Victorian Law Reform Commission

Guardianship Review

Submission by the Mental Illness Fellowship Victoria

Introduction

The Mental Illness Fellowship Victoria (MI Fellowship) is Victoria's leading membership-based not-for-profit organisation working with people with mental illness, their families and friends to improve their wellbeing. It has a vision of a society in which mental illness will be accepted and understood.

It is an organisation that is driven by the passion and professionalism of 241 staff, over 400 volunteers, 1,411 members, a board of directors and other supporters.

We provide people with a network of evidence-based services offering individual pathways through psychiatric rehabilitation. We also prioritise community education and advocacy. Everything we do is aimed at providing people with homes, jobs and relationships.

Many of our participants require assistance from a wide range of services including guardianship and administration. Many of the families or carers of our participants act, either formally under a VCAT Order or informally, as a guardian or administrator for the person with a mental illness. Although we are not generally directly involved in guardianship or administration we do have some dealings with organisations in the guardianship and administration sector on behalf of participants. Furthermore, by the very nature of our involvement with our participants and their families and friends we do form views based on their feedback as to some of the issues with, and advantages of, the Guardianship and Administration Act (GAA) and the practical implications of dealing with the Victorian and Civil Administrative Tribunal (VCAT), the Office of the Public Advocate (OPA) and professional administrators such as State Trustees (STL).

We also have the advantage of the input from a senior person experienced in the guardianship and administration sector now working for MI Fellowship.

It is in the context of our working with people who are, or have been, involved in guardianship and administration and the insights of our employee that we have this submission.

Our submission is in three parts.

1. During April the MI Fellowship was fortunate to be able to meet with representatives of the Victorian Law Reform Commission (VLRC) to discuss our views in person. The summary notes they subsequently provided were an excellent summation of our views. We have based our comments on the summary notes. Thanks to the VLRC for this.
2. Feedback based on specific consumer feedback following consultation with the VLRC.
3. The specific comments we received in respect of each question included in the Information Paper is attached. This is based on the information provided to the VLRC in April.

1. Submission Based on Discussion with VLRC

General Views

- In general, the system works well given the need to protect and / or assist some people and the problematic nature of their circumstances, if you accept the principle of parens patriae. VCAT provides a cheap and informal judicial process and one that is relatively empathetic to the nature of the Guardianship List. It seems to be the best within Australia and possibly overseas as well.
- The system is, however, crisis driven, which means that, at times, issues cannot be thought through properly. The outcome can be detrimental to the person's best interests.
- There is, rightly, a reluctance to take away people's rights and sometimes Orders are not made when they need to be. In trying to act in the person's best interests VCAT sometimes works against their best interest. This is more prevalent with Members inexperienced in guardianship matters.
- The guardianship regime currently works very much in the present in response to a crisis and does not allow VCAT to put in place arrangements that can operate when and if they are needed in the future. There should be some ability to do this, without locking people into protective arrangements that turn out not to be needed.

Education and Community Awareness

- There are many examples of people in the community not even being aware of the options available via the GAA and VCAT. There needs to be a lot more education about how the system works; even people who have been involved in it for a long time often don't understand the processes very well.
- People need more information about how to have Orders revoked. This is provided in relation to Community Treatment Orders (CTO), and should happen in the guardianship system too.
- Education must be conversational and it is especially important in CALD communities.

Best Interests and Stated Wishes

- Value judgments can easily be made about what is in the person's best interests, perhaps due to communication difficulties but more likely due to an inability by the substitute decision-maker to remove their personal perspective from the decision.
- How do you balance between recognition that people do need advocacy but they also need to be given more opportunity to speak for themselves too?
- Advance directives can be helpful.

Least Restrictive Alternative

- As result of either lack of evidence being brought to VCAT or insufficient time taken to delve into issues, the least restrictive alternative is not always identified.
- Alternatively we must also recognise that sometimes the crisis is so pressing that there is simply not time to look for a less restrictive alternative.

Interaction with the Mental Health Act

- There are clear gaps or inconsistencies between the two Acts.

