Law Institute Victoria

Guardianship Consultation Paper

To: Victorian Law Reform Commission

08 June 2011

Queries regarding this submission should be directed to:
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Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission to the Victorian Law Reform Commission (the Commission) in response to the Guardianship *Consultation Paper* (the Consultation Paper).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 14,500 members. LIV members have extensive experience advising on laws relating to substitute decision-making in Victoria, including guardianship and administration matters, mental health and powers of attorney. The LIV has long been active in advocating for policy and law reform of laws relating to substitute decision-making through its Elder Law, Disability Law, Health Law and Succession Law Committees.

Thank you for meeting with members of the Elder Law, Disability Law, Health Law and Succession Law Committees on 4 May 2011, to discuss a range of issues relevant to our members. We also look forward to continued participation on the Registry Working Group and would welcome any further meetings to elaborate on this submission.

This submission should be read together with our May 2010 submission to the Commission in response to the Information Paper, *Review of Guardianship* (our May 2010 submission). In addition, we refer you to a number of past LIV submissions which are relevant to the Review of Guardianship Laws, including:

- LIV submission to Department of Justice, Government Response to Law Reform Committee – Powers of Attorney Report, 13 December 2010;
- LIV submission to the President's Review of the Victorian Civil and Administrative Tribunal, 22 June 2009; and
- LIV submission to Victorian Parliament Law Reform Committee Inquiry into powers of attorney, 4 August 2009.
- LIV submission to the Attorney-General, Enduring Powers of Attorney, 3 July 2008;
- LIV submission to The Hon Rob Hulls MP, Guardianship List, 13 September 2007.

Copies of these submissions are attached for your reference.

Executive Summary

In this submission, we respond only to select questions in the Consultation Paper. The following provides an overview of our recommendations.

The Direction of New Laws (Question 2)

1. The LIV agrees that the purpose of new guardianship legislation should be to protect and promote the dignity and human rights of people with impaired decision-making capacity.

Principles of New Laws (Question 3)

2. The LIV generally supports the Commission's draft general principles for new guardianship laws.

Clear and Accessible Laws (Question 5)

3. The LIV strongly supports a single, comprehensive law in relation to substitute decision-making and therefore supports Option C.

Supported Decision Making (Questions 14 and 15)

4. The LIV would like to see greater promotion of supported decision-making, which provides autonomy for people with impaired decision-making ability and is consistent with Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* (the Disabilities Convention). We do not, however, agree that there is a need for legal recognition of supported decision-making and do not support proposals for personally appointed and tribunal made orders for supporters and co-decision-makers.

Personal Appointments (Questions 23 – 35)

5. The LIV supports the merging of powers of attorney (guardianship) and (medical treatment), so that enduring appointments are reduced from three to two.

6. The new enduring power of attorney (medical and guardianship) should be activated on loss of capacity and enduring powers of attorney (financial) should continue to be activated at the time, circumstance or occasion specified by the donor.

7. The LIV supports in principle the development of a register for powers of attorney documents and believes that a register could potentially lead to a reduction in the extent of abuse of these instruments.

8. The LIV does not believe that the Registry of Births, Deaths and Marriages should be the holder of the registry.

9. On balance, the LIV supports compulsory registration. We acknowledge, however, that some LIV members do not support compulsory registration.

10. Registration should ideally be required within a specified time of execution (such as 6 months).

11. The LIV emphasises the importance of timely access to the register in financial and legal transactions as well as medical matters, with appropriate privacy protections consistent with the *Information Privacy Act* 2000 (Vic). Registered legal practitioners should be 'preferred users' because of the range of matters that will require a search of the register.

12. We support notification to the registry of activation of financial powers only where the donor has specified that they are to be activated on loss of capacity, to ensure that oversight mechanisms such as periodic reporting commence. Notification will rarely be possible in a medical emergency or guardianship context.

13. A donor should be able to specify that certain people should not be notified when a power of attorney is activated. The attorney should be responsible for notifying immediate family that the power has been activated.

Documenting wishes about the future (Questions 38 – 44)

14. The LIV supports reforms to broaden and clarify the statutory right to make instructional medical directives to provide people with increased certainty that their instructions will be followed.

15. The LIV does not support stand-alone legally binding instructional directives for non-medical lifestyle matters. Rather, donors should be encouraged to set out their wishes in a non-binding instructional directive when appointing a substitute decision-maker under an enduring power of attorney.

16. The LIV supports the introduction of a statutory requirement that personally appointed decision-makers must consider instructional directives, but clarify that they are not bound by their terms. The same rules should apply for enduring guardians and enduring attorneys (financial).

VCAT Appointments (Questions 50 – 52)

17. The LIV agrees 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.

18. The LIV supports the Commission's suggestions for capacity principles and a legislative definition for incapacity. A legislative test for incapacity, rather than relying on the common law, will provide greater accountability for those people undertaking capacity assessments, so that subjective judgements and opinions are insufficient to make a finding that a person lacks capacity.

19. There should continue to be a demonstrated need for a substitute decision maker before a guardian or administrator will be appointed, because this provides the context for capacity assessments.

The Distinction between Guardianship and Administration (Question 55 – 56)

20. The current distinction between guardianship and administration should be retained.

21. The LIV supports measures to manage the overlap between guardians and administrators, including a requirement to undergo mediation of a dispute prior to seeking the opinion of VCAT.

22. Legislation should regulate what information should be shared between administrators and guardians and how confidentiality should be managed.

Powers of Guardians and Administrators (Question 58 – 67)

23. Plenary guardianship orders should be retained as an order of last resort but legislation should provide a clearer explanation of the available decision-making powers. VCAT should be required to list the specific powers in the guardianship or administration order.

24. Substitute decision-makers should not have powers to act in the following areas:
    - personal relationships (including consent to sexual relationships)
    - making a will
    - the power to make substitute decisions about the children of represented persons
    - decisions that detain a person for the benefit of others rather than to protect the represented person
    - the powers vested in a represented person to act as a legal personal representative of deceased estates

25. Restrictions on gifts in s50A of the *Guardianship and Administration Act* 1986 (Vic) (G&A Act) should be retained and this provision should be extended to limit gifting by attorneys.

26. The anti-ademption provisions in s53 of the G&A Act require clarification. The LIV supports the proposal by State Trustees to replace s53 with a provision to permit remedies to third-parties for the consequences of the substitute decision-maker's

actions, and to make such remedies available in a variety of legal situations (such as intestacies and joint assets, not just in dealings with wills) where the dealings with a person's property by a substitute decision-maker (not just an administrator) lead to financial loss by a third party.

27. New legislation should enable State Trustees to be given the same powers as other administrators with respect to s51 of the G&A Act, which sets out the investment powers of administrators, and section 27 of the *Settled Land Act* 1958 (Vic).

28. The LIV is concerned to ensure that people with a disability are able to pursue civil litigation to protect their rights and to ensure that their best interests are served. We propose that new guardianship legislation should enable administrators to pursue litigation on behalf of a represented person with indemnity from the represented person's assets where a court has made a declaration that litigation is the proper course of action.

Responsibilities (Question 87 – 92)

29. The LIV cautions against prescriptive guidance about how a substitute decision-maker should balance the wishes a person expresses at the time a decision is made, and any past wishes, views, beliefs and values the person has expressed. The LIV considers that each decision should be dealt with on a case by case basis.

30. The LIV suggested that the notion of best interests should be understood broadly, so that it encompasses risk minimisation as well as maximising life opportunities for people. A substitute decision-maker should not follow the wishes of a person where they involve a threat to life or some other grave danger.

31. The LIV supports a general set of decision-making principles for all types of substituted decisions.

32. Substitute decision-makers should be directed by the legislation to act in a way that promotes the personal and social wellbeing of the person. The legislation should provide guidance about how substitute decision-makers should exercise their powers and duties in accordance with this principle. Substituted judgement should be one guiding principle to consider.

33. New guardianship laws should specifically require substitute decision-makers to act honestly and respond appropriately to conflicts of interest. If new guardianship laws clearly set out the powers and responsibilities of substitute decision-makers, conflicts of interest are less likely to occur. The LIV recommends that specific legislative requirements relating to conflict of interest must be accompanied with community education.

Confidentiality (Questions 97 – 98)

34. New guardianship legislation should detail a substitute decision-maker's authority to access confidential and private information.

35. Substitute decision-makers should be required to maintain the confidentiality of information they obtain about a represented person unless it is reasonably necessary to disclose that information to a third person in order to perform the functions of a substitute decision-maker, or disclosure is otherwise required or permitted by law.

Accountability and Review of Substitute Decision Making (Questions 99 – 116)

36. The LIV supports periodic reporting requirements for private guardians and attorneys. We are concerned to ensure, however, that reporting is not overly burdensome and does not deter people from accepting appointment as attorney or private guardian.

