Submission No. 74

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promoting law in the public interest

homeless persons' legal clinic

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Professor Neil Rees
Chairperson
Victorian Law Reform Commission
DX 144 Melbourne Vic

Dear Professor Rees,

Submission to the review of Victoria's Guardianship and Administration laws

The PILCH Homeless Persons' Legal Clinic (**HPLC**) is writing to response to the questions raised in the *Guardianship Consultation Paper* (**Consultation Paper**) released by the Victorian Law Reform Commission (**Commission**) in March 2011. Thank you for providing the HPLC with an extension of time to make this submission.

This submission should be read together with the HPLC's response to the Commission's March 2010 *Guardianship Information Paper* (**Information Paper**). The HPLC's response to the Information Paper, entitled *Standing Guard,* informed the Consultation Paper, and this brief submission seeks to reinforce or expand on certain recommendations contained in *Standing Guard.*

We have done this by answering specific questions posed in the Consultation Paper. These responses are set out below.

Draft general principles (Question 3)

In *Standing Guard,* the HPLC submitted that the existing objects (including to impose the 'least restrictive option') were not always followed in practice.[1] The Consultation Paper proposes a commendable new and more detailed list of objects.[2] While we agree that the new principles articulate the objects of any substituted decision-making regime, we remain concerned that the three relatively simple objects in the current legislation are not always satisfied, so a long and detailed list of objects carries a risk that they will not be implemented in practice.

A number of the recommendations below are aimed at putting the new draft principles into practice, so that this is outcome is avoided.

Collection of data (Question 13)

As the HPLC noted in *Standing Guard*, we are concerned that a number of guardianship and administration orders are made when the person who is the subject of the application (a) does not attend the hearing; or (b) is not represented at the hearing.[3]

We encourage VCAT to monitor these numbers, with a view to building an evidence-base about the unmet need for representation in the Guardianship List.

[1] Standing Guard, 23; Consultation Paper, [5.28]–[5.29].

[2] Consultation Paper, [5.101].

[3] Standing Guard, 12–15.

Also, we noted in *Standing Guard*, the difficulties of having an order removed once it has been made.[4] We also encourage VCAT to record the number of successful applications for reassessment, with a view to identifying whether or not it is a meaningful reassessment process.

Criteria for appointment (Questions 50)

The HPLC prefers Option B, which provides that disability is removed as a criterion in its own right for assessing capacity, but it remains the case that lack of capacity to make judgments is linked to something that can be objectively assessed (i.e. that disability remains the preliminary step in the test).

While the introduction of capacity principles and a legislative definition of incapacity (discussed in relation to Question 51 below) may go some way to addressing our concerns, for our client group, there is otherwise a significant risk that orders will be made because of a perception of incapacity that is based on a chaotic lifestyle, rather than an actual incapacity to make independent decisions.[5]

Determining incapacity (Question 51)

The HPLC supports Options A and B i.e. that there should be clear capacity principles set out in the legislation, as well as legislative guidance about what amounts to "incapacity". Together, these provisions would provide some protection against guardianship and administration orders being made because a person is seen to make unwise decisions.

The HPLC reiterates its position in *Standing Guard* that, legislative guidance may go some of the way, but better training of VCAT decision makers is essential to making these principles effective in practice:[6]

> The Act also expressly prohibits VCAT from making a guardianship or administration order unless VCAT is satisfied that the order is in the person's best interests;[7] and requires that the order must be the least restrictive of the person's freedom of decision and action as is possible in the circumstances.[8]
>
> There is, however, no further legislative guidance as to how these principles are to be applied, including how to assess the key concepts of "reasonable judgment", "best interests" or "least restrictive". As pointed out in a recent Liberty Victoria paper, these gaps in the legislation create a risk that inadequate protection is given to the dignity and autonomy of people with disabilities.[9] This inadequate guidance to VCAT members ... means there is an increased risk of the balance in the Guardianship List swinging "too far in favour of paternalism or protection as against individual autonomy".[10]
>
> This lack of clarity in the Act and the way it is applied by VCAT members allows guardianship and administration orders to be made when it is strongly arguable that they should not be. While legislative "tightening" will be of some assistance in protecting the rights of people with disabilities, it is essential that

[4] Ibid, 25–27.

[5] Ibid, 30.

[6] Standing Guard, 16.

[7] *Guardianship and Administration Act* 1986 (Vic) s 22(3) (regarding guardianship) and s 46(3) (regarding administration).

