co-decision maker model. If the co-decision maker must consent to any decision as well, co-decision making 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. The co-decision maker may in fact take over the decision making process. There is a significant risk that in some cases the will of the person with a disability will be overborne and their wishes not followed. Aside from undermining the person's freedom of choice, this opens up the possibility of undue influence, abuse and exploitation. The more private and informal the support arrangements, the more likely that such abuse will go undetected.

It is arguable that the creation of a co-decision making role, in addition to the role of a supporter, may also make decision making frameworks more complex without any clear benefit.

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

In VLA's experience, many people with disabilities lack strong family connections or support, or alternatively there has been conflict in the past that indicates that family members would not be appropriate to perform the 'supporter' role. In this context, VLA would support the ability of VCAT to make appropriate orders appointing an independent supporter.

VLA believes that safeguards must be put in place to protect supported persons from abuse. The risk of financial abuse is very real for people with disabilities, particularly elderly people, and this may well go undetected without appropriate checks, balances and monitoring to ensure that supported decision making regimes are working appropriately.

The most important safeguard to protect supported persons from abuse is to be selective and strategic in who is appointed to the role of supporter to ensure that only appropriate persons undertake this role. Furthermore, it is vital to ensure that the supporters actually understand the responsibilities and restrictions of the role and the fiduciary duties attached.

Some of the safeguards required would be:

- ensuring the supporter is willing to assist and that conflicts of interests are not likely to arise between them and the supported person, when considering who should be appointed as the supporter
- providing adequate training and support for supporters, to ensure they fully understand the requirements and limitations of their role – see VLA's response to Questions 10-12 above
- registration of supported decision making agreements and orders
- quick and easily accessible processes to terminate supported decision making arrangements if the appropriate support is not being provided or the supported person no longer wants the arrangement to continue, and
- adequate resourcing for advocacy organisations to support people seeking redress.

Question 17. Do you agree that the Public Advocate should not be a 'supporter' or a co-decision maker?

The Public Advocate has a very important role in the implementation of supported decision making. However, VLA believes that, ideally, the Public Advocate should not be a supporter or co-decision maker. As well as the concern that this does not fit clearly within their role, VLA has a general concern that the OPA not be given so many roles that its capacity to act effectively is reduced. However, as has been previously noted, not all affected persons will have appropriate people to assist them. On this basis, the Public Advocate may have to step in and adopt the role of supported decision maker, but VLA envisages that this would be as a last resort.

Question 18. Do you think that the Public Advocate should play a role in training supporters and co-decision makers, and monitoring supported decision making arrangements?

The Public Advocate should play a key role in training supporters and co-decision makers about their roles and responsibilities. Disability advocacy organisations could also assist with this. See also VLA's response to Questions 10-12 above, and questions 127-129 below.

VLA believes that the monitoring role does not sit comfortably with the OPA. This is because the OPA has a very clear role in relation to advocacy and support for persons with disabilities. To provide the OPA with an additional role of monitoring and compliance may well 'blur' the boundaries of the present OPA and lead to a weakening of its key role and functions which it

performs to assist the Victorian public. VLA suggests that this monitoring and compliance role would sit more comfortably with an investigations unit, perhaps attached to the VCAT Guardianship List (see VLA's response to Questions 135-136 below). The OPA, however, may still have a role to play in looking at more systemic trends in supported decision making (see VLA's response to Questions 118-121 below).

Question 19. Should the Public Advocate establish and coordinate a volunteer support program to assist people who do not have family or friends willing and able to take on these roles?

The Public Advocate could coordinate a program of volunteer supporters to assist people. However, a significant difficulty with a volunteer program is the need for ongoing training and support to ensure consistency of approach and understanding of the task. Past experience has indicated that volunteers can differ considerably in quality even though they may have the noblest of intensions in fulfilling their role. If a volunteer program was to be implemented there would have to be strict controls in relation to the operation of the program, including who should be able to participate in the program as well as training and monitoring of the participants.

Question 20. Should 'supporter' or 'co-decision maker' arrangements apply to financial matters, or be limited to personal decision making?

Supported and co-decision making arrangements should apply to both financial and personal decisions, provided they are limited to the supporter model, they are registered and there are avenues to challenge abuse of powers, as noted at Questions 15-16 above. This allows for consistency of approach and ensures autonomy of decision making.

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?

See VLA's response to Question 18 above.

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

See VLA's response to Question 16 above.

Part 4: Personal appointments

Chapter 8: Personal appointments

Question 23. Should all enduring powers be activated at the same time? If so, when should this occur?

It is extremely important that:

- people clearly understand their duties (ie they must follow the directions of the donor prior to them losing capacity and they must follow their wishes if possible after capacity is lost), and
- adequate safeguards from abuse are established in law, including jurisdiction for VCAT to make a determination in relation to abuse or misuse of any power at any stage.

In relation to guardianship and financial powers, VLA endorses the views of the Law Institute of Victoria and the OPA and suggests that these types of enduring powers should be able to be activated immediately upon signing, and not just from the date of incapacity.

Obviously, the donor should be able to revoke the power at any time prior to losing capacity. This is especially important if evidence emerges or there is a sound basis for believing that the donor's instructions are not being followed or the powers are being abused.

In 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. VLA does not support bringing forward the time for activation of medical powers in the absence of demonstrated need.

Whichever model is adopted, of course, the difficult question remains in relation to when and how it is determined that capacity is lost. If the enduring powers only operate once capacity is lost, a medical opinion could be required in order for them to take effect. However, this requirement would seriously risk rendering the powers unworkable in practice, especially in the case of financial powers.

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?

and

Question 25. Should these wishes be a factor VCAT is required to consider when it appoints a substitute decision maker or supporter?

VLA agrees that parents and carers of people (whether adults or children) with disabilities should be able to file documents with VCAT stating their wishes about future guardianship and administration arrangements. This is appropriate as the parent or carer will usually have the best interests of their family member at heart and will want to ensure continuity of appropriate care after they are unable to provide the same.

These wishes should be a factor for VCAT to consider when appointing a substitute decision maker, but they should not be given any preferential or undue weight.

Case Study: Future guardianship arrangements

VLA assisted 'B', a woman who had a severe intellectual disability and had always been looked after and cared for by her mother. B did not understand any of the processes relating to guardianship or administration, nor did her siblings.

Before her mother died, she had B sign a power of attorney stating who should care for her in the future. This was an attempt by the mother to make her wishes known and to have some say about what occurred after her death.

Of course, the power of attorney was not legally valid as B had no capacity and so, unfortunately, the mother's attempts to have her wishes followed failed in this instance.

Question 26. Should the number of enduring appointments be reduced from three to two by removing the option of appointing an agent under the *Medical Treatment Act 1988* (Vic) and by requiring people to use an enduring guardianship appointment for medical treatment matters?

and

Question 27. Should there only be one type of appointment with a range of possible powers?

VLA submits that medical powers of attorney should not be removed. The advantage of a separate power is that its purpose and limitations are clearly understood and that strict limits are placed on the power. This is sensible and appropriate given the risks associated with abuse. Refusal of Treatment certificates should be incorporated into advance directives, (if they are developed) or medical powers of attorney. See VLA's response to Question 38 below.

Any confusion which exists between the powers can be addressed by terminology changes and CLE. See VLA's response to Questions 10-12 above.

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

VLA submits that an online registration system should be created for all powers, including personal appointments, supported decision making instruments and advance directives.

VLA is also concerned to ensure that, if the registration system is created online, there should be a physically accessible way in which to inspect the register. This is because many members of our community are not computer literate and/or do not have ready access to online services. This is particularly pertinent for members of CALD communities and the elderly.

Question 29. Which organisation should hold the register?

VLA believes that it is not appropriate for the OPA to undertake the role of holding and maintaining the register. The appropriate body to maintain the register may be VCAT, as many issues concerning validity of powers of attorney will have to be returned to that body, or alternatively the Registry of Births, Death and Marriages. Whichever organisation holds the register, it will require appropriate regulations, guidelines and resourcing to support efficient, appropriate and reliable access.

Question 30. Should registration be voluntary or compulsory?

and

Question 31. If registration is compulsory, what effect should this have on unregistered appointments?

Registration should be compulsory. VLA endorses the mandatory registration scheme presently operating in England and Wales, apart from concerns about the cost of registration. In VLA's experience, many persons seeking to make enduring powers are elderly with limited finances or alternatively persons with limited income who could not afford the cost of registration.

VLA acknowledges that, with any compulsory system, there may be some documents that fail to be registered. A document should not be rendered ineffective simply because it has not been

registered. With powers of attorney and advance directives or other decision making arrangements it is important that a valid later document takes precedence over any previously registered document, as it will contain the latest wishes of the person. Accordingly, VLA recommends that VCAT be given the power to formally validate any document or agreement that has not been registered, thereby allowing the most recent wishes of the person to be respected. Evidence that the unregistered power of attorney was validly made would of course be required.

Question 32. When is the best time for registration to occur?

In order to ensure compliance, VLA recommends that registration occur at the time of signing. If that does not occur, it should be registered when it is first used.

Question 33. Who should have access to the register? What safeguards could be put in pace to protect an individual's privacy while allowing appropriate people to access it?

As with all registries, confidentiality and privacy are extremely important. The provisions presently in place in England and Wales appear to represent a good balance between the need for public information regarding decision making authority and protection of personal information.

Certain organisations may be given priority or automatic access to the register as appropriate. Privacy can be protected by ensuring that only those with priority or automatic access, or who can demonstrate a genuine need for access, should get access. The Registry should also ensure that those granted access are aware of their confidentiality obligations.

Question 34. Should it be necessary to notify a public authority and/or various other people when a power of attorney is activated?

If a determination is made that a person now lacks capacity, that should be included on the register.

Question 35. Should a donor be able to specify that certain people should be notified when a power of attorney is activated? Who should be notified and why?

Donors should be able to specify that certain people be notified when a power of attorney is activated. That could be done by the Registry. Anyone who the person has specified should be notified unless there is some clear reason not to, such as risk of abuse. Otherwise, people who can demonstrate a genuine need for access should be able to get it from the Registry.