37. The LIV does not support the proposal for substitute decision-makers to provide periodic declarations of compliance with their responsibilities, as we do not believe these will be effective to identify potential abuse.

38. The LIV does not support the proposal that substitute decision makers should declare an oath or sign a statement agreeing to comply with their responsibilities before they undertake their roles.

39. The LIV supports random audits of periodic reports lodged by substitute decision-makers. It would be appropriate for State Trustees to carry out random audits of a sample of periodic reports lodged by financial substitute decision-makers.

40. VCAT should be given power to order administrators and financial attorneys to repay funds that have been misused.

41. The LIV supports more specific penalties for substitute decision-makers who misuse or abuse their powers.

42. As a preliminary view, we support the Commission's proposal to allow merits review of decisions made by the Public Advocate as a guardian and by State Trustees as an administrator. Reviews should be available only after the internal complaints mechanisms of the Public Advocate and State Trustees had been exhausted. In addition, we note the LIV's recommendation in our May 2010 submission for amendment of the G&A Act to allow a represented or other interested person to seek an advisory opinion on an individual decision of a guardian or administrator.

43. The LIV agrees that applications for review of decisions should be limited to the represented person and people with a "special interest" in the affairs of the represented person. VCAT should have discretion to determine whether the applicant has a "special interest".

44. In the event that merits review is limited to decisions of OPA and State Trustees, a reviewable decision should be any decision made by State Trustees as administrator or OPA as guardian in connection with the exercise of their powers under guardianship legislation and which has been subject to internal review.

45. VCAT already has power to summarily dismiss or strike out proceedings that are frivolous, vexatious, misconceived or lacking in substance, or are otherwise an abuse of process (*Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s75). The LIV has previously recommended that it might also be appropriate for the applicant to bear the costs of a merits review application, including the costs of the other parties involved, unless VCAT found that the relevant administrator or guardian has been negligent or dilatory.

46. We are seeking further feedback from members about who should conduct merits reviews.

VCAT (Questions 137 – 152)

47. The LIV supports amendment of s 62 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) to give a represented person or a proposed represented person a right to

legal representation in all Guardianship List matters and to create a statutory power for VCAT to order that a person be provided with representation when VCAT believes this is necessary. Funding must be provided to ensure that people are able to access the right to legal advice where they do not have the means to pay.

48. VCAT should explore less restrictive options through mediation with the proposed represented person, family members and other interested persons where appropriate, prior to determination of a guardianship or administration application.

49. The LIV will consult further on whether new guardianship legislation should specify a maximum period for all guardianship and administration orders.

50. The LIV is concerned to ensure that reassessment of a guardianship or administration order is a substantive review of the continuing need for the order. Our preference would be for a hearing to be held for all reassessments, which the represented person should be encouraged to attend and the guardian or administrator should be required to attend.

51. Where confidential information provided to VCAT relates to the proposed represented person, the default position should be that VCAT is required to treat all information relating to the represented person as *prima facie* confidential. At a VCAT hearing, VCAT should only permit disclosure of information relating to a represented person where disclosure is essential to the decision-making process.

52. Files in Guardianship List matters should be closed to the public unless VCAT determines otherwise.

53. The LIV does not generally support an extension of the 28 day limit in which an application must be made for a rehearing because of the need for finality.

54. VCAT should be required to inform parties of the right to seek a rehearing.

55. A represented person should be required to opt out of a reassessment hearing.

56. The LIV does not see a need for an unscheduled reassessment order, in the absence of new evidence about whether the person continues to meet the criteria for an order.

57. The LIV would welcome reforms to allow guardians and administrators to seek a VCAT order to enforce decisions they make which a third party refuses to accept and would be pleased to participate in further consultations about this proposal.

58. VCAT should be primarily responsible for attendance of persons with a disability and it should take a more proactive approach to encouraging persons with a disability to attend hearings. A Practice Note should be developed to assist VCAT members to use all reasonable endeavours to ensure that a person with a disability is present for a hearing, addressing:
    a. Adequate notice to parties to the proceeding
    b. Adjournment and temporary orders
    c. Independent representation of the person with a disability

***Mental Health Act* 1986 (Vic) (Question 157)**

59. The LIV submits that both fusion (Options B) and limited use of guardians (Option C) proposals are likely to introduce unnecessary complexity to the system for authorising compulsory psychiatric treatment and detention, for consumers, service providers and clinicians. On balance, we believe that people with a mental illness have more rights under the *Mental Health Act* 1986 (Vic) than they would under guardianship and on this basis, without more detailed proposals, we support no change.

Select Questions from the Consultation Paper

The Direction of New Laws

Principles of New Laws

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

The purpose of this Act is to protect and promote the dignity and human rights of people with impaired decision-making capacity. To this end, the Act establishes mechanisms to support and assist people to participate in decisions that affect their lives, realise their rights and protect their inherent dignity.

The LIV supports the statement of purpose for new guardianship laws proposed by the Commission.

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

The LIV generally supports the Commission's draft general principles for new guardianship laws. We agree with the Office of the Public Advocate's (OPA) submission in response to the Consultation Paper that some of the principles should be included in the decision-making principles (as proposed under Question 89), rather than under the general principles.[1]

Clear and Accessible Laws

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

The Consultation Paper notes that the LIV strongly supports a single, comprehensive law in relation to substitute decision-making (at p105). In our May 2010 submission, we outline the following benefits to consolidation of all substitute decision-making laws in Victoria:

- To simplify the currently fragmented approach to capacity, which is dealt with differently under numerous statutes relating to substitute decision-making in Victoria, including the *Guardianship and Administration Act* 1986 (Vic) (G&A Act); *Instruments Act* 1958 (Vic) (Instruments Act); *Mental Health Act* 1986 (Vic) (the MH Act); and the *Medical Treatment Act* 1988 (Vic) (MT Act).
- To establish a uniform test for capacity in relation to substitute decision-making.
- To create a principled framework for substitute decision-making.
- To ensure a comprehensive and integrated system that promotes advance planning (including enduring powers of attorney and advance directives) and provides for tribunal made orders (such as guardianship and administration) only where necessary.

[1] Office of the Public Advocate, Submission to the Victorian Law Reform Commission in Response to the Guardianship Consultation Paper, May 2011.

One single Act consolidating the various substitute decision-making laws will promote a consistent approach to impaired decision-making ability and should reduce confusion among substitute decision-makers and service providers such as hospitals, banks and aged care facilities about their responsibilities. We emphasise, however, that the benefits of a single Act will be realised only if accompanied by a comprehensive training and education program. Recent experience in the United Kingdom shows that attention must be paid to how new legislation is applied in practice.[2] Fundamental to an education program is the promotion of the general principles of the legislation, which should aim to promote empowerment for people with impaired decision-making ability and to prevent abuse, neglect and exploitation of people who are more vulnerable because of their impaired decision-making ability.

The LIV therefore supports the Commission's preferred Option C.

Supported decision making

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

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

The LIV would like to see greater promotion of supported decision-making, which provides autonomy for people with impaired decision-making ability and is consistent with Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* (the Disabilities Convention). We do not, however, agree that there is a need for legal recognition of supported decision-making. We believe that supported decision-making should be promoted by provision of education and resources to family members and carers and note that legal change is likely to introduce significant practical problems without increasing support for people with impaired decision-making ability to make their own decisions.

The Commission is proposing new formal arrangements to allow a person to appoint someone else in a supported decision-making role. There are two types of legal arrangements proposed: one where a support person is given legal authority to access private information on behalf of the other person, so as to be able to better support them in making decisions; and the other where a co-decision-maker is appointed and decisions are valid only if both the person, and their co-decision-maker agree. Support persons and co-decision-makers could be appointed by the person with impaired decision-making ability or by VCAT, making a total of four new possible appointments.

We understand that the Commission's proposals for new supported decision-making mechanisms are an attempt to deal with the complexity of capacity, which is decision- and time-specific, and may fluctuate. Further, we note that the Commission envisages the possibility of a series of cascading appointments, to ensure that people with degenerative and age-related disabilities maintain decision-making authority for as long as possible before a substitute decision-maker is appointed as a last resort.[3]

We are concerned with a number of aspects of the Commission's proposals, on the following bases:

[2] See Hansard, House of Lords, Column GC510 (Question for Short Debate: mental Capacity Act 2005) 29 March 2010, available at http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100329-gc0006.htm (last accessed 20 May 2011).
[3] VLRC/LIV consultation roundtable, 4 May 2011 held at 470 Bourke St,Melbourne.

- *Complexity* – The Commission acknowledges that its proposals for four new appointments would add another layer of complexity to a system that already contains three different personal appointments and six different substitute decision-making arrangements (p128). Community responses in the Consultation Paper suggest that the current system is not well understood and that in particular, there is little knowledge about enduring power of guardianship (p147). We note that while OPA supports the Commission's proposals for supported decision-making and co-decision-making, they acknowledge that community education will be a key challenge to the success of the proposals.[4] We are concerned that the complexity of the proposal will outweigh its potential benefits. For example, we believe it is overly complex to allow personal appointments of support persons and co-decision-makers where a person consents and is capable of understanding the nature and effect of the agreement and VCAT appointments where a person is incapable of making an agreement but consents to the order. We query how a person can consent to an order when they do not understand the nature and effect of the order, unless a further test for capacity to consent is established.

