Guardianship Review – supplementary submission on informal assistance (chapter 15)

To: Victorian Law Reform Commission

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Introduction

The Law Institute of Victoria (LIV) is pleased to make this supplementary submission to the Victorian Law Reform Commission (the Commission) in relation to Chapter 15 of the *Guardianship* Consultation Paper (the Consultation Paper). This supplementary submission should be read in addition to our previous submissions of 20 May 2010 and 8 June 2011.

We provide responses in the following to questions 74 – 78 in the Consultation Paper.

Question 74

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

The LIV believes there is a need for better regulation in Victoria to protect individuals who do not have the capacity to make their own decisions about admission to, and continuing residence in, certain residential care facilities (including aged care facilities), where they do not actively resist these living arrangements.

The Consultation paper notes that many people with dementia in Victoria are placed in hospitals or nursing homes and are unable to consent to these arrangements (at p279). Usually, admission and ongoing living arrangements are informally authorised by family members and carers. We understand that this type of 'informal authorisation' also occurs for other people with decision-making disabilities, because guardianship orders will be sought only if they are 'necessary' and as a last resort. In our view, growing awareness about the extent of elder abuse in our community[1] and reports about the inappropriate admission of young people with disabilities into aged care facilities[2] show that more formal oversight is necessary to better protect people who do not have the capacity to make their own decisions about living arrangements.

The European Court of Human Rights decision of *HL v United Kingdom*[3] highlights that, depending on the circumstances of the case, admission to hospital or another residential care facility and subsequent detention may constitute a deprivation of liberty and violation of the right to liberty and security of person (as protected in Article 5(1) of the *European Convention on Human Rights* (the European Convention) and under s21 of the *Charter of Human Rights and Responsibilities* 2006 (Vic) (the Charter). Under the European Convention and the Charter, a lawful deprivation of liberty must be according to a procedure prescribed by law.

The LIV is mindful, like the Commission, that any procedure prescribed by law must balance protection needs with practicability. We have considered the Deprivation of Liberty Safeguards, developed in the UK as a response to *UK v United Kingdom*, and agree with the Commission that they appear to be cumbersome and resource intensive. We do not therefore support their adoption in Victoria.

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[1] See eg Office of Senior Victorians, Victorian Government Elder Abuse Prevention Strategic Implementation Plan 2006–09, (August 2007) available at http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0009/38538/0SV_EAP_strategic_implementation_plan-FinalPDF1.pdf.

[2] See ag Office of the Public Advocate submission to the Senate Inquiry into Aged Care, (30 July 2004(, available at http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2004/Sub_Senate_Inquiry_into_Aged_Care.pdf.

[3] (2005) 40 EHRR 32.

Further, we do not propose that guardianship mechanisms be extended to authorise all admission and detention decisions where someone is unable to provide consent, as in our view, this would run contrary to the 'least restrictive' and enabling principles of guardianship legislation.

A new oversight procedure should focus on protecting the rights of and promoting the views of the person who lacks decision-making capacity, in accordance with article 12(4) of the United Nations *Convention on the Rights of Persons with Disabilities* (the Convention), as well as resolving the issue of legal authority for admission. Article 12(4) requires that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards that:

- prevent abuse;
- respect the rights, will and preferences of the person;
- are free of conflict of interest and undue influence;
- are proportional and tailored to the person's circumstances;
- apply for the shortest time possible;
- are subject to regular review by a competent, independent and impartial authority or judicial body, and
- are proportional to the degree to which such measures affect the person's rights and interests.

The LIV generally agrees with OPA (in its submission to the Commission of May 2011)[4] that the Commission should consider further whether a less burdensome form of deprivation of liberty standards could be implemented in Victoria, in preference to expanding the automatic appointments system.

The LIV suggests that a new oversight procedure for admission into care requires a cooperative response from both federal and state governments, given that aged care is subject to regulation by the federal government. The Consultation Paper does not consider, for example, any potential role for Aged Care Assessment Teams in accommodation decision-making and we note that significant reforms to aged care admission are proposed in the Productivity Commission's Final Report *Caring for Older Australians* (in particular, in relation to assessment of service entitlements) that could encompass 'capacity' assessments and oversight mechanisms for 'informal' decision-making by families and carers.[5] We therefore recommend that the Commission consider further how existing federal infrastructure could be adapted to meet the gap that has been identified following the case of *HL v United Kingdom*, in addition to state-based solutions.

Any scheme introduced should be monitored closely to determine whether it is meeting the objectives of Article 12(4) and its effectiveness at providing oversight and protection.

[44] Office of the Public Advocate submission to the Victorian Law Reform Commission in Response to the Guardianship Consultation Paper (May 2010), available at http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2011/OPA_submission_to_VLRC_052011.pdf.

[5] See Chapter 9, Productivity Commission, *Caring for Older Australians*

Question 75

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

The LIV does not favour Option E, that new guardianship legislation should extend the automatic appointments scheme to permit the 'person responsible' to authorise living arrangements in a residential care facility in these circumstances, even if additional safeguards are introduced.