[8] *Guardianship and Administration Act* 1986 (Vic) s 22(5) (regarding guardianship) and s 46(4) (regarding administration).

[9] Ergun Cakal, Victorian Council for Civil Liberties, 'Dignity, autonomy, privacy: disability reforms' (available at: http://www.libertyvictoria.org/node/107).

[10] *XYZ v State Trustees Limited* [2006] VSC 444 [66].

- VCAT members receive appropriate training to assist them to understand their obligations under sections 4(2), 22 and 46 of the Act.

These comments would apply equally to any new criteria that VCAT members are required to consider.

Powers of guardians and administrators (Question 58)

The HPLC supports Option A(iii) i.e. to include a non-exhaustive list of decision-making powers and restrictions in the legislation, so that, unless a guardian or administrator had a power expressly conferred upon them, that power remains with the represented person.

In *Standing Guard,* the HPLC noted that greater clarity in the form of orders is required.[11] While the HPLC does not have a firm view of the types of decisions that can (or cannot) be made by administrators or guardians, it is crucial that the orders clarify the role of the decision maker to:

- assist VCAT in its decision-making process as it will necessitate proper consideration of the person's capacity to make specific decisions in their everyday life and genuine contemplation of less restrictive means available to support that decision-making; and
- if a guardianship or administration order is made, ensure that the scope of the encroachment on the represented person's independence and autonomy is as limited as possible and is properly tailored to that person's decision-making capacity.

'Risky' or 'bad' decision-making and decision making principles (Questions 88 to 90)

As the HPLC noted in *Standing Guard*, we do not believe that the current law strikes the right balance between the "dignity of risk" and protectionism. As the case study in *Standing Guard*[12] pointed out, the HPLC is of the view that the current legislation, and the way it was implemented, favours a protectionist approach.

The HPLC supports Option B (including the decision-making principles) as a welcome reform that would remove the notion of "best interests", which encourages a protectionist approach rather than a focus on autonomy. Option B also avoids some of the difficulties associated with "substituted judgment". In particular, for the HPLC's client group, it will often be the case that, as a result of the isolation that comes with homelessness, the decision maker may not "know a great deal about the person's history of decisions, views, beliefs and values".[13] It this situation, "making the decisions the person would have made if they were able to" is not possible, so the substituted decision-making model would be unworkable for this client group.

Accountability mechanisms for substitute decision makers (Questions 99 to 100, 102 to 105 and 117)

The HPLC supports the view that VCAT needs to be rigorous in choosing who should be appointed as a guardian, and that guardians should be provided with more training and ongoing support to

[11] Standing Guard, 33–35.

[12] Ibid, 30.

[13] Consultation Paper, [17.112].

carry out their role.[14] Indeed, the Consultation Paper reflects the HPLC's view that, given the significant and complex role of guardians and administrators, attending the (currently optional) information sessions that are provided should be a condition of assuming the role guardian or administrator (with a higher level of training and support for private administrators).[15]

In addition to extra training, the HPLC supports the requirement for private guardians and attorneys to lodge periodic reports about their activities with a public official. In the event that this is not feasible,[16] the HPLC recommends that guardians and administrators are required to lodge annual declarations that they have met their responsibilities under the Act, reinforced by random audits of the conduct of substitute decision makers by the Public Advocate and the State Trustees.

The HPLC supports the recommendation that substitute decision makers should declare an oath or sign a statement agreeing to comply with their responsibilities before they undertake their roles; and VCAT should be able to order administrators and financial attorneys to repay funds that have been misused (either on the application of the represented person or on VCAT's own motion).

The HPLC also supports the proposal that VCAT should have the discretionary power to appoint a guardian or administrator on the condition that they complete any training requirements specified in the order.[17]

Review of a guardian or administrator's decisions (Questions 111 and 112)

The Act does not contain a mechanism for the decisions of guardians or administrators to be formally reviewed. A represented person can complain directly to the guardian or they can apply to have the entire order reassessed under section 61 of the Act.

In our view, this gap in the Act accentuates the inherent power imbalance between the guardian or administrator and the represented person – although there are requirements about how to make decisions, the represented person has no mechanism for holding their guardian or administrator accountable for those decisions.

The HPLC supports the model under the *Guardianship Act* 1987 (NSW), whereby decisions made by the public guardian are subject to review by the Administrative Decisions Tribunal.[18] We submit that a provision allowing represented persons to seek review of decisions made by their guardian or administrator is necessary to improve accountability of guardians and administrators, give represented persons a degree of empowerment in relation to decisions made about their lives and, more generally, improve public confidence in the guardianship and administration regime.

