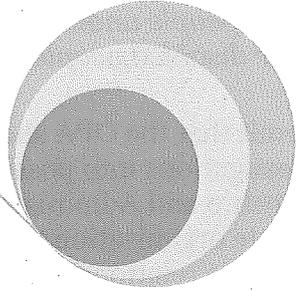
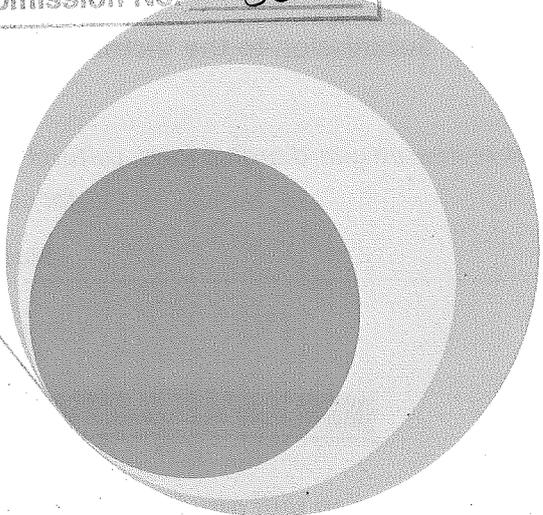


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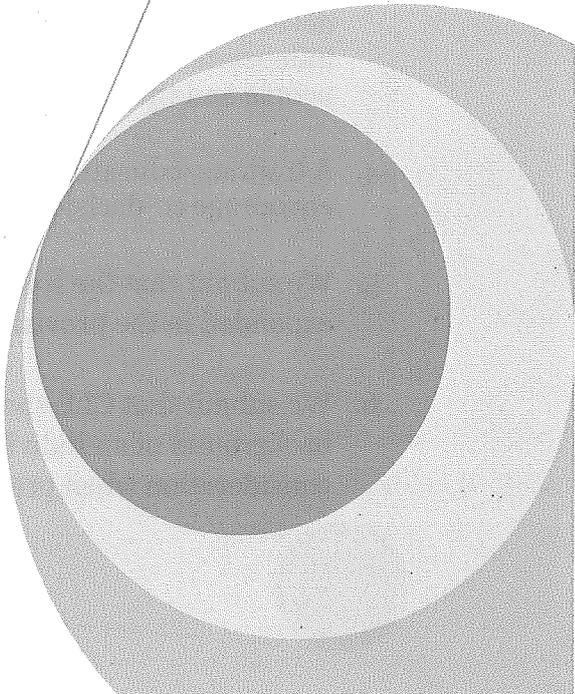


Submission to the Victorian Law Reform Commission: Access to legal justice for Disabled people

A review on guardianship laws, cultural & educational issues faced by the disabled and a push for co-decision-making

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Student submission on Behalf of Victoria University
Law school
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This submission will aim to review the current Guardianship and Administration laws in Victoria, focusing on the rights of disabled people when their basic human rights are threatened. Improving the availability of community legal training, with special regard to Victoria's cultural diversity is an important step in promoting Access to the justice system for people under guardianship. Our goal is to promote a greater level of participation for disabled people in making decisions in their lives.

1. We submit that the OPA should be given greater authority to conduct inspections and investigations into possible cases of neglect and exploitation under s 15 of the Guardianship and Administration Act 1986. In the event that the OPA is not the appropriate organisation to run routine checks into the progress of a Guardianship relationship, we submit that the Victorian Government should form an appropriate statutory body that functions as a Guardian 'watchdog' that aims to defend the liberties of vulnerable disabled people.
2. The laws governing appointment of a guardian should remain flexible and broad, ensuring that the election of a guardian remains open.
3. We agree with the sentiments of the Guardianship and Administration Act 1986 in relation to the goal of promoting a greater level of autonomy for disabled people in their own lives. We submit that the Victorian Government should play a greater role in implementing educational programs that will facilitate the development of the ability and capacity of persons with a disability to act independently. The recent move toward co-decision making between disabled people and their guardians is a positive initiative and should be encouraged.
4. A training/education initiative should be implemented for disabled people to encourage co-decision making.
5. We submit that the role of the Public Advocate should be better resourced and expanded in the provision of Community Legal Education (CLE).
6. We submit that CLE should be more culturally accessible. The cultural background of an individual seeking access to the legal system, is an important consideration when providing community legal education (CLE) in the area of

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guardianship law to the general public. The goal is deliver CLE about guardianship laws towards minors, the elderly, indigenous people and people of cultural and linguistically diverse (CALD) communities.

7. Lastly we submit that disabled people who have a guardian defined under the *Guardianship and Administration Act 1986* (Vic), should be provided greater guidance and information about important legal decisions in their lifetime such as making a will.



1. OPA should be given greater authority to conduct inspections and investigations

It would be erroneous to assume that the current guardianship law is flawless on the basis that there have been few complaints from the disabled and mentally ill. Incapable of managing their own affairs, many disabled people are also incapable of lodging formal complaints against their guardians in cases where they have been exploited; therefore the problem remains largely hidden from public view.