Question 36. How might notification work in a situation where a person's capacity is fluctuating?

VLA suggests that the only workable approach in this situation would be to refrain from both activation of and notification about the power of attorney until VCAT makes a determination that the person lacks capacity.

Question 37. Should a donor also be able to specify that people/bodies should not be notified when a power of attorney is activated?

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.

Chapter: 9 Documenting wishes about your future

Question 38. Do you think that the law concerning instructional medical directives should be set out in legislation?

VLA supports the proposal for the law concerning instructional medical directives to be set out in legislation, as outlined in Option B of the Consultation Paper, with a proviso that existing common law rights remain as a safety net. This option is attractive as it allows for advanced consent and refusal of medical treatment and more flexibility compared to the options presently available, as well as providing guidance and safeguards as to their operation,

To some extent, the law concerning instructional medical directives is already set out in legislation, in the form of Refusal of Treatment Certificates. VLA submits that these should be broadened to allow for refusal of treatment for future as well as current conditions. The question as to whether the requirement for information should be removed is less clear. All medical decisions should be based on informed consent.

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.

Question 39. Do you think it should be possible to make statutory instructional directives about things other than medical treatment?

and

Question 40. What types of things should it be possible to include in an instructional directive?

In principle, VLA supports the move to permit statutory instructional directives in relation to lifestyle and financial matters. Such directives promote and preserve individual autonomy, and reflect principles in international human rights instruments and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).

People should be able to include in the instructional directives any of the sorts of matters that can be dealt with under guardianship or financial powers.

It is extremely important that the enforceability of any wishes expressed in an instructional directive is explained to the person at the time of making the instructional directive (for instance, that such wishes may be binding on substituted decision makers and may be relied on to override any wishes they later express after they have lost capacity (see VLA's response to Question 87 below). For this reason, VLA believes that people should be encouraged to access legal advice prior to making an instructional directive and be provided with sufficient information to make an informed decision about the matters they wish to include in the directive.

Question 41. Should the wishes expressed in a document making a personal appointment be binding, or should they merely be matters that the personally appointed decision maker must consider?

and

Question 42. If the wishes are merely one of the matters that the personally appointed decision maker must consider, should that person be required to provide written reasons for departing from them?

and

Question 43. If the wishes are binding upon the personally appointed decision maker, should it be possible to override them in some circumstances? Do you think VCAT should this perform this role and (if so) in what circumstances?

The position most consistent with human rights obligations is that wishes validly expressed should be binding; this is reflected in the principle of substituted judgment (see VLA's response to Questions 89-91 below).

There will no doubt be situations where the person implementing the wishes questions whether they are achievable or in the person's best interests. It must be borne in mind that all people make less than optimum decisions at times and, if we have capacity to do so, that is our prerogative – the dignity of risk. There would need to be a high threshold for interfering with a clearly expressed wish made when someone was certified to have capacity and great care will need to be taken in articulating the limits, if any, on the enforceability of such instruments.

VLA strongly believes that it should only be permissible to override someone's validly expressed wishes where it is not, or no longer, possible to follow them because of cost issues, changes to services, death of a person or other incompatible circumstance. It should not be possible to override someone's validly expressed wishes simply because it is believed not to be in their best interests for them to be implemented.

If the decision maker proposes to override the donor's wishes due to incompatibility of circumstances, they should be required to first seek an order of VCAT. The donor should be given a notice explaining the reasons why it is proposed to override their wishes, as well as notice of the VCAT hearing to determine the whether the implementation of their wishes is in fact possible.

Implementation and enforcement of directives will clearly need to be a careful process, subject to review, and may be an incremental process. Data needs to be collected as to when directives have not been followed, and the reasons for departure, at the very least to inform the future development and monitoring of these arrangements.

Question 44. Should the same rules apply to both enduring guardians and enduring attorneys (financial)? If not, in what circumstances should they differ?

VLA believes that the same principles should apply to both enduring guardians and financial attorneys; namely, that genuinely held wishes should be considered binding in accordance with the principle of substituted judgment.

However, as financial decision makers are more likely to encounter problems in implementing wishes due to lack of funds, VLA suggests that a financial attorney could be permitted to depart from the donor's wishes where they are financially unviable, so long as the decision maker prepares a written statement outlining the basis for their decision and provides that statement of reasons to the donor and to an investigations unit, perhaps attached to the VCAT Guardianship List (see VLA's response to Questions 135-136 below). The investigations unit should be able to consider the statement and have the power to call the decision maker before VCAT to examine their decision further, and the donor should also be able to apply to VCAT if they believe their wishes can still somehow be implemented.

Question 45. Should there be sanctions for overriding an instructional directive in a way that does not comply with the law? What should they sanctions be?

There should be sanctions for unlawfully overriding a valid directive. The investigations unit proposed at Questions 135-136 could play a role in monitoring the implementation of instructional directives, as described under Questions 106-110 below.

As overriding an instructional directive involves a great breach of trust against a vulnerable person, perhaps for personal gain, the sanctions should be significant.

Question 46. Should there be an electronic registration system for advance directives?

and

Question 47. Should registration extend to medical and lifestyle instructional directives?

and

Question 48. Should registration be voluntary or compulsory?

VLA submits that all advance and instructional directives should be compulsorily registered, on one centralised register. See VLA's response in relation to Questions 28-33 above.

Question 49. Are there issues that arise in relation to the registration of advance directives that differ from those that are relevant when considering the registration of personal appointments?

An issue more relevant to instructional directives than personal appointments is the need to ensure that directives are reviewed at appropriate intervals to ensure they still reflect with wishes of the donor. This is particularly important if they are to be enforceable.

These reviews could be triggered by the Registry sending annual reminders to those who have registered instructional directives.

Case Study: Supported Decision Making

'W' is 49. He has numerous health problems including a brain tumour and an alcohol-related brain injury. His medical conditions become severe and he is admitted to hospital. While in hospital the social worker assesses him as requiring nursing home care. W is not happy with this decision and wants to return home. An application to appoint a guardian is made. A guardian is appointed. W is not happy with this decision as he feels that his rights to autonomy and independent decision making have been removed. W returns home with supports on a trial basis

but his condition deteriorates and he is returned to hospital. He is subsequently admitted to a supported residential service. As he does not wish to pay for the accommodation, an application to appoint an administrator is made. When an administrator is appointed and W loses control of his finances, W feels disempowered by the process. He feels nobody has listened to him or his wishes. He has lost control of his living environment and he has lost control of his money.

The opportunity to make an advance directive and work with a supporter may have assisted W to have his wishes respected and in turn adjust to his changed circumstances.

Part 5: VCAT appointments

Chapter 10: VCAT appointments and who they are for

Question 50. Do you agree with the Commission's proposal that disability should no longer be a separate criterion for the appointment of a substitute decision maker, but that it should be necessary for VCAT to find that a person is incapable of making their own decisions because of a disability before it can appoint a guardian or an administrator?

VLA agrees with the Commissions proposal that there should not be separate criterion of 'disability'.

Option B (preferred by the Commission and VLA) still requires a person's lack of capacity to make decisions be caused by a disability, but removes this as a separate criterion. This removes the perception that a disability by itself is a determinative factor in deciding whether an administrator or guardian should be appointed. This position is supported by the Mental Health Legal Centre in their submissions.

The reality is that often a person's capacity will fluctuate over time and between different types of decisions and contexts. Therefore, irrespective of any disability that a person may have, there may be some decisions that a person has capacity to determine for themselves. However, Option B still recognises that a lack of capacity to make reasonable judgments needs to be linked to something that can be objectively assessed, which is appropriate.

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.

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?

VLA supports the explicit articulation of capacity principles in law as this would provide VCAT and health professionals with guidance when assessing capacity. VLA supports similar definitions and principles to those suggested by the Commission.

The Commission have suggested the following capacity principles:

- A person must be presumed to have capacity.
- Incapacity is decision-specific and will fluctuate over time for many people.
- Capacity should not be assumed based on a person's appearance.
- That fact that an adult makes a decision that others consider to be unwise does not necessarily mean that they lack capacity.
- A person should not be treated as unable to make a decision if it is possible for them to make that decision with appropriate support.

With regards to a legislative definition of incapacity, a checklist may be of assistance. However, it is necessary to consider whether such a checklist may operate to capture people who would not otherwise fall within the Act. It is useful to consider the model incorporated within the United Kingdom's *Mental Capacity Act 2005* (the UK Act). Section 3 of the UK Act provides that:

> *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 in some way (whether by talking, sign language or any other means).*

Criterion 3(a) refers to understanding 'information relevant' to the decision. VLA suggests it that a legislative definition should provide greater clarification as to how detailed this information should be and the level of understanding required of the person. Otherwise, a vulnerable person without a disability who has a limited education or poor social skills may find themselves unable to satisfy the capacity test. VLA suggests that it should be sufficient for a person to have a global, generalised understanding of the basic information relating to the decision, and need not understand the minutiae or technical basis of the information to demonstrate capacity.

VLA also raises concerns about criterion 3(b), which refers to the ability of a person to retain information, as retaining information does not necessarily indicate capacity or incapacity once it is recognised that capacity fluctuates. The real question is how long the information needs to be retained to indicate capacity. The person must of course be able to retain the information for long enough to be able to evaluate it and make a decision.

There is a risk that the test for incapacity provided in the UK Act sets the bar too high which could lead to finding more people not having capacity than in the current Act. Whilst it is important to have clear criteria to assist in the process of determining whether a person has capacity, these

criteria must not be so onerous that a people find themselves unable to satisfy each element of the test.

Case Study: Administration order

'H' was placed on an administration order in 2002 due to concerns about his alcohol consumption. It seems that a housing service may have initiated the application. He remained on this order with State Trustees acting as his administrator.