- *People with no informal support networks* - Under the Commission's proposals, supported decision-making will be available only to those people with family and/or friends who are willing to undertake the role of supporter, because it is proposed the Office of the Public Advocate should not undertake the role. This means that people with pre-existing informal support networks will be able 'formalise' the relationship but that people with no family or support networks will not have the opportunity to access any support networks.

- *Risk of abuse, neglect and exploitation* – The LIV recognises that the risk of abuse, neglect and exploitation should not be overstated and that people in functional supporting relationships should be able to take advantage of the potential benefits of formal supported decision-making arrangements (for example, facilitating the involvement of a person with impaired decision-making ability in decisions and creating legal certainty for third parties about the nature and parameters of the support relationship). However, we remain concerned that proposals for supported-decision making and co-decision making might facilitate undue influence by legitimising the role of an overbearing family member and giving them access to sensitive personal information that could be used to perpetrate financial or other abuse. While the Commission's supported decision-making and co-decision-making proposals do not substitute the decision of the person with impaired decision-making ability, there is a risk that in practice, the resulting decision will be unduly influenced by the supporter/co-decision-maker, due to the increased vulnerability of the person with impaired capacity. While this risk could be addressed by accountability mechanisms, we are concerned that mechanisms such as reporting would be overly burdensome and act as a disincentive for most people to enter these formal relationships.

- *Potential for conflict* – The LIV does not support the co-decision-making proposals, which require the person and the co-decision-maker to agree for a decision to be legally binding. We are concerned that the requirement for agreement will mean that parties would need to go to VCAT to resolve conflicting views and that this could lead to an increased demand for urgent hearings.

The LIV reiterates its view, previously expressed in our May 2010 submission, that the case for Victoria to recognise supported decision-making authorisations is not compelling because powers of attorney are capable of fulfilling this role by authorising access to personal

[4] OPA submission, above n1, 5.

information. We recognise that this view is subject to reform of powers of attorney to ensure that they operate to better facilitate supported decision-making.

The case for supported decision-making is compelling when considered as a social need, rather than a legal need, for appropriate and adequate supports to be provided to people with disabilities who might need help accessing information and considering and weighing up options. In our view, supported decision-making can be achieved by provision of education and resources to carers, family members and people with impaired decision-making capacity, to support people to make decisions about all aspects of their lives. Supported decision-making should be promoted as an alternative to guardianship and administration in this context.

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

Our response to Questions 14 and 15 (above) indicates that while the LIV supports the concept of supported decision-making, we do not support the formal arrangements proposed by the Commission.

We understand that current supported decision-making and co-decision-making laws in Alberta apply only to personal decisions.[5] While co-decision-making orders can be made for financial decisions in Saskatchewan, we note that not many orders have been made so that there is little practical experience to rely on. We note that the Australian Bankers Association and State Trustees are not supportive of either 'supporter' or 'co-decision-maker' arrangements applying to financial matters, based on concerns about workability and certainty in transactions.

If supported decision-making was to be introduced in Victoria, we suggest that initially mechanisms be established for personal decisions only. However, we understand that AMA (Victoria) members are generally unsupportive of formal supported decision-making for medical decision-making for a number of reasons, including potential administrative burdens and how this would interact with laws relating to informed consent.[6]

Personal Appointments

Activation

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

The LIV believes that enduring power of attorney (medical) and (guardianship) should be activated on loss of capacity and enduring powers of attorney (financial) should continue to be activated at the time, circumstance or occasion specified by the donor.

The LIV notes in its December 2010 submission to the Department of Justice that at present, there is inconsistency between enduring powers of attorney financial, guardianship and medical treatment about time of activation. While a donor may specify a time, circumstance or occasion when the powers under an enduring power of attorney (financial) commence,

[5] Consultation Paper, p120-1.
[6] LIV Health Law Committee meeting with AMA (Victoria) representatives, 9 May 2010.

enduring powers of attorney (guardianship) and (medical treatment) commence only when a donor loses decision-making capacity.[7]

We understand that different activation rules for different instruments might create confusion for people who wish to execute them. We believe, however, that there are important policy considerations underpinning the status quo.

The LIV appreciates OPA's argument that donors should be able to elect when they intend an enduring power of attorney (guardianship) to come into effect, to alleviate uncertainty about when a donor has lost capacity, recognising that for some conditions, capacity might fluctuate and that capacity is decision-specific. Further, we acknowledge that there may be merit in taking a consistent approach to each type of enduring power so that the document is more accessible and readily understood by members of the public.

However, LIV members report that most clients would be unlikely or very reluctant to appoint an enduring guardian with immediate effect, because of concerns that an enduring guardian could override their decisions about lifestyle matters despite the fact that they retain capacity (with many fears relating to accommodation and staying in the home).

Medical decisions should be made by a substitute decision-maker only where a person lacks capacity to consent, consistent with longstanding common law principles about bodily integrity and consent to medical treatment. Similarly, a person with capacity has the right to refuse medical treatment, regardless of the consequences. We therefore strongly submit that a power of attorney (medical treatment) should continue to be activated only on loss of capacity.

Below, we argue that powers of attorney (guardianship) and (medical treatment) should be merged, so that an enduring guardian has authority to make medical and lifestyle decisions about a person when they lose capacity. We therefore submit that the new power of attorney (medical and guardianship) be activated on loss of capacity.

Enduring powers of attorney (financial) should continue to be activated at the time, circumstance or occasion specified by the donor. There are many circumstances when a donor might wish for an attorney to undertake financial transactions on their behalf, for example, where they have mobility problems.

Streamlining existing personal appointments

<u>Question 26</u> **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?**

The LIV supports the merging of powers of attorney (guardianship) and (medical treatment), so that enduring appointments are reduced from three to two.

[7] *Instruments Act* 1958 (Vic) s 117(2); *Guardianship and Administration Act* 1986 (Vic) s 35B(1).

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

The LIV has previously supported the Victorian Parliament Law Reform Committee recommendation for a single, consolidated form for enduring powers of attorney, with the option for donors to appoint an attorney in all or some of the areas of financial, guardianship and medical treatment. Members have suggested a model based on either the *Powers of Attorney Act* 2006 (ACT) or *Powers of Attorney Act* 1998 (QLD).

However, some members are concerned that one consolidated form will not achieve the aim to simplify enduring powers of attorney, because the form itself is likely to become too long and complex. For example, under the *Powers of Attorney Act* 1998 (Qld) the short form (Form 2) (for use if you wish to appoint the same attorney/s for both financial matters and personal matters (including health care) is 20 pages and the long form (Form 3) for use (if you wish to appoint an attorney/s for personal matters (including health care) and a different attorney/s for financial matters) is 24 pages.

Our members report that clients often choose to delegate different types of powers to different people, according to the skills and personalities of those people. One form that allows appointment of multiple attorneys is likely to create evidential difficulties because it might be unclear who should retain the original document. Further, confusion may arise for attorneys and for third parties who seek to rely on the power about when a particular power commences, in light of our position that medical and guardianship powers should continue to be activated only on loss of capacity and financial powers should be activated at the election of the donor. One form may also make it more difficult for a donor to change aspects of an appointment, so that people might be required to complete a new appointment when they might only want to vary terms that relate to one power.

In addition, providing for two types of personal appointment, which distinguish financial decisions from lifestyle and medical decisions, is consistent with our response to Question 55 below in relation to retaining the distinction between guardianship and administration.

We note that transitional arrangements will need to be made to deal with the valid and activated appointments made under the current system.

Registration

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

The LIV supports in principle the development of a register for power of attorney documents and believes that a register of powers of attorney could potentially lead to a reduction in the extent of abuse of these instruments.[8] Our preference would be for a national register, given the regular movement of people between states and territories. We suggest that a Victorian online register be developed with capability to adapt to a national scheme.

We understand that an important driver for registration is certainty for third parties about whether an enduring power is current and valid. In our experience, many enduring powers are complex, with varying commencement clauses and limitations on the scope of powers on which an attorney is authorised to act. A register will therefore provide certainty only if it is capable of dealing with this complexity.

[8] See e.g. LIV Submission to Department of Justice, December 2010.