The 'person responsible' provisions might achieve some of the 'appropriate and effective safeguards' set out in article 12 (4) of the Convention. For example, the person responsible might prevent abuse and might be in the best position to know and respect the rights, will and preferences of the person. However, the person responsible will not necessarily achieve these objectives. The person responsible is unlikely to be completely free of a conflict of interest and might have undue influence over the person with a disability. We are concerned that an automatic appointments system might even 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. Further, an automatic appointments scheme is not tailored to the person's circumstances because it prioritises certain family relationships, which might lead to an unsuitable or undesirable appointment, where other more suitable or desirable options exist.

The LIV is concerned generally about the lack of scrutiny of the actions of the 'person responsible' if the automatic appointments scheme is expanded beyond medical settings. The Consultation Paper notes that in a health care context, medical professional obligations impose safeguards on decision-making by persons responsible, because of ethical standards relating to treatments that might be offered and other provisions, such as those relating to informed consent. In contrast, in care settings, other pressures such as financial difficulties or bed shortages may put pressure on family members to make decisions about living arrangements that are not based on the best interests of the person. Accommodation decisions are also more likely to involve a conflict of interest for family members or carers than health care decisions, for example, to make to decisions to remove a person from the family home so that the person responsible themselves can live there or to prevent the sale of the family home rather than face a sale to pay for care and accommodation of an older family member.

We note that the Commission proposes a number of additional safeguards that aim to address the lack of scrutiny that would occur if the automatic appointments scheme was expanded to authorise living arrangements (at p283). The proposed safeguards appear to aim to:

1. limit the scope of the decision-making power (to certain types of facilities);
2. ensure the integrity of the decision (by setting out criteria for making the decision; requiring evidence to justify the decision; and imposing penalties for abuse); and
3. develop some form of monitoring through the Office of the Public Advocate.

The LIV believes that a number of the additional safeguards proposed by the Commission are problematic and might not be appropriate and effective, as required by article 12 (4) of the Convention.

Firstly, the proposed safeguards do not, in our view, adequately address the risk of conflict of interest and undue influence. We are concerned, for example, that the proposal for a person responsible to sign a declaration confirming that they have considered a compulsory list of matters might become a formality with little practical effect. This seems more likely if a person responsible is required to complete a statutory declaration at the time of admission to an aged care facility, when there is usually a high volume of paperwork to complete. It is unclear what penalty would be applied, if any, if a person responsible does not complete a declaration, so that practical issues of enforcement might arise.

Secondly, it is difficult to see how monitoring by the Office of the Public Advocate (OPA) would meet the requirement for regular review by a competent, independent and impartial authority or judicial body. We query whether the OPA would have capacity to undertake random audits or annual review of the ongoing need for restrictive intervention and further, whether OPA has jurisdiction to monitor accommodation arrangements for people who are living in aged care facilities, which are regulated under the *Aged Care Act* 1997 (Cth). We recommend that the Commission further investigate whether the Office of the Senior Practitioner might be in a better position to undertake random audits or annual review of the ongoing need for restrictive interventions for people with a disability, consistent with their oversight functions under the *Disability Act* 2006 (Vic).

Without more robust safeguards, an expansion of the automatic appointment scheme to authorisation of living arrangements is likely to address only the absence of legal authority under current informal arrangements, and is insufficient to address the protection needs of people who lack decision-making capacity in relation to living arrangements.

Question 76

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

The LIV favours a simpler version of the Deprivation of Liberty Standards, rather than an expansion of the person responsible provision. However, in the event that the personal appointment scheme is expanded, the LIV considers that further safeguards are needed than those proposed by the Commission.

The proposed medical certification 'that there is a risk of harm that cannot be ameliorated without secure accommodation and that the person cannot consent to this form of accommodation' at [15.96] should take the form of a statutory declaration. There should be guidance to practitioners as to matters they should consider. In the context of aged care, certification should be built into the Aged Care Assessment Team process and should not be imposed as an additional state-based requirement.

We note that oversight by an impartial authority or judicial body is not readily addressed without committing significant resources. In the absence of research as to the misplacement of people in facilities, it is difficult to provide a cost – benefit analysis. The LIV suggests that there be a staged approach to this issue, whereby initial resources are committed to undertake a scoping of the need for independent oversight. As an interim measure, OPA could undertake a monitoring role with powers to investigate any abuses for the purpose of seeking guardianship or administration. We understand that this would require a substantial increase in the resources of OPA to perform this role.

Question 77

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

If the automatic appointment scheme is expanded, there would need to be some change to the hierarchy so that people appointed as enduring guardians or guardians with accommodation authority had priority over others.

Question 78

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

If the personal appointment scheme is expanded, the LIV accepts the Commission's suggestion that facilities governed by other legislation, such as the *Mental Health Act* 1986 (Vic) or the *Disability Act* 2006 (Vic), should not fall within this scheme.

As the rights of people with disabilities are the responsibility of the state both in the private and public sector, there should be no limitation of the scheme to those facilities that receive some form of government funding.

As recommended above, the Commission should investigate further how any proposed scheme might interact with the *Aged Care Act* 1997 (Cth). It may be worthwhile, for example, to review Aged Care Standards to determine if they can be amended to improve admission processes for people who lack capacity in aged care facilities to minimise any abuse.