H contacted VLA in July 2010, expressing his desire to be able to manage his own finances. He felt that he could manage paying his rent and essential bills through Centrepay, which would automatically debit these costs from his Centrelink Disability Support Pension (DSP). This was in fact the way that his rent and bills were being managed by State Trustees. H wanted to be able to decide how to use the rest of his money.

Since being on the order, H had participated in a money management course and obtained a letter from the financial counsellor stating that he had been provided with the money management strategies that would enable him to meet all his essential living expenses and still have a small amount left for regular savings. H instructed that he saved his money each week so that he could purchase a ticket to watch a football match or purchase a train ticket to his home town in regional Victoria.

H's GP also provided a report stating that, in his opinion, H had the capacity to manage his own financial affairs, provided he used Centrepay to pay certain expenses. The GP held this opinion even though he thought H may have acquired a cognitive impairment through alcohol abuse.

H also had a psychiatric evaluation. The report writer noted that H's cognitive profile was consistent with a mild traumatic brain injury as well as aspects consistent with a 'mild to moderate degree of alcohol related brain injury' He noted that H had no psychotic features at that time and was psychosocially stable., He further stated that any assessment regarding H's ability to manage his money should rely more on current information provided by the carers at the housing service he was accommodated in.

At the hearing, VCAT ordered that H be placed on a 12 month 'Independence Trial'. This meant that H was able to decide how to spend his remaining money after rent, bills and food had been paid for by Centrepay.

This case study highlights the importance of 'disability' not being a criterion of its own when determining whether a person has capacity to make decisions, as well as the importance of review mechanisms that ought to remain in the Act.

Question 52. Do you agree with the Commission's proposal (Option B) that new guardianship laws should allow VCAT to appoint a guardian or an administrator for a person when it is satisfied that the person is unable to make their own decisions because of a disability – and is unlikely to regain or achieve that capacity – and might have some future need for a guardian or an administrator?

Currently, the law states that the need for a guardian or administrator only arises when a decision is required to be made, now or in the near future. Option B proposed by the Commission would remove this requirement, in order to address criticism that the current regime is unnecessarily

crisis-driven. However, under the Commission's proposal, VCAT would still need to be satisfied that that it is unlikely that the person would achieve or regain capacity.

Whilst there is merit in advance planning to minimise crises, the law's primary focus should be on promoting and protecting the rights of the represented person. There is a risk that, if a person is incorrectly diagnosed at the first instance, it would be very difficult for them to revoke such an order.

This proposal is also at odds with the well-accepted understanding that a person's capacity will fluctuate over time and in different decision-making contexts, and will also depend on the level of support provided. If guardianship and administration orders can be made in the absence of an immediate need for decisions to be made, and it has been found by VCAT that they are unlikely to regain capacity, there is a real risk that the represented person would be provided with less decision-making support in the future and would not be encouraged to develop their potential decision-making skills.

VLA believes that the most appropriate way of averting crisis-driven responses is to encourage the use of advance directives, which can later be used to determine the wishes of a person who no longer has capacity to make their own decisions. Whilst the current system may be perceived as crisis driven, nevertheless it provides an important safeguard against the appointment of guardians or administrators in situations where they may not be needed.

Option C, outlined by the Commission, proposes that no changes be made to the current system (ie there must be an existing need for a guardian or an administrator before one is appointed). Clearly, substitute decision makers may find it convenient to be appointed in the absence of the immediate need for decision making. However, would be necessary that such orders are only made on a very limited basis and in particularly compelling circumstances. If such orders are not tightly restricted then it would be preferable, in VLA's opinion, to maintain the current model to ensure that the rights of the represented person are protected.

Chapter 11: Age

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?

Currently, if a 17 year old child has not yet had a guardian appointed under the *Children, Youth and Families Act 2005* (CYF Act), they are unable to have one appointed due to their age as they are approaching the jurisdictional limit of the CYF Act.

VLA suggests that the definition of 'child' in the CYF Act be amended so that paragraph (b) reads 'in any other case, a person who is under the age of 18 years'. This would allow children to continue to be eligible for and receive age-appropriate social services until they reach 18 years of age. Raising the age limit for the CYF Act would make it consistent with the age limit in the Criminal Division of the Children's Court and with the definition of 'child' in international human rights law. Currently, children who are 17 years old and not on a CYF Act guardianship order may be at risk of being placed on an (adult) guardianship or administration order because of lack of available services under the CYF Act; as the guardianship or administration order would not take effect until they turn 18, they would potentially not receive any or adequate supports during this period.

With respect to lowering the age limit of the *Guardianship and Administration Act*, strict guidelines would be required to ensure that such appointments are made only where necessary and possibly only in exceptional circumstances. Because children who have a disability can be eligible for the Disability Support Pension once they reach the age of 16, they may be in situations where they need to make financial decisions and are thus vulnerable to financial exploitation. However, the *Guardianship and Administration Act* is not intended to protect people from financial exploitation unless, by reason of a disability, they do not have the capacity to make reasonable decisions about their finances.

NSW is the only Australian state where the age limit for guardianship laws has been lowered to 16. In NSW, the child protection and guardianship systems overlap, which means that a person aged 16 to 18 years could be subject to an order under either system. However, most of the appointments under guardianship laws have been made in relation to children who were already subject to guardianship orders under the child protection system, so they are thus simply being transferred into the adult guardianship system.

Whichever proposal is adopted, VLA is concerned to ensure that continuity of supports and services are provided to these vulnerable young people.

Question 54. Is there a risk that young people may not have access to the same services that are currently available if the Commission's proposal is adopted? What could be done to manage this risk?

VLA believes that, where there are overlapping responsibilities, there is a greater risk of a client falling between the cracks. VLA is aware of situations where young people have been eligible for services from both Child Protection and Disability Services, yet are not adequately served by either service due to each suggesting that service provision is the responsibility of the other.

As outlined above, if the age limit under the *Guardianship and Administration Act* were reduced to 16, VLA believes there is a 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.

Chapter 12: The distinction between guardianship and administration

Question 55. Should the current distinction between guardianship and administration be retained? If so, do you agree with any of the options (A (i)-(v)) described by the Commission?

VLA believes that the current distinction between guardianship and administration should be retained as separating these powers is more likely to protect the represented person from potential abuse.

It is important that the powers to make decisions about a person's lifestyle and finances do not reside in one person or one organisation. VLA submits that dual appointments should not be made at all to ensure that there is no conflict of interests. Therefore VLA endorses Option A (iv). This would be a significant change to the current law, where dual appointments can currently be made where there is a 'special relationship' between the represented person and the proposed guardian/administrator. VLA notes that guardians and administrators will require substantially different skills and knowledge to perform their roles effectively.

Question 56. Do you agree with any of the suggested ways to manage the overlap between the powers of guardians and administrators? Are there any other ways to manage this overlap?

VLA agrees with the Commission as to how the overlap of powers between guardians and administrators might be managed. Currently, limited direction is provided where there is a conflict between a guardian and an administrator, and the extent of each other's decision making powers. If legislative guidelines were established about their respective duties and dispute resolution options, many of these current problems would be addressed.

VLA believes it is important for guardians and administrators to regularly communicate and work cooperatively to ensure the best possible outcomes for the affected person.

Question 57. Should new guardianship laws guide VCAT about how to choose between family members and the Public Advocate when appointing a guardian or between family members and State Trustees (or some other professional administrator) when appointing an administrator? If not, how could this issue of recognising existing family relationships be addressed?

Guardianship and administration laws must ensure that the wishes as well as best interests of the represented person are considered when making a decision about who should be appointed as a guardian or administrator. It is important that family members of the represented person are provided with the opportunity to explain to VCAT why they would be the preferred guardian or administrator. However, given that the law exists to promote the rights of the represented person, it is imperative that VCAT listens to all the evidence put before it, including the wishes of the proposed represented person, when making a decision about the appropriate person or body to appoint.

For example, it would not be in the represented person's best interests if their guardian or administrator was not supported by the rest of their family, as there is a risk that this would jeopardise the represented person's relationship with other family members.

One way of ensuring that family relationships are recognised could be the use of advance directives.

Chapter 13: Powers of guardians and administrators

Question 58. Do you agree with the Commission's proposal (Option A (iii)) that new guardianship laws should contain comprehensive lists of the decision making powers that can and cannot be given to a guardian and an administrator?

VLA supports the Commission's proposal in Option A (iii). Such a list would provide greater clarity about the role of both guardians and administrators which would ensure consistency of approach and greater objectivity in the decision making process for appointed guardians or administrators. Another benefit of such a list is that it would provide greater guidance to determine if the appointed decision makers had acted inappropriately.

Question 59. If yes to Q58, what decisions should be a guardian be able and unable to make?

Amongst other things, guardians should be able to make decisions about appropriate housing for a represented person.

VLA does not believe that a guardian should have the power to make decisions concerning personal or sexual relationships. These are personal matters; simply because a person is subject to a guardianship does not mean that they do not have the right to intimacy and their privacy in these matters should be respected. However, VLA acknowledges that in some situations a lack of capacity can lead to inappropriate decision making about such personal matters. In these circumstances, VLA suggests that the role of the guardian should be limited to discussing and guiding the person, in the same manner that a 'supporter' would assist.

Question 60. If yes to Q58, what decisions should an administrator be able and unable to make?

Administrators should only be able to make decisions regarding payment of the represented person's housing expenses, utility bills, money for adequate food and other objectively essential items and services. They should not be able to make decisions about how a person spends the balance of their money that is not required for such expenses.

Administrators should also not be able to rely on moral or other subjective judgments as to whether or not a person needs a particular item that they have expressed a desire for (eg a bike or a computer). Provided they have the funds, represented people should be able to make purchases in line with their interests and wishes.

Further clarification and guidance regarding the amount of money that a person ought to have as 'savings' is also required, as many represented people are refused money for something that they wish to purchase on the basis that they will not have enough savings if they spend this money. Many clients have reported to VLA that State Trustees frequently denies them access to their money on this basis. This begs the question whether there is a degree of paternalism in relation to the way represented persons are dealt with.

Question 61. Do you believe that any of the other options are a better way of dealing with the decision making powers that guardian or an administrator could or could not be given?