Further, we emphasise that without additional safeguards, registration in itself is unlikely to prevent abuse. We understand that abuse of a valid power is more common than pressure to sign an enduring power or illegitimate use of a power that has been revoked. In our submission to the Victorian Parliament Law Reform Committee, we noted research which indicates that, in comparison to informal family care arrangements, the making of an enduring power of attorney does not necessarily better protect the interests of an older person. Seventeen per cent of the cases of elder abuse reported to the Aged Rights Advocacy Service were related to the improper use of enduring power of attorney.[9] An analysis of a sample of cases before the Queensland Guardianship and Administration Tribunal found that it was more likely that an enduring power of attorney was in place where suspected financial abuse had occurred, particularly where close family members acted as attorneys.[10]

Registration would have the benefit of facilitating oversight and accountability mechanisms and we recommend that the Commission investigate the practicality of a monitoring system for attorneys, such as mandatory reporting, annual production of records, and random auditing of active accounts. This would ensure better enforcement of the current requirement to keep and preserve accurate records of all dealings and transactions made under the power.[11] However, we caution that safeguards against abuse must not be overly burdensome and should not deter people from accepting appointment as attorney. We agree with the Commission that future planning should be encouraged and that personal appointments are preferable to guardianship and administration orders.

Question 29 Which organisation should hold the register?

The LIV is concerned about the proposal made by the Victorian Parliament Law Reform Committee that the Registry of Births, Deaths and Marriages (BDM) host the register. Our concern arises because of our dealings with BDM in relation to access to death certificates by legal practitioners, which has been ongoing since 2007. Concerns generally relate to confidence in BDM to administer the proposed register in light of experience in dealing with the agency and specifically, their restrictive approach to access. We note that BDM has recently proposed a new online access system for legal practitioners, which is under consideration by the Succession Law Committee.

The success and workability of the proposed power of attorney register will depend on the appropriate balancing of privacy with timely access that meets the needs of third parties seeking to rely on the Register. In addition, the holder of the register should ideally exercise some oversight and accountability functions regarding the making and use of enduring powers in order to address the problem of abuse. BDM currently serves an administrative function and is not an appropriate entity to investigate or oversee the making or use of enduring powers.

Question 30 Should registration be voluntary or compulsory?

On balance, the LIV supports compulsory registration. Certainty for third parties about whether a power of attorney exists and is valid will be achieved only if registration is compulsory. We are concerned that voluntary registration might affect the ongoing use and viability of the register, because third parties will be unable to rely on information contained in the register. In addition, registration makes it more likely that the wishes of the donor will be followed about who will be their substitute decision-maker when they lose capacity,

[9] Aged Rights Advocacy Service, Submission to the Inquiry into Older People and the Law: Submission No. 38, p. 2.
[10] Assets and Ageing Research Team, Submission to the Inquiry into Older People and the Law: Exhibit No. 97, p. 28.
[11] *Instruments Act* 1958 (Vic), s125D.

particularly in situations of medical emergency. Registration also places less reliance on a person to have a copy of the enduring power readily accessible, which is a particular problem when a person is losing or no longer has capacity.

Registration must be free or at a nominal cost to ensure that there is no disincentive to make an enduring power, especially because many older people who seek to make powers of attorney are of limited means. We note that registration in NSW for powers of attorney is $100 with Land and Property Information. Practitioners in border areas report that the $100 fee acts as a disincentive for many older people and report instances of clients electing not to make a power of attorney on this basis.

We acknowledge, however, that some LIV members do not support compulsory registration. Compulsory registration might discourage some people from making enduring powers because they will be forced to compulsorily disclose personal information to a government agency. For example, a person might not want family members to know that an enduring power has been executed until it is necessary to activate the power. They might not wish to disclose instructions about sensitive financial assets. People might also be discouraged from making an enduring power because of the bureaucracy of registration. Some members note the practical reality that there is currently no ideal host for the proposed register and that it is undesirable for the register to be placed with the only available option (that is, BDM) rather than under a best practice model. Further, the uptake will depend largely on administration of the register, including the cost of registration.

Question 31 **If registration is compulsory, what effect should this have on the validity of unregistered appointments?**

Members are concerned about the potential effects of non-registration and believe that a requirement to apply to VCAT might be overly burdensome where the donor has otherwise met the formal requirements (e.g. relating to witnesses). We therefore propose that attorneys should be able to register an appointment at any time after activation where the appointment is otherwise valid. This will ensure that VCAT resources are not used unnecessarily. Late registration could be subject to challenge in the same way as other appointments, where there are concerns such as relating to whether the donor had capacity to make the document or about undue influence. Incentives could be introduced to encourage registration within 3 or 6 months of executing an appointment, based on different pricing structures.

VCAT should have the power to approve unregistered appointments that do not meet the formal requirements. VCAT approval of an appointment should be recorded on the register.

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

Registration should ideally be required within a specified time of execution (such as 6 months). We propose, however, that late registration should be possible where the document is otherwise valid. If registration is compulsory, an attorney will be unable to rely on a power until the power is registered or VCAT approves registration. As suggested in response to Question 31, incentives could be introduced to encourage registration within 3 or 6 months of executing an appointment, based on different pricing structures. The prescribed forms should include a clear notice about the requirement to register the power and details about how to do so.

If registration were not necessary until activation, there is a risk that current problems will persist where an attorney is unaware of the existence or location of the document.

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

The LIV notes the Commission's proposal for online PIN access by donors and attorneys and for 'preferred users' such as banks and hospitals who can demonstrate a need for preferential access on a subscription basis.

We are concerned about the utility of the online PIN system for older people.

The LIV emphasises the importance of timely access to the register in financial and legal transactions as well as medical matters, with appropriate privacy protections consistent with the *Information Privacy Act* 2000 (Vic). Registered legal practitioners should be 'preferred users' because of the range of matters that will require a search of the register. For example:

- where a request has been made by an attorney to hand over documents held in safe custody
- where a contract of sale or other legal document may be signed by a person acting as attorney. Checks on the validity and currency of the enduring power would be required at the time of signing as well as immediately prior to settlement. A Transfer of Land is treated as if it were signed by the party immediately prior to the settlement so that if an attorney signed a Transfer of Land at a time when the Power of Attorney was valid, but that that power of attorney is revoked prior to the settlement of the property transaction, then the Transfer of Land becomes invalid.
- where a client seeks to make an application for guardianship or administration for a person

Legal practitioners could be required to record in the register the reason for a search. We note that unlawful searching of the register is likely to constitute professional misconduct under the *Legal Profession Act* 2004 (Vic) and could be the subject of a complaint to the Legal Services Commissioner.

We suggest that preferred users have access to limited information where an enduring power exists such as:

- the donor's full name and date of birth
- the name of the attorneys,
- the type of enduring power that has been executed
- whether the power is limited or conditional in some way.

Where the register indicates that a power is limited or conditional in some way, further steps would need to be undertaken to access information about the limit or condition.

Access to non-binding instructions or wishes expressed in the power of attorney document should be limited to attorneys and third parties should not be able to access this information.

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

Notification will rarely be possible in a medical emergency or guardianship context, where time is likely to be of the essence where the time between activation and the need for a substitute decision may be brief or capacity may fluctuate for example, due to mental illness.

Often enduring powers of attorney (financial) will commence immediately. We support notification to the registry of activation of financial powers where the donor has specified that they are to be activated on loss of capacity, to ensure that oversight mechanisms such as periodic reporting commence.

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?**

A donor should be able to specify that certain people should *not* be notified when a power of attorney is activated. The attorney should be responsible for notifying immediate family that the power has been activated.

Documenting wishes about the future

Instructional Medical Directives

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

The LIV supports the introduction of enforceable advance directives for all types of medical treatment and we note that the UK *Mental Capacity Act* provides legal recognition of advance decisions to refuse medical treatment, including in the mental health jurisdiction (ss24-46). The LIV therefore supports Option B, to broaden and clarify the statutory right to make instructional medical directives to provide people with increased certainty that their instructions will be followed.

The LIV recommends legislation that sets out clear rules, formal requirements and the circumstances in which advance directives may and may not be made. New legislation should simplify the current distinction between refusing medical treatment under the *Medical Treatment Act* 1988 (Vic) (MT Act) and withholding consent to medical treatment under the G&A Act. In our May 2010 submission, we note that criteria to be taken into account by a person responsible making a decision to withhold consent to medical treatment (see s38 of the G&A Act) are different to those criteria to be taken into account by an agent or guardian refusing treatment (under s5B(2) of the MT Act).[12]

We agree that the current refusal of treatment certificate scheme should be replaced with a broader range of binding instructional directives about medical care. However. we recommend that the existing common law right to make advance directives be retained as a safety net for situations not contemplated by statute.

The LIV recognises the need for a national approach to advance medical directives to support self-determination in end-of-life matters and for mutual recognition of Advance Care Directives (ACD) across all states and territories. We refer the Commission to the Working Group of the Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers Advisory Council, which released a Consultation Draft *National Framework for Advance Care Directives* in 2010.[13]

[12] LIV May 2010 submission, p32.
[13] Working Group of the Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers Advisory Council, A National Framework for Advance Care Directives – Consultation Draft 2010.