The OPA has been given statutory authority to monitor and administer “the protection of persons with a disability from abuse and exploitation and the protection of their rights.”¹ Colleen Pearce has noted in a recent speech that “balancing the need to protect people who are vulnerable to exploitation, abuse and neglect with their right to autonomy is a central ethical question for guardianship.”² In other words, how do we deal with the dichotomy of having “freedom” as a goal, whilst placing the liberty of disabled people in the hands of their entrusted guardians? In an ideal world all guardians would respect their dependants, and even allow them to participate in decision-making. Carney and Tate described this paradox as “the Alice and Wonderland world” and pointed out that ironically “the main task of guardianship forums is to strip

¹ The *Guardianship and Administration Act 1986*, Section 15

² Colleen Pearce, “Strengths and tensions in the current guardianship system,” (Speech at the OPA 25th Anniversary Symposium), Friday 29th July 2011 .

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citizens of rights, entrust proxies with the exercise of legal decision- making, and sometimes authorise incarceration through physical and chemical means.”³

In order to counter this contradiction, it is suggested that the OPA take on a greater role in uncovering infringements to the liberty of people under guardianship through an organised inspection program that investigates the livelihood of people living under guardianship for long periods of time. No disabled person should be left to slip between the cracks unnoticed. One suggestion might be introducing checks and balances.

e.g. An independent third party , like a social worker meets up once a year to monitor the progress of the guardianship relationship and check for anomalies . The lack of an independent third party in the present system has caused a lack of transparency which cannot go on unimpeded.

2. The laws governing appointment of a guardian should remain flexible

There are two sides to the argument relating to the appointment of guardians. There are those that claim that the system is working effectively and that further regimentation will only lead to a shortage of willing guardians. On the other hand relatives of victims of guardian fraud are calling for reforms to protect incapacitated people from neglect and asset theft.

It has been put forward that Guardianship accessibility in Australia may have become overly uncomplicated and has been ‘too successful:’

For example Carney and Tait have commented that “easy access to guardianship and management procedures without equivalent developments in other policies for people with disabilities may produce negative consequences’ such as unnecessary and intrusive interventions, resulting in incursions on civil liberty.”⁴

On the other hand evidence conducted by Barbara Carter suggests that the community has confidence in the current guardianship laws. The community has been pleased with formal processes that are adopted by community centers and hospitals and also in the informal decision making arrangements. Accordingly any large overhaul of the

³ Carney, T. & Tait, D. 1997, *The Adult Guardianship Experiment: Tribunals and Popular Justice*, Sydney: Federation Press.

⁴ Tait, D and Carney, T 1995 Too much access: the case for intermediate options to Guardianship. Australian Journal of Social Issues, Vol 30, No 4, November, p 445

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legislation would see a significant rise in guardianship orders with no guarantee of improved outcomes for those people to whom the orders are made.⁵

We submit that the process for appointing guardians should remain simple and user-friendly. We agree with the community consensus that there should be as little restriction on who can be a guardian as possible. It is more important to focus on maintaining support and contact with those who are dependent on guardians after that guardian has been appointed, to monitor the success of that relationship.

3. Promoting a greater level of autonomy for disabled people in their own lives: Co- decision making

Recently there has been an impetus of the law away from the strict legal stance on a disabled person's capacity to make decisions. Co-decision making respects the importance of the recognition of the independence of all people, even those with mental impairments. Whilst the guardianship legislation does not formally allow for co-decision making as it stands, it is arguably accepted informally.

Article 12 of the UNCRPD particularly supports this notion. In a recent Guardianship Consultation published by the Victorian Law reform commission, Australia's guardianship laws were compared with those of Canada. Canada has a broadly similar set of laws relating to guardianship, however recently they have successfully formally recognised the notion of co-decision making and the role of 'supporters'. The paper also discusses the wide community support for co-decision making.⁶

⁵ Barbara Carter "Guardianship and the ageing population: Profile of Victorian guardianship clients aged over 65 years" May 2011, Office of the Public Advocate, available at the OPA website at http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2011/Profile_of_guardianship_clients_over_65.pdf

⁶ "Guardianship Consultation Paper : Part 4" March 2011, Victorian Law Reform Commission, available at VLRC website at http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/3/4/3494a48045f662e58f0aff51b55034df/Guardianship_CP_Part_3.pdf

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We submit that Australia should follow the Canadian model and formalize co-decision making. The incapacitated person should be encouraged to participate in life changing decisions and if necessary, the incapacitated person should receive some guidance and education to help them understand the state of their own affairs.

4. A training/education initiative should be implemented for disabled people to encourage co-decision making

In a recent speech to the OPA Coleen Pearce commented that:

“Up until the 1980s, the framework of legislative arrangements for people with disabilities in Victoria could be described as one of protection, control and separation. Tens of thousands of people with a mental illness and intellectual disability were shut away in large institutions without rights, autonomy or equality and many experienced institutional abuse and neglect.”⁷

Because the disabled and mentally ill have a history of being institutionalised and heavily drugged before the mental health act was reformed in the 1990's , many of these individuals have missed out on basic numeracy and literacy , which makes it impossible for them to monitor their own affairs. This is one of the many reasons why an educational program needs to be improved in institutions catering for the disabled. If there were initiatives such as numeracy and internet classes, this would facilitate co-decision making in the guardianship relationship.