VLA supports the Commission's proposal in Option A (iii).

Question 62. Should it be possible for VCAT to order that a guardian or an administrator have the power to make decisions about any of the following matters:

- **Whether a represented person should continue to hold a driver licence**
- **A will by a represented person**
- **Organ donation by the represented person?**

VCAT should not be able to order a guardian to have the power to make a decision as to whether a represented person should hold a drivers licence. Such a decision ought to be determined by VicRoads. A guardian should have no role in this decision.

VCAT should not be able to order that a guardian or administrator have the power to make a will for a represented person either. This goes well beyond what is necessary to ensure that a person's lifestyle requirements are met or that their finances are dealt with appropriately whilst they are alive. There is a clear potential for conflicts of interest to arise and for financial abuse to occur. In the event that a represented person has not made a will prior to losing capacity, laws already exist to distribute their assets appropriately.

Organ donation is a very personal decision, often based on the person's ethics or religion. VLA believes that a guardian should have the power to make a decision about organ donation by the represented person, provided that the decision is made in accordance with the principles of substituted judgment. In order for a guardian to consent to organ donation by the represented person, the represented person must have previously registered themselves as an organ donor or there must be sufficient evidence to conclude that they would have wanted to donate their organs.

Question 63. Should new guardianship legislation extend or clarify the provisions in section 50A of the *Guardianship and Administration Act 1986* (Vic) which permit an administrator to make small gifts on behalf of a represented person in limited circumstances?

VLA believes that the current provisions regarding gifts are adequate. However, if a person has made an advance directive prior to becoming incapacitated which indicates that they would like to continue making donations or give gifts, then this should be rejected by the decision maker.

Question 64. Should new guardianship legislation alter or clarify the anti-ademption provisions in section 53 of the *Guardianship and Administration Act 1986* (Vic)?

VLA agrees that the anti-ademption provisions in the *Guardianship and Administration Act* should be clarified as the section is poorly drafted. It is important, as far as possible, to ensure that the intentions and wishes of a represented person are upheld in the event that they lose capacity. This is particularly important because the represented person had capacity at the time that they wrote their will and expressed their wishes in relation to their estate. This intention should not be frustrated by the fact that an administrator has been appointed.

Question 65. Should new guardianship legislation enable State Trustees to be given the same powers as those of other administrators?

VLA believes that State Trustees should be given the same powers as those of other administrators.

Question 66. Who should conduct litigation on behalf of a represented person?

and

Question 67. Should it be possible for a court or tribunal to order that an administrator or guardian who conducts litigation on behalf of a represented person is personally liable for some or all of the costs of that litigation.

A litigation guardian will be required where a person is 'incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the proceeding' (O. 15, Supreme Court Rules). If the person is the subject of a guardianship and/or

administration order, they will be presumptively require a litigation guardian in respect of any matter which touches on the scope of the powers contained in the order (as VCAT will have determined that they have an incapacity in relation to those matters). In these circumstances, the appointed guardian or administrator, as appropriate, is the best person to act as litigation guardian on behalf of the represented person.

VLA suggests that further clarification should be provided as to what types of legal matters administrators can and cannot act in, as the inconsistency of approach can cause confusion.

Currently, many people are reluctant to act as litigation guardians because they may become personally liable for costs. Additionally, State Trustees refuse to conduct litigation on behalf of people they represent; State Trustees policy states that 'it will not conduct proceedings as litigation guardian of represented persons, or otherwise expose itself to adverse costs in this regard'. Presently, people with disabilities often find themselves in a situation where they are not able to conduct litigation or pursue claims because no one will act as litigation guardian for them. This can occur across all jurisdictions but occurs frequently in family law, civil and Children's Court matters. As this reluctance to act as litigation guardian limits the ability in practice of represented people to pursue claims, and thus limits their access to justice, this issue must be addressed.

VLA believes that litigation guardians should be granted an automatic, statutory right to indemnity as to costs (including statutory costs) from the estate of the represented person. This right should be conditional on them having complied with the principles set out in the new guardianship laws, as well as any additional equitable and legal duties, in relation to the conduct of the proceedings. This would remove the reluctance for people to act as litigation guardians.

VLA suggests that, where a represented person is listed as a defendant in a proceeding, and that proceeding falls within or is connected to the scope of the guardianship or administration order, the guardian or administrator should have a statutory duty to act as litigation guardian for them.

VLA suggests that, 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 pursing that claim. Both the substantive merits of the matter as well as the likely cost/benefit implications should be considered. VLA suggests that guidance in articulating this merits test could be drawn from the guidelines upon which VLA determines whether to provide a grant of legal assistance in a matter. These guidelines include considering whether a 'reasonably prudent self-funding litigant' would pursue the case. In undertaking this assessment, the guardian or administrator must discuss the proposed litigation with the represented person and seek their views.

Where the guardian or administrator determines that, on the balance of the prescribed test, there is merit in pursuing the claim:

A. If the represented person expresses a desire to pursue the claim, there should be a statutory duty for the guardian or administrator to pursue that claim. They should then act as litigation guardian for the represented person in the matter. If they do not wish to pursue the claim for some reason, they should be required to seek a

determination from VCAT within 14 days as to whether or not they should be required to act as litigation guardian in relation to that matter.

B. In all other situations, the guardian or administrator should, presumptively, pursue the claim as litigation guardian on behalf of the represented person. However, if they do not wish to pursue the claim for some reason, they should be required to file with VCAT a notice stating the reasons for their decision within 14 days of that decision. An investigations unit, perhaps at VCAT (see Questions 135-136 below) could then review the notice to determine whether the decision was appropriate in the circumstances and, if necessary, have the matter listed for a determination by a VCAT member as to whether or not they should be required to act as litigation guardian in relation to that matter.

Where the guardian or administrator determines that, on the balance of the prescribed test, there is *not* sufficient merit to pursue the claim:

C. If the represented person expresses a desire to pursue the claim, the guardian or administrator should provide them with a notice stating the reasons for their decision within 14 days of that decision. The notice should also inform the represented person of their right to seek a review to that decision by VCAT, the right to engage an independent litigation guardian and how to access legal advice. Steps should be taken ensure that the represented person understands the contents of the notice.

D. In all other situations, the guardian or administrator should not pursuer the claim and should keep a written record of their assessment and decision.

Where a person does not have an administrator or guardian but nevertheless requires a litigation guardian, or whether the administrator or guardian VLA suggests that a specialised agency could be established which could act as litigation guardian. This agency could also step in following a referral from a guardian or administrator who is not able to act as litigation guardian. This new role may lie either with the OPA or State Trustees. VLA notes that the establishment of such an agency would obviously require resourcing.

Alternatively, as per VLA's previous submission, the Act could provide for:

> *[t]argeted 'one off' administrator appointments for people who do not otherwise have an administrator but in respect of whom a court has decided assistance is required. State Trustees or the OPA properly resourced and guided by clear statutory obligations, may be suited to this task.*

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?

and

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

VLA agrees that the provision currently permitting VCAT to authorise a guardian or other person to use force to ensure that a represented person complies with the guardian's decisions needs to be refined.

The scope of any powers that VCAT gives to a guardian or other person should be consistent with established human rights principles as set out in the Charter and the *Convention on the Rights of Persons with a Disability*. The degree of force authorised must be reasonable and proportionate to the level of risk or harm that would result from non-compliance. VLA suggests that force of any kind should only be permitted in situations where there is a real risk of immediate harm to the represented person if that force were not applied.

VLA endorses the additional safeguards proposed by the Commission.

Part 6: Statutory appointments

Chapter 14: Automatic appointments – the person responsible

Question 70. Do you agree with the Commission's proposal (Option B) that the hierarchy for automatic appointees, as currently set out in section 37 of the *Guardianship and Administration Act 1986* (Vic), should be retained?

VLA observes that there is presently confusion and a lack of understanding about the provisions relating to the role and responsibilities of persons responsible. This confusion is apparent not only from the number and nature of queries VLA receives from the general public, but also from the implementation of the provisions by the medical profession.

Accordingly, VLA agrees with the Commission's proposal to clarify and strengthen these provisions.

VLA also suggests that an effective CLE program needs to support any legislative change (see VLA's response to Questions 10-12).

Question 71. What alterations (if any) should be made to the list?

and

Question 72. Do you think new guardianship legislation should require an automatic appointee to take a substituted judgment approach to decision making?

VLA has observed many situations where there is conflict between children and domestic partners, or other family members, as to who should be the 'person responsible'. This can cause tremendous distress where one or other person is excluded from the decision making process. VLA submits that the law should provide greater clarity about who should presumptively take precedence and be automatically appointed as the person responsible (and why), to minimise the likelihood of conflict.

Case Study: Person responsible

'L' and 'P' were in a long term same sex relationship. L and P lived in Perth. L originated from Melbourne and elected to return to Melbourne when he became terminally ill with cancer. There had been conflict for many years between L's family and P. L was admitted to hospital for the terminal phase of his illness while P was still interstate. L's mother told the hospital that she was

L’s nearest relative and therefore the most appropriate person responsible under s. 37 of the Act. On P’s return to Victoria, the hospital refused to recognise P as L’s domestic partner and excluded him from decision making. This caused P grief and distress and further estrangement from L’s family.

Following L’s death, P lodged a complaint with the Victorian Human Rights and Equal Opportunity Commission and received an apology from the hospital.

Had the Act provided greater clarity around who should be the person responsible in this situation, some of the distress experienced and conflict entrenched may have been avoided.

Question 73. Do you think that new guardianship legislation should contain additional measures for scrutinising the decisions made by automatic appointees? If so, what should those measures be?

VLA does not propose any additional measures for scrutinising decisions.

If there are difficulties with decision making and it is felt that the appointee is not acting in accordance with their obligations to the represented person, an application can be made to VCAT to formally appoint an appropriate substitute decision maker.