Lifestyle Instructional Directives

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

The LIV does not support stand-alone legally binding instructional directives for non-medical lifestyle matters. Rather, donors should be encouraged to set out their wishes in a non-binding instructional directive when appointing a substitute decision-maker under an enduring power of attorney.

In our May 2010 submission, we recommended that people wishing to make enduring powers should have access to support to talk through hopes, expectations and wishes with their families, so that substitute decision-makers are properly informed about the donor's preferences. We note with interest the South Australia pilot program for supported decision-making agreements, which includes a facilitated process for making the agreement by the Supported Decision-Making Committee of the Public Advocate.[14] We recommend that the government provide funding for OPA, in partnership with community legal centres, to facilitate lifestyle planning discussions for people making enduring powers. Specialist clinic services could be established, in partnership with organisations such as Seniors Rights Victoria. OPA could also work with the LIV to develop specialist training for lawyers, to assist them undertake more detailed advance planning with their clients.

Hybrid Directives

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?**

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

The LIV supports option B, to introduce a statutory requirement that personally appointed decision-makers must consider instructional directives, but clarify that they are not bound by their terms. The proposed decision-making principles (under Question 89) should apply, so that a substitute decision-maker should balance the terms of the instructional directive with other considerations. Personally appointed decision-makers should be required to record their reasons and retain them in case of a future VCAT application seeking to revoke their appointment.

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

The same rules should apply for enduring guardians and enduring attorneys (financial).

[14] Consultation Paper, p123.

VCAT appointments

Criteria for appointments

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?**

The LIV agrees 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. This proposal is consistent with our May 2010 submission (see response to Question 6).

Understanding and assessing capacity

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?**

The LIV supports the Commission's suggestions for capacity principles and a legislative definition for incapacity. Options A and B are consistent with our May 2010 submission (see response to Question 7), in which we propose a formal two stage capacity assessment test, which can be explained as follows:

1. Does the person have a cognitive impairment, (that is "impairment of, or a disturbance in the functioning of, the mind or brain" or similar)?

Stage one requires evidence that establishes, on the balance of probabilities, that a person has a cognitive impairment. This is a question of fact and will require expert medical evidence.

2. Is the person, by reason of the cognitive impairment, 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 or her decision (whether by talking, using sign language or any other means)?

Stage two requires consideration of whether the cognitive impairment means that the person is unable to make a specific decision when they need to. A person with a cognitive impairment is presumed to have capacity to make the decision unless, by reason of the impairment, they are unable to do understand, retain or weigh information relevant to a decision, or communicate their decision. Stage two can only apply if all practical and appropriate support to help the person make the decision have failed. Assessment of stage two is a mixed question of fact and law.

We believe it is important for guardianship laws to set out a legislative test for incapacity, to provide clear and objective guidelines about when a substitute decision-maker should be appointed. A legislative test for incapacity, rather than a reliance on the common law, will provide greater accountability for those people undertaking capacity assessments, so that subjective judgements and opinions are insufficient to make a finding that a person lacks capacity.

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?**

The LIV supports no change (under Option C), so that there should continue to be a demonstrated need for a substitute decision maker before a guardian or administrator will be appointed. The requirement for a demonstrated need provides the context for capacity assessments, because the assessment requires consideration of whether the person lacks capacity at the time of the application to make a particular decision or type of decisions.

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?**

The LIV supports Option A (ii), to retain the distinction between guardianship and administration and to allow dual appointments for private administrators and guardians only.

In our May 2010 submission, we comment that a proposal for one decision-maker is initially attractive, because it might streamline decision-making, simplify terminology and allow VCAT to tailor the role of the substitute decision-maker according to a range of powers.

However, the LIV considers that having two types of substitute decision-makers provides checks and balances on decisions made and can reduce the possibility of conflict of interest where different people (or institutions) are appointed to different roles.

Our members report that in the context of powers of attorney, clients often choose to delegate different types of powers to different people, according to the skills and personalities of those people. This suggests that people prefer to be able to distinguish between financial, lifestyle and medical decisions and that they perceive that different people will approach the role of guardian, administrator or medical agent, in a different way. The option to appoint one person should, however, be retained where this is appropriate in a family or other private setting.

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?**

The LIV agrees with many of the Commission's suggestions to manage the overlap between the powers of guardians and administrators, which include

- clarifying in legislation the powers available to administrators and guardians so that VCAT can provide clear and specific orders;
- creating a legislative duty for guardians and administrators to consult with each other where they are both appointed;
- increased training for guardians and administrators; and
- providing legislative guidance about whether the decision of a guardian or administrator prevails in the event of a dispute.[15]

The LIV supports the Victorian Parliament Law Reform Committee recommendation that the decision of a representative with guardianship powers (whether personally appointed or appointed by VCAT) should prevail in the event of a dispute.[16]

We do not support the suggestion for a legislative requirement that the guardian and administrator establish a plan as to how issues will be managed, such as informal meetings, mediation or conciliation. Rather, we propose that administrators and guardians be required to undertake mediation before seeking the opinion of VCAT.

In addition, we suggest that the legislation should regulate what information should be shared between administrators and guardians and how confidentiality should be managed.

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?**

The Commission proposes that plenary orders should be abolished. In our May 2010 submission, the LIV recommended that plenary guardianship and administration orders should be retained as an order of last resort, but the powers, duties and responsibilities required of the substitute decision-maker should be specified in the G&A Act. The LIV therefore supports Option B, to retain plenary guardianship orders but provide a clearer explanation of the available decision-making powers. Option B should be implemented by listing both the available powers and restrictions on powers in the legislation. VCAT should be required to list the specific powers in the VCAT order which form the guardianship or administration order.

[15] Consultation Paper, p230.
[16] Victorian Parliament Law Reform Committee, Inquiry into Powers of Attorney Final Report, August 2010, recommendation 47.

Question 59 **If yes to Q 58, what decisions should a guardian be able and unable to make?**

Question 60 **If yes to Q 58, what decisions should an administrator be able and unable to make?**

In our May 2010 submission, we stated that substitute decision-makers should not be able to make decisions to marry, divorce or vote on behalf of the represented person, or in relation to special procedures. In addition, the LIV agrees that substitute decision-makers should not have powers to act in the following areas:

- personal relationships (including consent to sexual relationships)
- making a will
- the power to make substitute decisions about the children of represented persons
- decisions that detain a person for the benefit of others rather than to protect the represented person
- the powers vested in a represented person to act as a legal personal representative of deceased estates

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?**

The LIV supports retaining restrictions on gifts in s50A of the G&A Act and submits that this provision should be extended to limit gifting by attorneys.

The LIV supports the recommendation of the Victorian Parliament Law Reform Committee to bring regulation of gifts by attorneys into line with administrators, so that attorneys can make a gift of the principal's property, including to the attorney, only if the gift is reasonable in the circumstances, and the gift is to a relative or close friend of the principal and is of a seasonal nature or for a special event or the gift is a type of donation that the principal made when he or she had capacity or might reasonably be expected to make.[17]

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

The LIV agrees that the anti-ademption provisions in s53 of the G&A Act require clarification.

In a submission to the (then) Attorney-General Rob Hulls in 2008, the LIV recommended that the Instruments Act be amended to save testamentary gifts made by a donor of a power which would otherwise be adeemed by the actions of the appointed attorney. Under common law, there is some uncertainty and debate about the extent to which the sale of a specific gift by an attorney will be saved from ademption. Australian cases suggest that a specific gift will be saved only where the sale is made by an attorney in ignorance of the devise in the donor's will and without the knowledge of the donor.[18] In *Mulhall v Kelly*[19] the Supreme Court

[17] Ibid, recommendation 58.
[18] .*Re Viertel* [1997] 1 Qd R 110.

of Victoria held that the sale of an asset by an attorney did not adeem the testamentary gift in the circumstances of that case. However, the courts in the United Kingdom have not followed this approach and in *Banks v National Westminster Bank plc*,[20] held that the devise of a house was adeemed by its sale by an attorney and that the intention of the donor was irrelevant, as the actions of the donee of the power bind the donor pursuant to the law of agency.

The LIV supports the proposal by State Trustees to replace s53 with a provision to permit remedies to third-parties for the consequences of the substitute decision-maker's actions, and to make such remedies available in a variety of legal situations (such as intestacies and joint assets, not just in dealings with wills) where the dealings with a person's property by a substitute decision-maker (not just an administrator) lead to financial loss by a third party.

Further, the LIV acknowledges that it is difficult for administrators and attorneys to comply with anti-ademption provisions where they are unaware of the contents of the donor or represented person's will. Section 58G of the G&A Act only permits an administrator to open and read without order any paper or writing deposited with the administrator and purporting or alleged to be the will of the represented person. The LIV submits that substitute decision-makers should be able to apply to VCAT seeking details of any specific bequests in a will.