- It is onerous for people to come under both frameworks. It involves a lot of processes to go through, hearings and appointments to attend, and takes time. All of this detracts from time that should be spent managing their illness.
- There needs to be more dialogue between the two Acts. Often by the time a person is involved with the GAA they have become very unwell. If there was more connection between the two regimes and issues were addressed earlier then potentially a crisis could have been avoided. Mandatory allocation of a caseworker when an Order is made could help to enable this dialogue.
- People can often benefit from an Administration Order after a CTO has expired. Managing finances is often the last thing a person wants to do when they're recovering.

VCAT

- The Tribunal system is good but it should be more informal and more geographically accessible.
- VCAT seems to lack the "kindness" that was more a feature of the old Guardianship and Administration Board.
- There needs to be early intervention and better use of mediation. In the current system it's usually too late for mediation by time a matter gets to VCAT.
- Lawyers are increasingly involved in hearings and this isn't a good thing.
- It would be good to have someone at VCAT who can help orient people to the setting and what to expect in hearings.
- It's very common for the person who is the subject of the hearing not to attend. Often they are unaware of the implications of this. Is the VCAT communication tailored to be effective to people with an illness or is it just a process to be followed? For example, the notice of hearing itself looks intimidating and more like a fine.
- Would be good to have less emphasis on lawyers as Tribunal Members and have Members with broader experiences.
- Members need to consult more broadly before making decisions.

Capacity

- Capacity can be difficult to determine because a person might present very well and put forward very cogent arguments against an Order being made. The nature of their illness is such that their capacity may fluctuate widely one day to the next. This means that people who do need assistance with decision-making do not obtain it and, conversely, Orders are made for people who don't need one. The VCAT process must be sensitive enough to cope with this issue.
- Problems arise because decisions about capacity are made in a crisis.
- There are not really any universally accepted objective tests for capacity relevant to mental illness, nor do they properly take into account the episodic nature of mental illness, and fluctuating capacity.
- Decisions about capacity are often made on the basis of one doctor's report, which can be very limiting, and sometimes even by doctors who don't really know the person. A broader range of evidence should be collected in certain circumstances and not just rely on the report of a doctor.

- To assess the capacity of a person with mental illness VCAT need to be better educated on what to look for.
- Capacity in mental illness can be difficult to understand. It is often manifested more in behaviour than in cognition; so assessing capacity should really be more about looking at the impact of people's decisions on their quality of life. The dilemma this creates, however, is that this then raises challenges about how you assess this without bringing in value judgments.
- One thing that is often missed in people's understanding of mental illness is that there is a physiological cause interfering with the person's thinking. It is therefore important to keep the disability criterion in as part of the gateway into the system.
- The assessment of capacity is more difficult when the diagnosis is less obvious, such as when a person is simply exhibiting impulsive or reckless behaviour, as opposed to periods of psychosis.
- Defining mental illness is difficult. The DSM is not helpful but standardised assessments are needed, focusing on the decisions' outcomes for the person.

Supported Decision-making

- Supported decision-making can be particularly relevant in situations where a person's mental illness and capacity are not so clear cut, such as when exhibiting reckless or impulsive behaviour.
- It is important as a way of upholding the person's human rights and assisting them in recovery.
- There will continue to be a need for substitute decision-making.
- Sometimes the more important need is for support while the person is unwell, rather than for a substitute decision-maker. One example is when a person is manic and likely to spend impulsively: having someone who can talk them through the situation can be helpful, rather than just having someone take control of their money.

Guardianship and Administration Divide

- It's good to keep these separate, because it encourages discussion and debate between guardians and administrators, resulting in better decisions.
- People with mental illness sometimes only need help paying bills. Is a full Order always the solution?

Advance Directives

- Advance directives may be one way of avoiding the crisis driven nature of the guardianship system. It would reduce the need to make rushed decisions about capacity
- Advance directives can help where people have difficulty expressing their wishes when they are ill, but the question of the status of advance directives is complex, particularly when a person really does appear to change their wishes when they are unwell.

Review of Guardian's and Administrator's Decisions

- This should be available, but only around the bigger decisions and not the minutiae.
- There should be independent audit or reviews of decisions made by guardians and administrators – this may help identify systemic issues that need addressing.