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[14] Ibid, [17.43].

[15] Ibid, [19.15] – [19.16].

[16] Ibid, [19.54].

[17] Ibid, [19.117] – [19.120].

[18] *Guardianship Act* 1987 (NSW) s 80A (review by ADT of guardianship decisions of Public Guardian) provides that an application can be made to the Administrative Decisions Tribunal (**ADT**) for a review of a decision of the Public Guardian that: (a) is made in connection with the exercise of the Public Guardian's functions under the Guardianship Act as a guardian; and (b) is of a class of decision prescribed by the regulations for the purposes of section 80A. The application can be made by: (a) the person to whom the decision relates; (b) the spouse of the person; (c) the person who has the care of the person to whom the decision relates; or (d) any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

We therefore recommend Option B, including a discretionary power of VCAT to order that individual decisions of private guardians and administrators can be reviewed.[19] The HPLC supports the view that the represented person or a person with a special interest in the affairs of the interested person can apply for merits review of a guardian or administrator's decision.

Improving attendance, legal assistance and advocacy support at VCAT (Question 137 and 152)

Generally, the HPLC agrees with each of the options identified at [21.139]–[21.143] of the Consultation Paper, and would support further investigation of these options. *Standing Guard* identified a number of safeguards that have the potential to improve assistance, advocacy and support to people appearing before the Guardianship List. These included:[20]

- suggestions for ensuring a person who is the subject of an application attends the hearing (such as reviewing the form and content of notices of hearing and using a text messaging service to remind people of hearings);
- providing a right of representation; and
- introducing a case work support program that assists respondents to engage with necessary support services and networks that might present a less restrictive means for meeting the person's needs.

Maximum period (Questions 139 to 141)

While the HPLC does not have a firm view on any maximum period for an order, we endorse the practice of some VCAT members on the Guardianship List of ordering a "trial period". This period can be used to assess (a) the need for a guardianship or administration order; and (b) in the event that an order is required, what powers, duties, and obligations the guardian or administrator should have under the order and what aspects of the represented person's independence can be expressly preserved.[21]

Rehearings (questions 145 and 146)

The HPLC recommends that the period in which an application for a rehearing can be made be extended beyond the current 28 day limit (to 60 days), and that VCAT should be required to inform parties of the right to seek a rehearing. VCAT should also be required to inform the person of the timeframe for applying for a rehearing and to provide them with a list of services that can provide relevant legal or non-legal support or advice.

Reassessment of orders (Questions 147 and 148)

The reassessment mechanism in the Act is extremely important. Essentially, it is the legislative mechanism for recognising that numerous factors in that person's life will change over time and for acknowledging people's potential for improvement. As identified by John Billings, former Deputy President of the Guardianship List:

> "... what the person's best interests require may change over time. When it is also considered that the person's condition can be static, progressive, fluctuating or improving it will be obvious that, as the

[19] Consultation Paper, [19.86].

[20] See Standing Guard, 2–5.

[21] Consultation Paper, [21.74].

legislation requires, an administration order should never be made 'once and for all' but should be reassessed later on".[22]

The HPLC is concerned that some people are unaware of their right to seek reassessment of a guardianship or administration order, or that they may have difficulty in exercising that right. This is further complicated where VCAT requires the represented person to provide new medical evidence which may be expensive or difficult to obtain. For those reasons, there should be greater flexibility in applying for, and being granted, reassessment hearings.

The HPLC supports the proposal that represented people should be requested to opt out of, rather than into, a reassessment hearing. This will gradually change the situation whereby the inaccessibility of reassessment processes has meant that guardianship and administration orders are being made "once and for all". It will remind represented people that they are entitled to this reassessment and it will remind VCAT members that they are required to genuinely reconsider whether the prerequisites that required substituted decision-making are still present in the person's life.

The decision-making principles and the legislatively prescribed test for incapacity should be relied on at reassessment i.e. there should not be a presumption of incapacity.

Conclusion

The HPLC congratulates the Commission on its thoughtful and consultative approach to this review, and thanks you for the opportunity to again comment on the proposed reforms.

We would welcome the opportunity to discuss this issue with the Commission – please direct any contact or queries to Lucy Adams

Yours sincerely,

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[22] John Billings, 'The ABC and XYZ of Guardianship and Administration' (VCAT) [2007] Victorian Judicial Scholarship 13.