Chapter 15: Informal assistance – admission into care

Question 74. Do you think there should be specific laws about people being admitted to and remaining in remaining in residential care facilities in situations where they do not have capacity to consent to those living arrangements but are not objecting to them?

and

Question 75. If yes, do you agree with the Commission's Option E that new guardianship legislation should extend the automatic appointment scheme to permit the "person responsible" to authorise living arrangements in a residential care facility in these circumstances if there are additional safeguards?

and

Question 76. If the automatic appointment scheme is expanded to cover these circumstances, do you agree with any or all of the possible safeguards suggested by the Commission? Are there any other safeguards that should be introduced?

and

Question 77. If the automatic appointment scheme is expanded to cover these circumstances, should the hierarchy of automatic appointees be changed?

and

Question 78. If the automatic appointment scheme is expanded to cover these circumstances, what residential facilities should fall within the scheme?

VLA supports the need for specific laws relating to people being admitted to and detained in residential care facilities in situations where they do not have capacity to consent. 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 can not be solved through the expansion of s. 37 of the Act, this would at least create stricter controls and a more transparent process. Accordingly, VLA supports the Commission's recommendations in Option E.

VLA also suggests 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.

In relation to additional safeguards, VLA believes it would be appropriate to allow a person admitted or detained, or any interested party, to challenge the consent directly to VCAT and, if necessary, have a decision maker formally appointed. VLA also suggests that the Aged Care

Assessment Service should be required to make additional inquiries when conducting assessments to ensure that there is no more appropriate placement reasonably available.

Chapter 16: Medical treatment

Question 79. Do you think that the definition of medical treatment should be broadened?

and

Question 80. Should a broader definition include the prescription and administration of pharmaceutical drugs?

and

Question 81. Should it include paramedical procedures, such as physiotherapy? Should it include complementary health procedures, such as naturopathy and Chinese medicines? What else should it include?

VLA agrees that there is need for change in relation to substituted decision making for medical treatment. As outlined in the Consultation Paper, this area is particularly difficult to navigate and there is a need for harmonisation between the guardianship laws and the *Medical Treatment Act*. Accordingly, VLA recommends one piece of legislation should cover all substituted decision making for medical treatment.

VLA believes that the definition of medical treatment should be broadened to allow substituted decision makers to make all health care decisions (other than psychiatric treatment decisions). However, VLA offers no views as to what specific additional medical procedures and treatments should be covered by the enhanced definition.

In addition, VLA suggests that comprehensive CLE and professional legal education will be required to assist health professionals, lawyers and users to navigate this system. See VLA's response to Questions 10-12 above.

Question 82. Do you think a distinction should be made between minor and other medical procedures when a person is unable to consent? If yes, how should the distinction be made between minor and other procedures?

and

Question 83. Do you agree that minor medical procedures should not require substituted consent if certain safeguards are met? Do you agree with the safeguards suggested?

and

Question 84. Do you believe the law should retain the requirement that a medical or dental practitioner must notify the Public Advocate where a person responsible does not consent or cannot be identified or contacted and the practitioner still wishes to carry out the procedure? If not, are there any other safeguards that might be more appropriate in these circumstances?

VLA supports the proposition that there should be no change to the present requirement for a medical practitioner to obtain the consent of the person responsible to any medical treatment,

regardless of how minor in nature the proposed procedure is. VLA believes that requiring consent adds a layer of protection and places appropriate controls on the performance of medical procedures. Consent is a requirement prior to any treatment of a person without a decision making disability, so people with a decision making disability should not be afforded less protection or respect.

Question 85. Do you believe the process for obtaining substituted consent to participation in medical research procedures should be the same as the process for obtaining substituted consent for medical treatment?

and

Question 86. If the process is the same, what factors should the person responsible be required to consider before giving substituted consent to participation in medical research procedure.

VLA submits that the same process for obtaining prior consent for medical treatment should apply to medical research procedures. VLA suggests that safeguards for substituted decision making in this context need to be put in place, but defers to expert opinions as to what those should be.

Part 7: Responsibilities and accountability under the law

Chapter 17: Responsibilities

Question 87. Does the law need to provide more guidance about the relationship between the wishes a person expresses at the time a decision is made, and any past wishes, views, beliefs and values the person has expressed?

VLA acknowledges that it is particularly difficult to try to balance a person's currently expressed wishes with any wishes previously expressed when the person had capacity, especially if those previous wishes were contained in an instructional directive. VLA believes the law should provide greater guidance to decision makers in this situation.

In any such situation, VLA suggests that an inquiry needs to be made into the person's current level of capacity in relation to the particular wishes, and to what extend they understand the nature and consequence of the expressed wish or preference. In matters that are simple and/or inconsequential, VLA suggests that the person may be found to have capacity at the time of decision making and therefore be able to make such a decision themself. If the decision is complex in nature and the person does not appear to understand the consequences of their currently expressed wishes, VLA suggests that the decision maker should be guided more by the wishes and preferences that the person expressed when they had capacity.

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.

Where the previous wishes were expressed in an instructional directive and the person has subsequently lost capacity, VLA believes that there should be a presumption that the wishes expressed in the instructional directive, rather than those currently expressed, should be followed. If the decision maker proposes to depart from the instructional directive in situations where those directions could be followed, they should be required to seek an order from VCAT authorising the departure.

As stated in VLA's response to Question 39-40, VLA believes that it must be made clear to a person at the time of making an instructional directive that, once made, the wishes expressed in that directive could be used to override any wishes they later express once they have lost capacity. It is also extremely important that instructional directives are regularly reviewed so that they most accurately reflect the wishes and circumstances of the person (as stated in VLA's response to Question 49 above).

The uptake, implementation and enforcement of instructional directives should be carefully monitored and subject to review.

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?

VLA submits that the current laws create a risk of paternalism, in focussing on the avoidance any risk or danger. As a consequence, many persons subject to guardianship and administration orders feel that their wishes and autonomy are not sufficiently respected.

VLA instead supports the principle of substituted judgment, where the substituted decision maker's starting point should be determining what the person themselves would have wanted to happen in the circumstances and, if that position involves some risk, balancing that risk whilst still taking into account the circumstances and the wishes and desires of the person. See VLA's response to Questions 41-43 above.

VLA commends the move away from the 'best interests' model of decision making to a more comprehensive model focussing on the wishes of the represented person. This will allow for better and more appropriate decision making.

VLA believes that this model, as well as guidance as to its practical operation, should be set out in legislation. VLA endorses the principles contained in the UK Act in this regard, save that VLA believes that the term 'best interests' is not appropriate and that the starting point should be, as the Public Advocate indicates, what the person themselves would have wanted to happen in the circumstances substituted judgment. See VLA's response to Questions 89-91 below.

Case Study: Risk-averse decision making

'M' is subject to an administration order. He lives in a supported residential service (SRS). His only income is the disability support pension (DSP). His administrator pays his rent to the SRS, which covers meals, care and accommodation. The administrator then also pays $125.00 per fortnight to the SRS as M's allowance for living expenses. M does not receive any of this money in cash. Instead, he has to tell the SRS staff if he needs anything and these items are put on a shopping list, or he can go on the facilities bus with a staff member to buy the things he needs. The staff then write down the amount spent and deduct it from his fortnightly allowance. M has no

idea how much money he has spent or remains in his SRS kitty. He never sees any cash and he has no cash for his own personal use.

M contacted VLA. VLA rang the administrator and was advised that as, M had an issue with alcohol, he was not allowed any money. The administrator also indicated he did not know how much money was held in M's SRS kitty, as they trusted the SRS to keep proper records.

All M wanted was access to some money in his pocket. He did not object to the administrator and saw some value in the administrator assisting him. However, he did not accept that it was in his best interests that his allowance be managed solely by the SRS.

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 decisions?

and

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

and

Question 91. Is substituted judgment relevant to supported decision making?

VLA's strongly endorses the Commission's proposal (Option C) for substituted judgment to be the paramount consideration for decision makers. VLA believes that a substituted decision maker should be required, where possible, to make the decision the person would have made themselves in those circumstances.

VLA also believes that there should be a general set of decision making principles that apply to all types of substituted and supported decision making processes. This would ensure that all decision makers approach their task with the same broad goal in mind: to attempt to facilitate the outcome that the person would want. This position is most consistent with human rights principles as it promotes respect, dignity and freedom for the person.

Question 92. Do you agree that new guardianship laws should specifically require substitute decision makers to act honestly and respond appropriately to conflicts of interest?

VLA agrees that new guardianship laws should explicitly require substitute decision makers to act honestly and respond appropriately to conflicts of interests.

As with Question 45 above, VLA believes that sanctions should be set out for breaches of these requirements.

Question 93. Do you agree that new guardianship laws should specifically require guardians and administrators to treat the represented person and important people in their life with courtesy and respect at all times?

VLA strongly agrees that new guardianship laws should specifically require guardians and administrators to treat the represented person and important persons in their lives with courtesy and respect at all times.

Question 94. Should new guardianship laws contain the same decision making principles for financial decisions and personal decisions?

and

Question 95. If no, how could financial decision makers be guided to balance the need for sound financial management with the principle of substituted judgment where these considerations might conflict?

and

Question 96. Should there be separate and distinct principles for medical decision making? If so, what should these principles be?

VLA submits that there should be general principles for all decision making, including medical decision making and agrees with the proposed legislative duties set out in 17.150 and 17.151 of the Consultation Paper.

In relation to Question 95, VLA believes that, 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 an 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). See VLA's response to Questions 135-136 below.

Case Study: Supported Decision Making

S is a 61 year old woman with bipolar disorder. When S was 17, she was involved in a car accident and acquired a brain injury. S owns her own home and lives on the disability support pension. She has been married and divorced and has two grown up children.

S acknowledges she has bipolar disorder. However, as a result of her acquired brain injury, she has made some unwise financial decisions, such as giving away money or providing her family with financial support when she is not able to do so .

An administrator is appointed. S feels that her right to look after her money has been taken from her. Her eldest sister continually writes to VCAT requesting that S remain on an administration order. S has no family support to assist her with managing her finances.