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

The LIV agrees that new legislation should enable State Trustees to be given the same powers as other administrators with respect to s51 of the G&A Act, which sets out the investment powers of administrators, and section 27 of the *Settled Land Act* 1958 (Vic), which requires State Trustees to apply for a court order to exercise the powers of a tenant for life who becomes a publicly represented person with State Trustees as their administrator.

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

The LIV notes that following the decision in *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86, administrators might be unwilling to bring legal proceedings on behalf of represented persons because they may be required to seek appointment as litigation guardian and be exposed to potential personal liability for costs.[21]

The LIV is concerned to ensure that people with a disability are able to pursue civil litigation to protect their rights and to ensure that their best interests are served. We propose that new guardianship legislation should enable administrators to pursue litigation on behalf of a represented person with indemnity from the represented person's assets where a court has made a declaration that litigation is the proper course of action. Legislation should clarify factors to be considered by a court hearing an application to approve litigation and should also clarify when costs may be awarded personally against an administrator or a guardian when acting as a litigation guardian. This would be consistent with s125T of the *Instruments Act* 1958 (Vic), under which an attorney has the protection of the court or tribunal if either has given an advice, direction or recommendation.

[19] [2006] VSC 407.
[20] [2006] WTLR 1693.
[21] *Supreme Court (General Civil Procedure) Rules* 2005, Order 15.

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?**

The LIV proposes that an administrator should be able to pursue court approved litigation on behalf of a represented person, with indemnity from the represented person's assets. New guardianship laws should clarify when an administrator may be personally liable for costs (such as, for example, where costs are incurred due to conduct of the litigation in breach of appropriate professional standards).

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?**

The LIV cautions against prescriptive guidance about how a substitute decision-maker should balance the wishes a person expresses at the time a decision is made, and any past wishes, views, beliefs and values the person has expressed. The LIV considers that each decision should be dealt with on a case by case basis and we note that the approach may vary depending on the nature of the relevant decision, knowledge of and nature of wishes expressed and the extent that decision-making capacity is impaired. It may also depend on whether the person has previously had capacity for those decisions.

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?**

In our May 2010 submission, the LIV suggested that the notion of best interests should be understood broadly, so that it encompasses risk minimisation as well as maximising life opportunities for people. In this way, the notion of "best interests" allows substitute decision-makers to take risks where they seek to improve a person's wellbeing or otherwise benefit them in some way. A substitute decision-maker should not follow the wishes of a person where they involve a threat to life or some other grave danger. We support the comments made by former Public Advocate Julian Gardiner that substitute decision-makers should take steps to ensure that in some circumstances risk is properly managed rather than completely avoided.[22]

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?**

The LIV supports a general set of decision-making principles for all types of substituted decisions and notes that these should be consistent with the general principles of new legislation.

[22] Consultation Paper, p324.

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?**

The LIV prefers Option B, so that substitute decision-makers are directed to act in a way that promotes the personal and social wellbeing of the person. The legislation should provide guidance about how substitute decision-makers should exercise their powers and duties in accordance with this principle. We agree that substituted judgement should be one guiding principle to consider. Option B is consistent with our May 2010 submission, in which we recommended that substitute decision-makers should be subject to overriding principles and that if the notion of "best interests" is retained, the concept should be better defined in the G&A Act, in plain English, to provide better guidance to guardians and administrators about how to exercise their duties and powers. In the alternative, we argued that if different language is proposed, this should be based on the concept of benefit to the person, or benefit to their wellbeing.

The LIV considers that substitute decision-makers must be held to account for decisions they make on behalf of another person and that some standard must be imposed which establishes overriding considerations and principles for the purpose of maintaining checks and balances in the exercise of their functions. The LIV therefore recommended in May 2010 that "best interests" (or alternative language) should include a requirement to consider:

a. the represented person's past and present wishes and feelings (and, in particular, any written advance directive or statement made by him or her when he or she had capacity),
b. the beliefs and values that would be likely to influence his or her decision if he or she had capacity, and
c. the other factors that he or she would be likely to consider if he or she were able to do so.[23]

Further, a guardian or administrator should have good (or "cogent") reasons for departing from a person's wishes, beliefs and values. The legislation should emphasise the duty of a substitute decision-maker to consult with the represented person and should also accommodate for a person with fluctuating capacity, recognising that the person may in future be able to make decisions for themselves in some or all areas of life.

The LIV recommends that the list on p378 of the Consultation Paper (at [17.131]), which sets out when a decision-maker will promote the personal and social wellbeing of a person, should be recast so that "a decision maker *must* act to protect the personal and social wellbeing of a person, by making decisions that" (along the lines of [17.135]), to clarify that decision-makers are required to undertake those things listed, to the extent possible (including, for example, consulting with 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?**

The LIV agrees that new guardianship laws should specifically require substitute decision-makers to act honestly and respond appropriately to conflicts of interest. We noted in our May 2010 submission that many abuses of power might occur in good faith because the substitute decision-maker does not understand the limits of his or her power or how to

[23] See UK *Mental Capacity Act* 2005, s4(6).

exercise that power in the best interests of the represented person. In our experience, the need to avoid conflict of interest is not well understood in the community and is problematic in families where past conduct has included, for example, loan arrangements with a relative where that arrangement was entered into before the person lost capacity. In this situation, an independent administrator might come to the conclusion that the loan is not in the best interests of the person.

If new guardianship laws clearly set out the powers and responsibilities of substitute decision-makers, as proposed by the Commission, conflicts of interest are less likely to occur. The LIV recommends that specific legislative requirements relating to conflict of interest must be accompanied with community education.

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?**

The LIV supports the Commission's proposal that new guardianship legislation should detail a substitute decision maker's authority to access confidential and private information. In our view, a 'need to know basis' should include information that is necessary for a decision and information that is relevant to whether an appointment has been activated. For example, an attorney might need access to medical reports to determine whether a donor has lost capacity. VCAT should determine whether a substitute decision-maker has a "need to know" in the event that a third party refuses to provide access to confidential or private information.

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?**

The LIV agrees with the Commission that substitute decision makers should be required to maintain the confidentiality of information they obtain about a represented person unless it is reasonably necessary to disclose that information to a third person in order to perform the functions of a substitute decision-maker, or disclosure is otherwise required or permitted by law.

The LIV supports the adoption of a provision similar to s101 of the *Guardianship Act* 1988 (NSW), which establishes an offence punishable by a fine of 10 penalty units or imprisonment for 12 months, or both, if a person disclose any information obtained in connection with the administration or execution of [the *Guardianship Act* 1988] unless the disclosure is made:

> (a) with the consent of the person from whom the information was obtained,
>
> (b) in connection with the administration or execution of this Act,
>
> (c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings,

(d) in accordance with a requirement imposed under the *Ombudsman Act* 1974 (NSW), or

(e) with other lawful excuse.

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?**

The LIV supports periodic reporting requirements for private guardians and attorneys. We are concerned to ensure, however, that reporting is not overly burdensome and does not deter people from accepting appointment as attorney or private guardian.

It is unclear whether State Trustees will have capacity to examine attorney accounts in addition to administrator accounts. We suggest that periodic financial reports should be subject to random audit, rather than full examination in every case.

We note that a requirement for attorneys to lodge reports relies on compulsory registration to be effective.

Further, we note OPA's comments the private guardian reports are unlikely to be instructive about the quality of guardianship decisions made.[24] We query whether VCAT is the appropriate body to scrutinise guardian reports and whether they in fact have capacity to do this.

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

The LIV does not support the proposal for substitute decision-makers to provide periodic declarations of compliance with their responsibilities, as we do not believe these will be effective to identify potential abuse.

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?**

The LIV does not support the proposal that substitute decision-makers should declare an oath or sign a statement agreeing to comply with their responsibilities before they undertake their roles. Similar to Question 100 above, we do not believe these will be effective to identify potential abuse because the requirement to declare an oath or sign a statement might become a formality with little substantive effect.

[24] Above n1, p39.

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

The LIV supports random audits of periodic reports lodged by substitute decision-makers, as suggested in response to Question 99 above. However, random audits should be limited to administrators and financial attorneys and should not be undertaken for medical and guardianship matters. OPA should investigate reports of abuse in guardianship and medical contexts.

Question 104 **Who should carry out these random audits?**

In our view, it would be appropriate for State Trustees to carry out random audits of a sample of periodic reports lodged by financial substitute decision-makers.

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

The LIV supports Option F, that VCAT be given power to order administrators and financial attorneys to repay funds that have been misused. In our May 2010 submission, we note the difficulty at present in holding someone to account for abuse because VCAT does not have power to require someone to return property removed from the represented person. This will normally require the new administrator to initiate further court action to retrieve property (at p28).

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

The LIV supports more specific penalties for substitute decision-makers who misuse or abuse their powers.