Confidentiality

- Current provisions are too restrictive. Whilst respecting a person's privacy is important information doesn't get to the people who need to know. This can then work against the person's best interests.

2. Consumer Feedback

All of the significant feedback related to the hearings / review provision of the GAA and the process as it is applied within VCAT.

- People with a mental illness can have episodic conditions and / or be very adept at presenting themselves in a positive way. This does not mean that they really are coping and effectively managing the issues in their lives. Members can sometimes not see this. Families can often be given no say, especially when they see and may live with the person and know the person is going and the extent to which they need help.
- If families are consulted they wonder whether they are ever listened to.
- Triennial reviews are too infrequent.
- Lack of knowledge about the appeal process and even whether others eg families, can actually appeal decisions made.
- There can be a flaw in the process which limits what information is raised at hearings or reviews. An example is private knowledge that a person is unable or unwilling to communicate in the public forum which the Member doesn't get to hear. How can people provide relevant sensitive information in the hearing and review process?

3. Other Comments Received for Each Question

Q	Comments
1	• Overall it works exceptionally well given the need to protect and / or assist some people and the problematic nature of their circumstances – if you accept the principle of parens patriae. The GAA tries to provide for the best interest for the represented person but recognizes that any decisions may not be what the individual or their family wants. VCAT provides a cheap and informal judicial process and one that is relatively empathetic to the nature of the guardianship list. • The GAA in practice struggles: - o in situations where people have episodic conditions; o where represented persons are on the cusp of having capacity; o to provide a balance between volume and the need for due process; and o where its obligations are to err on the side of the family. • Although the appointment of an administrator can provide lead to loss of autonomy and great frustration to the represented person it is her experience that it is generally beneficial to the person and provides some financial stability that they otherwise would not have. • There is concern that there is overlap with people who come under two Acts and potentially find themselves administered from two government departments. This can be onerous. A single administrative framework would be beneficial. • People with a mental illness find they are subject to situations in practice which they perceive are at odds with the objects of the GAA as defined by Part 4(2). To overcome this the GAA needs to be more clearly aligned with factors that promote recovery such as choice, responsibility, personal control, advocacy, empowerment, supportive relationships, education and reconstructing identity and purpose;
2	It may not be the best but I know of none better. It has been successfully copied elsewhere.
3	There is almost no understanding within the community. The problem is that guardianship is probably one of those matters that people don't feel they need to know about until the need arises. Unfortunately they then don't know where to turn for help. The obvious solution is extensive communication but then should this be the priority eg greater focus on prevention and active control solutions (EPAs). Philosophically at what point is it the State's responsibility to provide information or should individuals be responsible for their own wellbeing?
4	No comments received.
5	Refer Q3 – prevention via EPAs. The GAA should be amended to cover accountability for actions taken as an attorney. For example elder abuse is a hidden but growing problem with most perpetrators being someone trusted by the donor.
6	• What is the difference between having a disability and lack of capacity? If you introduce the concept of vulnerability or "inability to do something themselves" the question of the role of the State then emerges. Gambling is an example. Differing cultural practices are another. One question to be resolved is should it always be a medical practitioner who determines disability or lack of capacity? • The GAA should favour concepts around capacity and vulnerability rather than disability. • There is concern that the basis of being on an order is purely medical and rested solely on a doctor's report. The GAA should give equal consideration to social, rehabilitation and lifestyle factors with medical evidence.