S undertakes a financial independence plan and with the assistance of a local administer is able to manage her finances. S is grateful of the support of somebody she trusts so that she knows she is making the right decisions and is able to look after her money. This gives her confidence and she feels happy with herself and her disability.

S returns to VCAT and her administration order is removed.

Chapter 18: Confidentiality

Question 97. Do you agree with the Commission's proposal that new guardianship legislation should authorise all substitute decision makers, including automatic appointees, to have access to confidential and private information about the represented person on a "need to know" basis?

VLA agrees with the Commission's proposal that substitute decision makers have access to confidential and private information on a 'need to know' basis, as outlined in the Consultation Paper (Option B).

Question 98. Do you believe that new guardianship legislation should contain a provision similar to section 101 of the *Guardianship Act 1988* (NSW) for dealing with misuse of confidential or private information?

VLA believes that new guardianship legislation should contain similar provisions to s. 101 of the *Guardianship Act 1998* (NSW) for dealing with the misuse of confidential and private information, as the person misusing the information will have committed a breach of trust and abuse of their power by doing so.

Chapter 19: Accountability and review of substitute decision making

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

VLA agrees there is a need for private guardians and attorneys to lodge periodic reports. VLA agrees with 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.

VLA also supports a requirement for compulsory training and information sessions to be provided to private guardians and attorneys so that they are aware of the role they are undertaking and their fiduciary duties. This would be an additional level of external scrutiny of their conduct to ensure they are acting appropriately and within their powers when representing and supporting the person in relation to whom they have been appointed. See VLA's response to Questions 127-129 below, regarding OPA's potential role in providing support and training to decision makers.

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

and

Questions 101. Who should receive and monitor the declarations?

VLA supports the provision of periodic declarations of compliance. VLA believes that VCAT would be the appropriate body to receive these declarations and that State Trustees should remain as the examiner. An investigations unit, perhaps attached to the VCAT Guardianship List could also play a role in reviewing these declarations. (See VLA's response to Questions 135-136 below)

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?

As stated at Question 99, above and Questions 127-129 below, VLA believes that there needs to be increased CLE to support guardians and administrators. In this context, VLA believes that appointment of private substitute decision makers should be *conditional* on them attending compulsory training sessions regarding the nature and responsibilities of their proposed roles.

After such training, it would be appropriate for a substitute decision maker to sign a statement agreeing to comply with their responsibilities. This can only occur once their responsibilities are fully known and understood.

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

and

Question 104. Who should carry out these random audits?

VLA supports the requirement for random audits to be performed. Random audits would have the primary function of ensuring compliance and would also assist in monitoring and minimising the risk of elder financial abuse.

VLA believes that State Trustees would be the most appropriate body to perform these random audits. An investigations unit (see Questions 135-136 below) could also undertake this role.

Question 105. Should VCAT be able to order administrators and financial attorneys to repay funds that have been misused?

VLA believes that VCAT should be able to order administrators and financial attorneys to repay funds that have been misused.

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

and

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

and

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

and

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

and

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

VLA supports specific civil and criminal sanctions for substituted decision makers who abuse their powers and breach their fiduciary responsibilities.

At present, prosecution of such individuals relies on the general offences set out in the *Crimes Act 1958* (Vic). VLA supports the introduction of specific criminal offences to capture substitute decision makers who abuse their powers, such as appropriating funds for personal gain, intentionally or recklessly mismanaging funds and intentionally or recklessly breaching the decision making principles set out in the new guardianship and administration laws.

VLA suggests that an investigations unit, perhaps attached to the VCAT Guardianship List could undertake the preliminary investigation of suspected abuses of power, and then refer appropriate matters to Victoria Police for further investigation and prosecution. In less serious matters, such as where a substitute decision maker negligently breaches the decision making principles, the investigations unit should be able to refer the matter to VCAT for a VCAT member to consider imposing a civil penalty (rather than pursing a criminal case against them).

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?

VLA believes that all decisions made by all guardians and administrators, not just the statutory bodies, should be subject to merits review.

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 an 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 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.

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

VLA believes that the person affected by the decision of the guardian or administrator should be entitled to apply for merits review. VLA also believes that other people with a special interest should be entitled to seek review and that VCAT should have the discretion to decide whether their application is appropriate in the circumstances.

Question 113. What should constitute a "reviewable decision"?

VLA supports the definition used in the *New South Wales Administrative Decisions Tribunal Act 1997* (NSW).

Question 114. Are there any additional steps that need to be taken to limit trivial, vexatious or repeated applications for merits review of a guardian's or administrator's decision?

VLA supports the position outlined in the *New South Wales Administrative Decisions Tribunal Act 1997* (NSW).

However, VLA believes that a statement of reasons should be provided when a matter is struck out or summarily dismissed. Often there is a misunderstanding by the parties as to the powers of

VCAT or the role of the guardian and administrator, so a summary dismissal without adequate explanation may in fact exacerbate a party's grievance rather than solving it.

Question 115. Should merits review of decisions by administrators be treated differently to merits review of decisions by guardians?

VLA submits that merits review of decisions by administrators should be treated in exactly the same manner as merits review of decisions by guardians.

Question 116. Who should conduct merits review decisions of public guardians and administrators?

VLA submits that VCAT is the most appropriate body to conduct merits review of decisions of both public and private guardians and administrators, as VCAT is a specialist Tribunal with the appropriate expertise. In addition, this function could be supported by an investigations unit, perhaps attached to the Guardianship List at VCAT. (See Questions 135-136 below)

Question 117. Should VCAT have the discretionary power to appoint a guardian or administrator on the condition that they complete any training requirements specified in the order?

As discussed at Question 99, VLA supports the need for comprehensive training as a condition of appointment of private guardians and administrators, in addition to ongoing CLE and professional education for lawyers and doctors. See also VLA's responses to Questions 10-12 and 102 above.

Part 8: Implementing and regulating new laws

Chapter 20: The Public Advocate

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

and

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?

and

Question 120. Do you think the Public Advocate should have the power to enter private premise 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?

and

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?

VLA is aware that the Public Advocate currently uses her powers to investigate systemic issues affecting the rights with people with disabilities or who are disadvantaged within the community. A prime example of this work is the investigation into people who suffer from elder financial and physical abuse, and those who have been placed on Supervised Treatment Orders. VLA supports this important role and acknowledges that at times she has difficulties in performing it. Accordingly, VLA supports the Public Advocate's systemic investigation role being strengthened in legislation and provided with sufficient resources to enable to her pursue it effectively.

However, VLA supports the Public Advocate having additional investigative powers so that she can compel people to provide documents and answer questions, as well as the power to enter private premises with a warrant on the basis of a reasonable suspicion that a person with a disability has been neglected, exploited or abused on those premises. The basis and scope of these powers would have to be clearly articulated in the legislation. VLA would also support all other reasonable steps have been taken to allow the Public Advocate access to premises without the need for a warrant is issued.

The question of anonymity can be vexed. As a starting principle, all persons should have the right to know who has made an allegations, because allegations may be deliberately or inadvertently incorrect, unfounded and/or based upon a wide range of reasons that are less than humanitarian. Accordingly, VLA suggests that anonymity for informants should only be protected in the most limited of circumstances, such as where there is a real risk that a significant, supportive relationship with the represented person would be jeopardised, and not as a general rule.

VLA also suggests that the Public Advocate should have a role as *amicus curiae* in line with the extension of statutory powers recently provided to the Human Rights and Equal Opportunity Commission. An extension of the Public Advocate's investigatory and litigation powers in this context is a natural extension of the role presently played by the Public Advocate.

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

VLA would not support an extension of powers to the Public Advocate to permit or mandate the investigation of alleged criminal breaches of legislation or the prosecution of such matters. VLA believes such functions are too far removed from the core function and purpose of the Public Advocate. VLA suggests that such an investigation role would sit better with an independent investigator, such as an investigations unit, perhaps attached to VCAT's Guardianship List. See VLA's response to Questions 106-110 above and 135-136 below.

Question 123. Do you support clarifying the Public Advocate's individual and systemic advocacy functions in guardianship legislation?

and

Question 124. Do you think that the legislation should include principles to guide the Public Advocate when undertaking her advocacy functions?

and

Question 125. Do you think that the Public Advocate's functions in relation to community advocacy are necessary?

VLA supports an extension of the Public Advocate's powers to systemic advocacy issues as previously indicated, and would support legislative principles to guide the Public Advocate when undertaking her advocacy functions, so long as those principles do not unduly fetter her discretion to undertake advocacy which she believes will assist people with a disability and the Victorian community as a whole.

Question 126. Do you agree that the Public Advocate should continue to be both the guardian of last resort and an advocate?

VLA believes that the Public Advocate should continue to be both an advocate and guardian of last resort.

Question 127. Should the Public Advocate be responsible for training and supporting private guardians?

and

Questions 128. Should the Public Advocate be responsible for monitoring the activities of all or some private guardians?

and

Question 129. If so, how should any monitoring activities be performed?

VLA believes that most private guardians attempt to comply with their legislative obligations when performing their role, however they do need assistance, guidance and advice. VLA believes that the Public Advocate should be responsible for training and supporting private guardians in performing their role. This could be achieved by setting up a specialist training and CLE unit within the OPA. Rather than performing a formal monitoring role in relation to private guardians and other decision makers, VLA suggests that the Public Advocate should instead provide a support and advice role. This would allow a private guardian to seek guidance and advice in performing their role from a more experienced professional guardian, thus improving the quality of the service they provide to the represented person. The private guardian should also be made aware that the performance of their role is subject to review by VCAT, and if they do not act appropriately an application can be made for another guardian to be appointed.

VLA does not believe that the role of the Public Advocate should extend to include investigating or prosecuting guardians who do not act appropriately in their role. VLA recommends that this function sit with an investigations unit, perhaps attached to the VCAT Guardianship List, as set out at Questions 106-110 above and 135-136 below.

Question 130. **Do you think the Public Advocate should play a role in designing a register of personal appointments?**

VLA expresses no view.