5. The Public Advocate and other legal bodies that engage in the provision of Community Legal Education (CLE) need to be better resourced and expanded

The Public Advocate is empowered to provide community education and awareness about guardianship laws and the rights of people with disabilities.⁸ The Public Advocate deliver CLE through a number of methods: information sessions for people throughout Victoria who have an interest in guardianship issues (including people with disabilities, families, disability providers, professionals who are likely to engage in the system as third parties ie: medical practitioners); support offered to people using the system such

⁷ Colleen Pearce, “Strengths and tensions in the current guardianship system,” (Speech at the OPA 25th Anniversary Symposium), Friday 29th July 2011 .

⁸ *Guardianship and Administration Act 1986* (Vic) s 15(c).

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as private guardians and administrators, people holding power of attorney; and supporting the development of other community organisations with CLE initiatives.⁹

Although the Public Advocate is given a broad educative role, her capacity to undertake these activities are restricted by the lack of funds and resources made available to her. Therefore, we endorse the Commission's submission that the role of the Public Advocate in relation to promoting public awareness and CLE of guardianship laws be expanded.

6. CLE should be more culturally accessible

Community legal education (CLE) plays a vital role in supporting and providing information about guardianship law, the processes and its administration. Aspects of guardianship laws such as rights and duties are difficult for people within certain cultural backgrounds, ethnic groups and age groups to understand. Recent case studies have shown that 'by 2011, almost one quarter of all Australians Aged over 65 – around one million people – will be from a culturally and linguistically diverse (CALD) background'.¹⁰ These groups within the community experience barriers in the access of legal information.

We endorse the idea that cultural background should be an important consideration in the Commission's general principles. We further submit that the methods of delivery of guardianship and administration CLE should depend on the target group.

To ensure that CLE in the field of guardianship laws is culturally accessible, we recommend that CLE should be delivered as a strategy that aims to educate people who may be affected by these laws about their rights and responsibilities. The approach adopted would be largely information based, supplemented by good training of workers and support people. Any information for (proposed) represented people should be provided in ways which best suit their needs and abilities. For example, image-based materials and face to face strategies might be an appropriate method for some people. Also, the Victorian Government should allocate funds to properly resource an education strategy around the new laws.¹¹

⁹ Victorian Law Reform Commission *Guardianship: Consultation Paper* March 2011, 20.57.

¹⁰ Giddings, Jeff and Michael Robertson, 'Self- help legal aid: abandoning the disadvantaged?.' *Consumer Policy Review* 12.4 (2002): 127 *Business Source Complete* EBSCO. Web. 22 Aug 2011.

¹¹ Victoria Legal Aid *Response to the Victorian Law Reform Commission's Guardianship Review Consultation Paper*

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7. Guidance to make a will should be easily accessible for Guardians and disabled people

We recommend that guardians who look after a person with a mental disability who has made a will, should be informed of the legal implications of that will and the general nature of how a will work and the risks associated.

Making a will can be overwhelming for anyone, especially for someone with a mental disability. Any assistance that can be given to inform an individual suffering from a mental disability about how to go about making a will, or where they can go for help, will go a long way in ensuring their wills are done properly.

It is important that information is available and easy to access for not only a person suffering from a mental disability but also for the guardian who is responsible for their decision making.

At present there is no community level service that provides adequate legal advice on making a will for a disabled person. This is a major problem for disabled people who do not have the resources to seek expensive legal services. Currently Victoria Legal Aid does not give legal advice about making or challenging wills, but sometimes there are legal information services offered over the phone which can give out broad information. Legal Aid often refers clients seeking advice on wills to other organisations that specialize in this area.

We submit that the Victorian Government needs to form a thorough information campaign about the legal requirements of a will for disabled people. There is very little information of this sort available. For example, Legal Aid's website does provide a publication for parents of people with a decision making disability which provides general information about wills and estate planning as well as the role of guardianship and administration. The publication is titled 'securing their future' but other than this, there is little support surrounding this legal issue.¹²

Most issues that arise in relation to wills are complicated and can have serious consequences that can affect a lot of people. It is therefore difficult to provide detailed

http://www.legalaid.vic.gov.au/dir_lr_20110603_submission_to_VLRC_re_Guardianship_Review.pdf

p 5

¹²'Securing you future" at <http://www.legalaid.vic.gov.au/485.htm>



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advice and support for someone who is suffering from a mental disability and making a will, without discussing their personal and idiosyncratic circumstances. Wills are often changed so ongoing support needs to be maintained ensuring that any new wills properly revoke previous wills, and that new wills comply with all the legal requirements.

There is plenty of room for improvement. One suggestion we would like to make is that when a person applies for guardianship over someone who is suffering from a mental disability, this would be a perfect opportunity for VCAT to begin providing guidance and information specific relating to making wills. At that point Guardians should be encouraged to seek further assistance relating to wills.

Thank you for reading our submissions. We hope that you will consider the above suggestions during this commission.