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

In our submission to the Department of Justice on the Government Response to the Law Reform Committee – Powers of Attorney Report, we support the introduction of offences for:

- procuring a power of attorney by threat or deception;
- not acting honestly and with reasonable diligence to protect the principal's interests, having regard to the principal's expressed wishes; and
- knowingly exercising powers under a revoked power of attorney.[25]

We would support similar offences for guardianship and administration, adapted as appropriate.

The LIV does not support the creation of an offence for failing to keep accurate records. The LIV considers that failing to keep accurate records can be differentiated from the above listed offences, which include elements of intention and dishonesty. In contrast, failing to keep accurate records may occur through inadvertence or negligence and is of a lesser degree of seriousness. We suggest that VCAT have the power to order a representative to

[25] LIV submission to Department of Justice, Government Response to Law Reform Committee – Powers of Attorney Report , 13 December 2010.

provide accurate records and that failure to comply with the order could be grounds for revocation of the enduring power of attorney.

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?**

The LIV has not had the opportunity to full consult on this proposal. As a preliminary view, we support the Commission's proposal to adopt the NSW approach, to allow merits review of decisions made by the Public Advocate as a guardian and by State Trustees as an administrator. Reviews should be available only after the internal complaints mechanisms of the Public Advocate and State Trustees had been exhausted. We agree with the Commission that this option would provide increased accountability for public bodies.

In addition, we note the LIV's recommendation for amendment of the G&A Act to allow a represented or other interested person to seek an advisory opinion on an individual decision of a guardian or administrator. In a submission to the (then) Attorney General in 2007, the LIV proposed that VCAT could provide for the right of a disappointed or other interested person to seek, in certain circumstances, an opinion on the decision of an administrator or guardian.[26] The LIV will consult further about whether members prefer the Commission's alternative option, for decisions of private guardians and administrators to be subject to merits review.

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

The LIV agrees that applications for review of decisions should be limited to the represented person and people with a special interest in the affairs of the represented person.

Question 113 **What should constitute a 'reviewable decision'?**

In the event that merits review is limited to decisions of OPA and State Trustees, a reviewable decision should be any decision made by State Trustees of OPA as administrator or guardian in connection with the exercise of their powers under guardianship legislation and which has been subject to internal review.

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?**

As noted by the Commission, VCAT already has power to summarily dismiss or strike out proceedings that are frivolous, vexatious, misconceived or lacking in substance, or are otherwise an abuse of process (*Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s75).

The LIV has previously recommended that it might also be appropriate for the applicant to bear the costs of a merits review application, including the costs of the other parties involved, unless VCAT found that the relevant administrator or guardian has been negligent or dilatory. However, the LIV also recognises that there may be some instances where people are disadvantaged financially and it would be appropriate to waive costs.

[26] LIV submission to The Honourable Rob Hulls MP, *Guardianship List* (13 September 2007).

The Victorian Parliament Law Reform Committee published its final report of its *Inquiry into Vexatious Litigants* in December 2008. We refer the Commission to its recommendations, a number of which are directed to VCAT, as well as the article "Vexatious Litigant Law Reform" by Ian Freckleton.[27]

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

No, merits reviews of guardians' and administrators' decisions should not be treated differently.

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

VCAT seems the logical forum for merits review of decisions made by guardians and administrators. However, some members have expressed the view that it will be difficult for VCAT members to conduct merits review of decisions by State Trustees because of the tribunal's practice to appoint State Trustees as administrator of first resort. In the alternative, some members have suggested review by an Associate Justice at the Supreme Court. We are seeking further feedback from members about who should conduct merits reviews, in the event that they are implemented for decisions of public guardians and administrators.

VCAT

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?**

The LIV supports both Options B and C, to amend s62 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) to give a represented person or a proposed represented person a right to legal representation in all Guardianship List matters and to create a statutory power for VCAT to order that a person be provided with representation when VCAT believes this is necessary. Funding must be provided to ensure that people are able to access their right to legal advice where they do not have the means to pay.

The LIV considers that independent representation is highly desirable in Guardianship List matters to ensure that the wishes of the person with a disability are adequately conveyed to VCAT. This is particularly important in matters where the person with a disability has communication difficulties or cannot travel to the hearing because of her or his health. VCAT should not assume that the interests of family members, who might be represented, are the same as the interests of the proposed represented person. In our experience, in many cases the interests of the proposed represented person will not be aligned with other family members.

In our submission to the President's Review of VCAT in 2009, we noted that at present, limited representation and advice is available through the duty lawyer service operated by Victoria Legal Aid, and procedural advice is available from the Office of the Public Advocate

[27] I Freckleton, "Vexatious Litigant Law Reform" (2009) 16 *Journal of Medicine and Law*, 721.

VCAT Duty Officer. LIV members report however that these services are inadequately resourced and unable to cope with the number of hearings listed at VCAT.

In matters where there is a divergence of views between family members and other interested parties about the best interests of the person with a disability, it will be particularly important for there to be independent representation of the person with a disability. The LIV urges the government to provide greater funding for advice and representation in the Guardianship List, for both legal and non-legal advocacy services.

In addition, we emphasise the importance of providing merit tested legal representation to persons with a disability who wish to challenge guardianship and administration orders. The Joint Standing Committee on Treaties (JSCOT) identified this in its report to Parliament as an area where the progressively realisable obligations under the Disabilities Convention can be enhanced.[28]

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

The LIV does not support the Commission's proposal for tribunal-made supported and co-decision-making orders. Rather, VCAT should explore less restrictive options through mediation with the proposed represented person, family members and other interested persons where appropriate, prior to determination of a guardianship or administration application. Mediation will be appropriate only where the proposed represented person has sufficient ability to participate in discussions and make their wishes known. Guidelines could be developed to determine how mediation or other facilitated communication should maximise participation by a person with a cognitive disability.

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

The LIV will consult further on whether new guardianship legislation should specify a maximum period for all guardianship and administration orders. Some members are concerned about the practical effect of limiting all orders to three years, particularly in cases where a represented person is unlikely to regain capacity. It might be preferable to improve reassessment processes to ensure that a substantive review is undertaken of the continuing need for an order, including a review of the performance of the guardian and/or administrator.

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?**

The LIV is concerned to ensure that reassessment of a guardianship or administration order is a substantive review of the continuing need for the order. It is important to ensure natural justice for the represented person and we query whether it would be fair to seek the consent of the represented person to undertake the reassessment in the absence of the parties, particularly in light of their impaired decision-making capacity. Our preference would be for a

[28] Joint Standing Committee on Treaties, Report 95: Review into treaties tabled on 4 June, 17 June, 25 June and 26 August 2008, Ch2, 12

hearing to be held for all reassessments, which the represented person should be encouraged to attend and the guardian or administrator should be required to attend. VCAT should assess the continuing need for the order, seeking new medical evidence where appropriate and should ensure that the guardian or administrator has complied with reporting and other requirements.

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?**

Question 142 is answered together below with Question 143.

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

Before answering Questions 142 and 143, it is necessary to address whether VCAT should disclose confidential information, and to whom.

The LIV agrees that it is important to strike a balance between ensuring transparency of VCAT decision making, and competing concerns about the protection of information provided in confidence.

In our May 2010 submission, the LIV suggested that procedural fairness is a primary consideration when considering the balance between privacy and transparency. Procedural fairness, protected under s24 of the Charter, is important so that people know what is being said about them at VCAT and so they have the chance to put their case. We suggested that the default position should be protection of procedural fairness and that where a party (other than the proposed represented person) seeks to provide information in confidence, the onus should be on the party seeking to withhold information.

However, where the confidential information relates to the proposed represented person, the default position should be that VCAT is required to treat all information relating to the represented person as *prima facie* confidential. The proposed represented person may not be capable of arguing that the information should be kept confidential, and VCAT should not assume that lawyers acting for other parties are necessarily acting in the best interests of the proposed represented person. Therefore, at a VCAT hearing, VCAT should only permit disclosure of information relating to a represented person where disclosure is essential to the decision-making process. For example, a neuropsychological report provided to VCAT on the issue of capacity often contains highly sensitive information about the proposed represented person that the proposed represented person would not want disclosed to other parties. The proposed represented person has a right to access his or her own information, but it is often inappropriate to disclose that personal information to others. The neuropsychologist has a duty to keep information about the represented person confidential (for example, under section 141 of the *Health Services Act 1988* (Vic)), and VCAT should also be required to keep the information confidential unless it reasonably considers that disclosure is essential to the decision-making process.

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?**

The LIV supports Option B (at [21.169] that VCAT files in Guardianship List matters should be closed to the public unless VCAT determines otherwise. The LIV agrees with paragraph 21.170 that providing sensitive information to other parties may be to the detriment of the proposed represented person. Accordingly, the LIV suggests that VCAT should be required to keep confidential all sensitive information relating to the proposed represented person, unless VCAT determines otherwise in the best interests of the proposed represented person.