7	Refer Q6. To what extent should detailed medical knowledge over a period be required by a medical practitioner? How do you cover episodic medical circumstances? What about limited decision-making capacity for certain decision only or only under certain circumstances (stress, medication, comfort zone, etc.)?
8	Generally yes. However, if a person has a disability are they any less entitled to do things that aren't in their best interest than a person without a disability is?
9	Refer Q8 – no it doesn't. Administrators and guardians should always be bound by the answer to the question "what would the person do if they were capable of making the decision themselves?" Should this concept be included within the GAA. Also, how do you prevent the administrators and guardians applying their value judgments in decisions relating to the represented person?
10	• Impossible to identify one answer that covers all situations. A person's wish can change every 5 minutes – which one do you follow? How does a person express their wish and to what extent does their ability to effectively express themselves impinge? To what extent should administrators and guardians go to establish a person's wishes? • There is evidence that for many represented persons (those managed by State Trustees) there is considerably more involvement in decision-making than was previously the case. This should be continued as should be the encouragement for administrators to introduce some financial independence for the represented person.
11	• Yes, if you accept the argument that the State has some responsibility under parens patriae. • New legislation incorporate provision for supported decision-making – options are person-centred and align with factors that enable recovery and respect people's human rights. • Education around understanding mental illness and education on factors that enable recovery is provided for people who come under a supported decision-making and co-decision-making order and their family and friends.
12	Probably yes. The issue with one, all encompassing, decision-maker is that often what is in the person's best interests financially and personally can be at odds. Two parties, or three if medical is included, can provide specific perspectives from their angle and a creative tension is created. In the end the best decision taking into account all angles can be arrived at. Furthermore two or three parties acts as a check and balance in respect of the other decision-makers.
13	Plenary orders should be retained as there are people who are not capable of making any decisions – aged related conditions such as dementia, those who are comatose, etc. The ability to have limited orders currently exists and if the information available to VCAT was specific enough then greater use of limited orders, especially for administration, may be an excellent step forward. Care would need to be taken to ensure that a person's condition was stable enough for a limited order to be made and be effective.
14	• Substitute decision-makers are limited in situations where there is a strong suspicion of elder abuse and / or financial fraud. Victoria Police will generally not get involved in these matters unless proof is provided. This cannot generally be obtained and so a stalemate is reached. Alternatively if fraud has occurred then the victim frequently doesn't have the resources left to find an investigation of legal action. The problem is clear but the solution is not. • Gifting needs to be closely looked at. Should gifts and fees only be allowed via a separate decision by VCAT.
15	A lot of work is required with EPAs as this is largely unregulated and is widely abused. Further work is also required for Wills mainly in the area of a Wills Register and clearer evidence of capacity when Will instructions are taken.

16	• Yes – they currently do and this should continue. If the GAA can be changed to make it even easier that would be beneficial as long as that it provided for vexatious appellants. • Power of review should be continued and people or organizations that work with the represented person should continue to be able to ask for a review.
17	• Immediate termination of the relevant authority (which currently occurs). • Ability to demand and appropriate relevant documents. • Some easy link with the criminal justice system?
18	No comments received.
19	• Provision for the requirement for a triennial hearing of administration orders to be waived if VCAT, the administrator, the represented person and significant others agree there would be no useful purpose served. Obligation of the administrator to provide the necessary reports to continue. • People with mental illness who experienced the Guardianship and Administration Board prior to the creation of VCAT have commented that the GAB was "kind and understanding" whereas VCAT is "cold and not understanding". A solution could be peer liaison officers similar to in the magistrates court to assist people in their knowledge of the process and their families about what to expect.
20	16 years and above given the increasing incidence of youth homelessness / transientness and mental illness in teenagers.
21	This is probably not a big issue. Currently an administrator (and possibly a guardian) is not able to know the represented person's medical condition. This presents potentially dangerous situations and limits the administrator's ability to respond appropriately given that different medical conditions can sometimes require different styles of interaction.
22	Not a big issue.
23	No comments received.
24	No comments received.
25	The three types of EPA are well defined and seem to operate effectively although there may be a perceived grayness at the boundaries between financial and guardianship. They also seem to work well with VCAT orders although attorneys can have a great deal of trouble accepting VCAT's decision to revoke an EPA and appoint a guardian or administrator.
26	Generally yes. The only caveat would be if the attorney believes circumstances have changed so significantly that the donor's original intent would either be frustrated or against their best interests. Application should be made to VCAT to override the advance directives provided the GAA was prescriptive in what would be the grounds for overriding the directive. Evidence other than hearsay should be the basis of any VCAT decision.
27	No comments received.
28	No comments received.
29	No comments received.
30	No comments received.
31	No comments received.
32	No comments received.