Question 131. **Do you think the Public Advocate should be given responsibility for monitoring the activities of personally appointed substitute decision makers?**

and

Question 132. **If so, what functions and powers should be given to the Public Advocate to undertake this responsibility?**

and

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?**

See VLA's response to Questions 127-129 above. VLA believes that the Public Advocate's role in relation to training and supporting private guardians should extend to supporting all personally appointed substitute decision makers and persons responsible, as well as supporters.

For the reasons set out above, VLA does not support the Public Advocate being given responsibility for formal monitoring, investigation or prosecution of personally appointed substitute decision makers or persons responsible.

Question 134. **Do you think the Public Advocate should be required to report annually to Parliament?**

VLA believes that the Public Advocate should be required to report annually to Parliament, particularly if her powers are extended. It is through reporting to Parliament that the Public Advocate becomes responsible for the actions she undertakes and also raises awareness, not only with Parliament but with the Victorian public, of her important and critical role.

Chapter 21: VCAT

Question 135. **Should the Guardianship List be supported by a body such as the New South Wales Guardianship Tribunal's Coordination and investigation Unit so that it can take a more active role in preparing cases for hearing?**

and

Question 136. **Should the Public Advocate be funded to undertake this role?**

VLA believes that the Guardianship List at VCAT should be supported by a coordination and investigation unit similar to that proposed. VLA has identified various functions which could sit with this unit in responses to Questions 44-45, 66-67, 94-96, 100-101, 103-104,106-110, 116, 118-122 and 127-129 above.

VLA does not believe that this role or unit should sit with the OPA. As previously noted at Questions 118-122 above, VLA has some concerns about the Public Advocate performing an investigations role in relation to matters before VCAT, particularly when the Public Advocate is then appointed as the guardian in the matter. There may be a perception by some that neither the investigations role nor the appointed guardian are independent. Accordingly, VLA recommends these functions be formally separated.

VLA also notes from experience that certain cases listed at VCAT are factually complex and require proper investigation and preparation before the hearing. VLA acknowledges that the Public Advocate does this very well, but any other additional supports that can be provided to

ensure that all information is made available to VCAT before important life-affecting decisions are made would be of assistance.

VLA would encourage greater use of appropriate dispute resolution (ADR) within the Guardianship List at VCAT. In certain types of disputes, for instance where there are concerns about the scope of the administrator's role or whether a guardian has acted appropriately, participating in an ADR process is likely to clarify the issues in dispute or even resolve the matter, thus saving time for VCAT and the parties. ADR would allow the parties to discuss the matter in a less confrontational setting than the formal Tribunal hearing. See also VLA's response to Question 149 below.

Such an ADR service should form part of VCAT and be staffed by appropriately trained mediators.

It is exceedingly important however that the (proposed) represented person have access to legal advice and representation before participating in any ADR event to ensure they understand the process and their rights. See VLA's response to Question 137 below.

Question 137. **Do you agree with any of the options proposed by the Commission to improve legal assistance and advocacy support for people in Guardianship List matters at VCAT?**

VLA believes that access to legal assistance and advocacy for people before the Guardianship List at VCAT is important, VLA strongly supports the Commission's proposals to increase awareness of and availability of legal services. As detained in Section B. above, VLA is a major legal service provider for people in Guardianship List and related matters.

From VLA's perspective, it is not always clear to proposed represented persons that they have a right to legal representation. This is compounded by the fact that the notices of hearing distributed by VCAT are difficult to open and, especially for a person with a disability, difficult to navigate and comprehend. VLA notes that many clients seek advice and assistance *after* their Guardianship List matter has been completed, which suggests they were not previously aware of the opportunity for legal assistance.

VLA endorses Option A, to ensure that all people who are subject to applications in the Guardianship List are informed about options for legal assistance. VLA notes that, in order to be understood, the information needs to be accessible in language, content, format and delivery (see VLA's response to Question 10-12 above). VLA believes that this aim could be supported by VCAT adopting more user-friendly processes to assist people to obtain legal representation, including active referrals to VLA's duty lawyer services, local community legal services and other advocacy networks.

VLA also endorses Option B, to give (proposed) represented persons a right to legal representation for all Guardianship List matters, for the reasons set out in the Consultation Paper. The Guardianship List necessarily deals with people who have or may well have a disability, and so will find it more difficult to navigate the legal system.

Often, (proposed) represented people will simply require information to be explained to them in an accessible manner and support during the hearing, rather than adversarial style advocacy; this a jurisdiction where 'therapeutic jurisprudence' should be seen to be at work. Despite this,

VLA does not support a model whereby law students or other interested volunteers are trained and engaged as advocates (Option D) as there would inevitably be a high turnover of participants and no guarantee as to quality or consistency. Given the importance of the matters in dispute, including the right of the person to make their own decisions, VLA believes that it is essential that (proposed) represented people are provided with accurate and thorough legal advice and assistance from appropriately experienced lawyers.

Question 138. **Should VCAT be required to consider making supported and co-decision making and decision making orders before appointing a substitute decision maker?**

VLA believes that VCAT should be required to consider making the least restrictive order first, before giving consideration to making the next least restrictive order. Thus, appointing a substitute decision maker should not be considered until all other less restrictive options have been properly considered and dismissed as not appropriate in the circumstances. Setting out this requirement in the new guardianship laws would remind the VCAT member of the significance of their decision and minimise unnecessary or inappropriately restrictive orders.

Question 139. **Do you think that new guardianship legislation should specify a maximum period for all guardianship and administration orders?**

and

Question 140. **If so, what should that maximum period be?**

and

Question 141. **Following the expiry of an order, should it be possible for VCAT to reassess or make a new guardianship or administration order in the absence of the parties, with their consent?**

VLA believes the guardianship new legislation should specify a maximum period for all orders. This maximum period should be 12 months for a guardianship order and three years for an administration order. If an application is not made to renew the order prior to its expiry, it should automatically lapse without any further listing at VCAT. This approach would be consistent with that proposed in the Exposure Draft Mental Health Bill in relation to involuntary treatment orders (whereby orders have a capped duration) and would protect the rights of the (proposed) represented person by minimising unnecessary or inappropriate orders drifting on indefinitely.

If an application is made for a further order, the onus should be on the applicant to demonstrate the need for the order, rather than for the (proposed) represented person to demonstrate that their circumstances have changed and that they do not meet the criteria. VLA also recommends that there be a statutory requirement for new medical reports to be obtained and filed before the making or renewing of an order. In VLA's experience, orders can currently be made without any new medical evidence being obtained. For example, VLA assisted a client who had chronic paranoid schizophrenia where no new medical evidence had been obtained or presented to VCAT for a period of nine years. With a mental illness such as schizophrenia, the client's medical condition and capacity could have altered dramatically within that period of time. It is acknowledged that some people's conditions and capacity cannot reasonably be expected to alter or improve over time, such as someone suffering from a dementia. However, despite the

inconvenience in some matters, VLA believes that new or updated medical reports should be required before the making or renewing of any order, to protect the rights of the affected persons.

VLA believes that the appointment of a guardian or an administrator should not be made in the absence of the parties, even with their consent, wherever possible. See also VLA's response to Question 147 below.

Question 142. Should VCAT advise a person who provides them with confidential information that the information may be made available to the proposed represented person and other parties?

VLA believes it is appropriate that VCAT advise the provider of confidential information that that information may be made available to the (proposed) represented person and other parties to the proceeding.

Question 143. Should a person who provides VCAT with confidential information be responsible for requesting and justifying the need to keep the information confidential?

VLA believes it is important that any person who seeks to provide confidential information be responsible for justifying the need to keep this information confidential.

VLA supports for a presumption that all information should be provided to the (proposed) represented party and their legal representative, as this ensures a fair hearing. Having access to the information upon which a decision may be based is a key element of the principle of natural justice, which is supported by the VCAT Fair Hearing Obligation Practice Note (PNVCAT 3).

Attention is also drawn to sections of the *Mental Health Act* that deal with the provision of confidential information. VLA submits that similar provisions may be appropriate for the Commission to consider.

Question 144. Should VCAT Guardianship List files remain open to the public, with some restrictions about who can gain access, or should the files be closed to the public, with only the parties having a right of access?

VLA believes that all VCAT Guardianship List files should remain closed to the public, and only the applicant, the proposed represented person and their legal representatives should have right of access. By their very nature, Guardianship List files contain very sensitive and personal information which should be protected. The following case study demonstrates the need for strictly controlling access to files, as the information can be used for a variety of purposes by the recipient, and possibly to the disadvantage of the represented person.

Case Study: Access to files

VLA recently acted for 'K' to defend Supreme Court litigation; K's mother was the plaintiff in the matter.

During the case, K's treating doctor made an application to VCAT to appoint a litigation guardian for K. K's mother, who had previously unsuccessfully applied to be appointed K's guardian, was listed as an interested party in these VCAT proceedings.

The mother sought full access to K's VCAT file and to be actively involved in the VCAT proceedings. Release of the information on the file, including discussions about issues in the VCAT proceedings, would have been detrimental to K and her ability to defend the Supreme Court litigation. VLA made arguments before VCAT as to why it was inappropriate for the mother to be granted access the file or be party to the proceedings. As a result, the mother was excluded from the VCAT proceedings.

However, the mother then sought to access the file by writing directly to VCAT. VCAT, in turn, advised VLA that it would be providing documentation to the mother. VLA again requested that no information be provided to the mother in these circumstances.

Whilst VLA's request was ultimately adhered to, this case study illustrates the importance of maintaining confidentiality and strict controls on access to files and documentation.

Question 145. Should the period in which an application for a rehearing can be made be extended beyond the current 28-day limit?'

and

Question 146. Should VCAT be required to inform the parties of the right to seek a rehearing?

VLA believes that the period in which an application for a rehearing can be made should be extended beyond the current 28 day limit, if an adequate reason for the delay is provided to VCAT. Likewise, VLA believes that VCAT should be required to explain to parties at the conclusion of each hearing their right to seek a rehearing as well as to obtain a statement of reasons. VLA refers to the VCAT Fair Hearing Obligation Practice Note (PNVCAT 3) and in particular the requirements placed on VCAT members where a party is unrepresented.