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

The LIV does not generally support an extension of the 28 day limit in which an application must be made for a rehearing because of the need for finality. Rather, we suggest that VCAT be required to inform parties of the right to a rehearing (in particular, where the proposed represented person does not attend the hearing and an order is made in their absence).

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

The LIV agrees that VCAT should be required to inform parties of the right to seek a rehearing (see above Question 145).

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

The LIV agrees that a represented person should be requested to opt out of a reassessment hearing.

In the LIV's submission to the President's Review of VCAT, the LIV noted its concern that VCAT is not providing a fair hearing in the case of reassessments. Our concerns arise due to the number of hearings listed on each day and because of the requirement for interested parties to provide reasons for wanting a hearing.

We understand that most reassessment hearings are considered on the papers and a formal hearing is not held. We are concerned by reports from our members that reassessments are regularly conducted on the basis of old medical reports and that updated reports are rarely requested by VCAT, in the absence of any request by interested parties. We consider that this practice does not ensure a fair hearing of reassessment of guardianship and administration orders and, in practice, it places a heavier burden on represented persons and interested parties to show cause for the revocation of an order.

In our submission to the President's Review of VCAT, we noted deep concern about the current practice of VCAT to require interested parties to indicate reasons for requesting a hearing of a reassessment order. We understand that current practice is to write to interested parties when reassessment is due under s61 of the G&A Act, asking them to return a "reassessment hearing request" form. The form requires interested parties to tick if they request a hearing and indicate their reasons for wanting a hearing.

The LIV is extremely concerned about the requirement to provide reasons for requesting a reassessment hearing. In our view this practice could in effect reverse the onus of proof, so that guardianship and administration orders are considered to continue to be necessary until proven otherwise. We are concerned that this removes the safeguard effect of reassessment, which aims to ensure that substitute decision-making is still necessary.

Ideally, the LIV advocates for a hearing to be held as a matter of principle in reassessment matters.

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

The LIV does not see a need for an unscheduled reassessment order, in the absence of new evidence about whether the person continues to meet the criteria for an order.

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?**

The LIV would welcome reforms to allow guardians and administrators to seek a VCAT order to enforce decisions they make which a third party refuses to accept and would be pleased to participate in further consultations about this proposal.

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

In our submission to the President's Review of VCAT, the LIV raised concerns that guardianship and administration orders are routinely being made without the person with a disability being present. The Consultation Paper notes that there is no data available about levels of attendance (at p413). In past meetings with the LIV VCAT Working Group, former Deputy President Billings acknowledged the low attendance rate of persons with a disability and that this is an issue for VCAT.[29]

The LIV considers that VCAT should be primarily responsible for attendance of persons with a disability and that it should take a more proactive approach to encouraging persons with a disability to attend hearings. We recommended to the President's Review of VCAT that a Practice Note be developed to assist VCAT members to use all reasonable endeavours to ensure that a person with a disability is present for a hearing, addressing the following issues:

(a) Adequate notice to parties to the proceeding

A person with a disability is a party to the proceedings[30] and as such is entitled to notice of the hearing by VCAT.[31] We submit that the adequacy of notice of hearing will affect whether a person with a disability attends a hearing.

LIV members report that procedures to notify parties to the proceedings are currently inadequate. Members note issues including: notice of the hearing not physically

[29] Between 2005 and 2006, the LIV VCAT Working Group met with VCAT Deputy President Billings and the former VCAT President, Justice Morris, to discuss concerns and suggestions about the operation of the Guardianship List, in relation to the G&A Act.
[30] Guardianship Act, s19(2)(a).
[31] VCAT Act, s99.

reaching the person with a disability (who might be in a nursing home, residential service or hospital) with no process to follow up on this; and a lack of procedures to ensure that the notice is adequately explained to persons with a diminished capacity, to ensure that the person understands to the greatest extent possible the reason for the hearing and the implications of an order being made.

We submit that VCAT, and not the applicant, should be primarily responsible for taking measures to ensure that notice is received by the person with a disability and importantly, that measures are taken to explain the implications of the notice and the hearing.

The LIV suggests that hearing officers at VCAT could be responsible for contacting persons with a disability to confirm they have received notice of the hearing, and to explain the content of the notice. We recognise that this proposal will require additional resources and, particularly, that additional training will be required.

The LIV also emphasises the importance of ensuring that close relatives and other relevant interested persons are informed of developments in the matter, including legal representatives who are listed as interested parties, so they can assist the person with a disability to attend the hearing. We understand that administrative problems are still occurring which mean that interested parties do not always receive notice of hearings, orders or reassessment hearings.

(b) Independent representation of the person with a disability

The LIV considers that independent representation is desirable in Guardianship List matters, in addition to their attendance, to ensure that the wishes of the person with a disability are adequately conveyed to VCAT. The need for legal representation is discussed above in response to Question 137.

(c) Adjournment and temporary orders

Where a person with a disability does not attend a hearing and VCAT is not satisfied that all reasonable endeavours have been made to contact the person and assist them to attend, the LIV submits that the Member hearing the application should adjourn the matter.

In any case, we submit that only temporary orders should be made (under s33 or s60 of the Guardianship Act) until VCAT is satisfied that the person with a disability has been afforded a reasonable opportunity to attend the hearing. Section 33(3) provides that "the Tribunal must hold a hearing to determine whether a guardianship order should be made under s22 as soon as practicable after the making of a temporary order but within 42 days of making that order".

We consider that this approach is preferable to reliance on re-hearings under Part 6, Div 1 of the Guardianship Act, because it shifts the onus to VCAT to hear the matter in full rather than depending on a party to apply for a rehearing, while allowing further time to use all reasonable endeavours to assist the person with a disability to attend.

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?**

The options put forward by the Commission are:

Option A: No change;

Option B: Fusion of guardianship and mental health law; and

Option C: Limited use of guardians for non-consensual psychiatric treatment.

In our May 2010 submission, the LIV advocated that the government should undertake a review of all laws relating to substitute decision-making and we urged the government to engage in debate about the advantages and disadvantages of generic capacity legislation. In the Consultation Paper, the Commission has explored some of the arguments for and against fusion of guardianship and mental health law. However, in the absence of a proposed model for fusion of guardianship and mental health law, the LIV is unable to provide detailed comment on the merits of this proposal.

Under the Commission's preferred option (Option C), the Commission is proposing more overlap between mental health and guardianship laws. The Commission's proposal would allow enduring guardians to consent to a person's psychiatric treatment, and to their accommodation, in those situations where the person does not have the capacity to consent themselves.

In our May 2010 submission, the LIV confined our response to whether guardians should be able to consent to psychiatric treatment to those situations where a person is unable to consent and is not on an involuntary treatment order. We have not therefore previously addressed the question whether patients should be able to elect, when they have capacity, for their guardian to make treatment decisions for them, rather than the authorised psychiatrists. We have noted that we are not convinced that guardianship is the best mechanism to ensure that people receive treatment that is properly authorised and best meets their needs.

We note that the Commission's proposal in Option C is confined to personally appointed enduring guardians, which excludes tribunal appointed guardians. The LIV is concerned that this would create a two tier system for those with and without enduring guardians. This might leave people who have no family or trusted close friends at a disadvantage, when they are already one of the most vulnerable consumer groups.

Further, we are concerned that enduring guardians are unlikely to have expertise in psychiatric medication. We consider there to be a difference between psychiatric treatment and non-psychiatric medical treatment and that it will be difficult for lay people with no or limited experience to make decisions in this area. It seems likely that enduring guardians would rely heavily on medical opinion, so that the benefit of an external substitute decision-maker might be lost. In addition, we are concerned that family members might be inclined to favour compulsory treatment against the wishes of a represented person, without the external scrutiny and accountability that currently exists in relation to the authorised

psychiatrist (including the immediate right to appeal against an involuntary treatment order, automatic Mental Health Review Board reviews and clinical oversight by the Chief Psychiatrist). We note that under the proposed changes to mental health law in Victoria in the Mental Health Bill Exposure Draft 2010, a number of additional oversight mechanisms are proposed including a Mental Health Commissioner. Members have expressed the view that an objective decision-maker, subject to accountability and oversight, is, on balance, preferable to an enduring guardian. Members are also concerned that reliance on enduring guardians may lead to too many urgent hearings where a guardian is unwilling to make a decision.

We note that a number of further issues need to be addressed in the consideration of limited use of guardians, including whether a person would be treated differently with or without a guardian; whether this would result in a different standard of care and treatment; whether applications could be made to VCAT to have guardianship revoked and what would happen to people receiving compulsory treatment under the Mental Health Act.

The LIV submits that both fusion (Options B) and limited use of guardians (Option C) proposals are likely to introduce unnecessary complexity to the system for authorising compulsory psychiatric treatment and detention, for consumers, service providers and clinicians. On balance, we believe that people with a mental illness have more rights under the Mental Health Act than they would under guardianship and on this basis, without more detailed proposals, we support no change.