Questions 147. Should a represented person be requested to opt out of, rather than opt in to, a reassessment hearing?

VLA believes that a represented person should be required to opt out of, rather than opt in to, a reassessment hearing. Often persons subject to orders do not understand the nature of the order or the effect it may have on their lives. Alternatively, they may wish to discuss issues with VCAT or clarify the implications of the order, and so they should be encouraged to attend and participate.

Questions 148. Should a represented person be entitled to at least one unscheduled reassessment of the order during the period of the order?

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.

As noted at Questions 139-141 above, in any reassessment hearing, the onus should be on the party wanting the order to continue to demonstrate why the order should continue, rather than the represented person being put to proof as to why it should not continue.

Question 149. Should the legislation allow guardians and administrators to seek a VCAT order to enforce decisions they make which a third party refuses to accept?

VLA believes that the legislation should allow guardians and administrators to seek a VCAT order to enforce decisions they make which a third party refuses to accept. However, VLA suggests that before such an order is sought, parties to the dispute should be referred to ADR, for the reasons set out under Questions 135-136 above. This may be particularly helpful when the third party is a family member, and a VCAT order to enforce a decision may only serve to aggravate their underlining animosity towards the appointment of the guardian and administrator. This animosity may in turn adversely affect the represented party. Facilitated ADR could be helpful in these circumstances.

Question 150. Should multi-member panels, with members drawn from a range of backgrounds, be the standard practice for initial guardianship and administration applications?

VLA submits that there is a benefit to having multi-member panels drawn from a range of backgrounds, particularly in initial guardianship and administration applications and where there are particular issues in dispute that require professional judgment, for instance where the alleged disability is in dispute or there are complicated financial issues. VLA believes that there is no need for multi-member panels as a matter of course.

Question 151. Do you have any views about how VCAT Guardianship List hearings should be conducted?

VLA agrees that VCAT Guardianship hearings should be conducted with as little formality and technicality as is allowable, and endorses the practice of VCAT members sitting at the bar table as opposed to sitting behind the bench in the more formal court style. VLA believes that this is important as the Guardianship List should apply the principles of therapeutic jurisprudence. VLA endorses the principles and requirements set out for VCAT members in the recently released VCAT Fair Hearing Obligation Practice Note (PNVCAT 3).

VLA also believes that VCAT members sitting in the Guardianship List should be required to undertake specific training to assist them to communicate appropriately with persons with a range of disabilities and to promote their understanding of the various issues that may affect these people.

Question 152. Do you have any ideas about how to achieve better attendance of the represented person at VCAT hearings?

VLA submits the better attendance by represented persons at VCAT hearings could be achieved through very simple changes, such as:

- User-friendly language in all correspondence, so that represented persons have a clear understanding of the role and function of VCAT and the nature and purpose of the hearing (see also VLA's response to Questions 10-12 above).

- Hearing notices that are more clearly set out and can be opened without difficulty.
- Active encouragement in all correspondence and notices from VCAT for the represented person to attend and participate in hearings.
- Active promotion of the availability of legal advice and representation.

VLA draws a comparison between the approach taken by VCAT and that taken by the Mental Health Review Board, where persons subject to mental health involuntary treatment orders are actively encouraged to attend their hearings. VCAT could adopt some of the procedures used by the Mental Health Review Board to ensure better attendance at hearings.

Question 153. Do you have any ideas about how to make the Guardianship List more accessible to Indigenous people?

VLA suggests that VCAT could appoint a Koori Liaison Officer at VCAT for guardianship matters. Consultation with the indigenous community would be appropriate, to determine whether specialised members, lists or sittings are appropriate.

Question 154. What can be done to make the Guardianship List more accessible to users who come from culturally and linguistically diverse backgrounds?

VLA supports the translation in to community languages of all documents and information pertaining to matters in the Guardianship List. VLA also supports the use of readily accessible, appropriately qualified interpreters in all hearings.

As discussed under Questions 10-12 above, VLA believes that it is very important to target appropriate CLE to people from CALD backgrounds.

Question 155. What can be done to make the Guardianship List more accessible to users in regional areas?

To improve the accessibility of the Guardianship List in regional areas, VLA suggests that hearings must be conducted on a regular basis, without significant delays between application and hearing. The hearings should be conducted in a user-friendly environment. VLA suggests this will not always be a courtroom in the local Magistrates Court; appropriate settings may include nursing homes and community meeting rooms.

An important factor for accessibility also involves effective communication about the role of VCAT, when it is sitting and how to access VCAT. If VCAT can be seen to have a ‘face’ in a regional area, people in that area will be more likely to identify with VCAT and accordingly feel that VCAT is more accessible.

This should be supplemented with targeted CLE about the role of VCAT and, in particular, the Guardianship List.

Part 9: Interaction with other laws

Chapter 22: *Disability Act 2006* (Vic)

VLA endorses the Public Advocate's view set out in 22.32 of the Consultation Paper, that guardianship laws should never be used as a means of protecting society from (potentially) dangerous individuals.

VLA does not support the reported preference of some medical practitioners to rely upon the authority of a guardian rather than statutory compulsory treatment regimes when providing some forms of treatment to a person with a disability. Such statutory regimes have the appropriate legislative safeguards in place. VLA believes that the regime established by the *Disability Act*, which is overseen by the senior practitioner, renders decision makers more accountable. Such authority should not be placed in the hands of a guardian. VLA recommends that professional education and training be provided to medical practitioners, regarding the appropriate use and intended scope of guardianship laws.

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?

VLA does not agree with the Commission's previous recommendation to extend the compulsory treatment provisions in the *Disability Act* to people with a cognitive impairment other than intellectual disability.

Compulsory treatment is a significant interference with a person's autonomy. Any such extension should be based on sound research demonstrating the need for such intervention, and be supported by appropriate risk assessment tools which have validity for the particular population being assessed. The OPA, in its report *Supervised Treatment Orders in Practice: How are the human rights of people detained under the Disability Act 2006 protected*?, expressed concern at the limited validity of risk assessment tools for people with intellectual disability (who may currently be subject to an STO). VLA believes that, before the STO regime is expanded to cover a wider population of people with other cognitive impairments, valid risk assessment tools which can more accurately predict risk for that population must exist. Otherwise, the intervention, which necessarily significantly infringements a person's rights, cannot be justified.

Chapter 23: *Mental Health Act 1986* (Vic)

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?

VLA supports Option A - no change. VLA believes that the *Mental Health* Act should continue to be the sole source of authority to provide compulsory psychiatric treatment and to impose restrictions upon liberty by requiring a person to be a patient in a hospital or to live at a specific place in the community.

The protections contained within the *Mental Health Act*, and further protections proposed by the Exposure Draft Mental Health Bill, are more stringent than Option C, which would allow a guardianship to be used as a mechanism for authorising psychiatric treatment and place of residence decisions in some circumstances. VLA does not believe that there are sufficient protections in place to support this extension of power. VLA believes that, to ensure abuse does not occur in these situations, detailed legislative protections and processes would need to be set

in place that would likely render proceedings more costly and less comprehensible to those members of the community who need to access it.

Chapter 24: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)

Question 158. Do you believe that an advocate should be made available to a person subject to the *Crimes (Mental Impairment and Unfitness to be Tried Act 1997* (Vic) at particular times?

and

Question 159. Do you believe that the Public Advocate should be given a formal role as an advocate for people involved in proceedings or detained under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

In addition to the breadth of services described in Section B above, VLA frequently provides legal services to people subject to the CMIUT Act. Experienced lawyers from VLA's Mental Health and Disability Advocacy team conduct a visiting service to Thomas Embling Hospital on a fortnightly basis. The lawyer may assist existing VLA clients who are inpatients at the hospital, as well as newly admitted inpatients and inpatients referred by the social workers at the units or medical practitioners or staff at the hospital. Legal information and advice on a wide range of legal matters is provided to inpatients through this visiting service.

In addition to the visiting service, anyone subject to the CMIUT Act can phone VLA's Legal Information Service for legal information and referrals to the appropriate office or division of VLA for legal advice and representation. Lawyers throughout VLA may conference with their clients at Thomas Embling in person or via videolink.

Lawyers from the Mental Health and Disability Advocacy team assist people subject to the CMIUT Act with a wide range of civil matters, including guardianship and administration, debt, discrimination and victims of crime matters. Inpatients may also be referred to lawyers in VLA's family law and criminal law services as appropriate. Ongoing assistance and representation will be subject to a grant of legal assistance, which in these matters involves consideration of the nature and merits of the matter and the person's means.

In addition to these general legal issues, VLA conducts an extensive practice assisting and advocating for 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. Grants of legal assistance for these matters are *not* subject to a means test and are allocated to either in-house VLA lawyers or the Mental Health Legal Centre.

VLA also represents clients before the Forensic Leave Panel. Such assistance is both means and merit tested.

VLA endorses the view expressed in 24.32 of the Consultation Paper. VLA does not believe that guardians should have a special role in relation to people subject to the CMIUT Act. VLA does not consider it appropriate that a guardian be appointed to make substitute decisions about legal proceedings under the CMIUT Act. VLA notes that the CMIUT Act enables proceedings to be

brought by the treating team where a person no longer has the capacity to make a decision to initiate proceeds.

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 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. As noted above, VLA frequently undertakes this role on behalf of clients subject to the CMIUT Act, as do the Mental Health Legal Centre and Villamanta.

VLA believes that the Public Advocate may play a formal role where a person does not have the capacity to provide instructions as to their wishes regarding care and accommodation in applications for extended leave. In VLA's view, such an appointment would be an option of last resort.

VLA refers to the Commission's comments at 24.35 of the Consultation Paper and notes that reviews of custodial supervision orders do in fact occur, typically at intervals of between one and three years. However, there is no legislative requirement for a regular review. VLA submits that consideration should be given to including in the legislation a requirement to review each custodial supervision order at least every two years.