

**Submission to the  
VLRC Review of the *Guardianship and Administration Act 1986***

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This submission focuses on the roles and functions of the Public Advocate. In particular, the purpose of this submission is to request

1. That the VLRC considers the adequacy of the governance framework of the Public Advocate and the Office in its Review of the *Guardianship & Administration Act 1986*.
2. That the VLRC considers the introduction of safeguards for guardianship decision-making to ensure the protection of the rights of people with a decision-making disability.

### **1. Governance framework for Public Advocate**

Corporate governance encompasses the arrangements by which the power of those in control of the strategy and direction of an entity is both delegated and limited to enhance prospects for the entity's long-term success, taking into account risk and the environment in which it is operating.

Source: Uhrig Report, p.2

The Public Advocate has a critical role in promoting the rights of people with a disability and/or mental illness and protecting them from abuse, exploitation or neglect. The Public Advocate also has significant powers, including acting as guardian of 'last resort', delegating community guardians, undertaking investigations and advocacy and overseeing and coordinating the activities of community visitors.

In carrying out these roles and responsibilities, maintaining independence from government is considered important by the Office of the Public Advocate. As a statutory authority accountable to the Victorian Parliament, the Public Advocate clearly has this independence from government.

Despite its independence from government (and partly in view of this independence), and in considering the significant powers of the Public Advocate, a governance framework is required to ensure accountability of this public entity.

In 2003, the Uhrig *Review of Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig Report) identified that:

In comparison to the direct relationship between a Minister and the portfolio department, statutory authorities often operate with a greater level of separation. It is this separation, or 'independence', that creates the need for robust governance structure. The need for governance increases when independence is combined with power.<sup>1</sup>

Furthermore, the Uhrig Report noted that statutory authorities should only be created or continued when there is sufficient need for either efficiency or independence (that is, separation from government to ensure objectivity).<sup>2</sup>

In the case of the Public Advocate, this objectivity and separation from government is required particularly in its oversight of the Community Visitor Program. Community visitors have statutory powers to visit and report on facilities funded and, sometimes

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<sup>1</sup> Uhrig, J. (2003) *Review of Corporate Governance of Statutory Authorities and Office Holders*, Commonwealth of Australia, p.7.

<sup>2</sup> Uhrig, *Review of Corporate Governance of Statutory Authorities*, p.7.

operated, by government. The need for such objectivity in making guardianship decisions is more ambiguous. In other jurisdictions (such as New South Wales), for example, the role of the ‘public guardian’ is conducted within government structures.

In view of the substantial authority and responsibility of this public entity over the lives of people with a disability and/or mental illness, the review of the *Guardianship & Administration Act 1986* provides a valuable opportunity to consider the governance arrangements of the Public Advocate.

The Australian Government’s 2005 *Governance Arrangements for Australian Government Bodies*, notes that

As the governance structures and arrangements for a body can have significant long-term implications, sufficient time should be made available, where possible, to properly work through the best arrangements for any proposed body (or changes to an existing body).<sup>3</sup>

In view of these long-term implications, the VLRC review provides a significant opportunity to ensure that the best governance arrangements are considered.

The Review might consider, therefore, what governance framework exists to ensure that there are transparency and accountability mechanisms linking power and responsibility to performance and review? Currently, the Public Advocate has no governing board and is directly accountable to the Parliament (through the Attorney-General, as outlined in Part 5 of the *Public Administration Act 2004*).

Is this governance structure adequate for ensuring transparency and accountability in the decisions the Public Advocate makes and the power the Public Advocate exercises over the lives of people with a decision-making disability? Are funds managed appropriately? Are the risk management strategies appropriate to the context the Public Advocate operates within? Is the strategic direction and organisational structure of the Office appropriate to the objectives and functions of the Public Advocate? Are broader legislative and policy changes integrated into the organisational structure, strategic directions and internal policies and procedures in ways that meet the objectives of the Public Advocate? Is there adequate governance oversight and consistency in strategic direction between the end of one Public Advocate’s period in office and the appointment of a new Public Advocate? Or does the oversight of the Office get delayed during these (often lengthy) periods, with major decisions put on hold?

Furthermore, how do the governance structures support staff within the Office in the event that they have any concerns regarding how the Public Advocate is carrying out his/her functions? Are the links to and mechanisms provided through the portfolio department appropriate in such circumstances? In the absence of a governing board, it is clearly not realistic for staff to raise any concerns with the Victorian Parliament.

Notably, in the 2003 Uhrig Report, it was found that in Australia generally:

There is a lack of effective governance for several of the authorities considered by the review due to several factors including unclear boundaries in their delegation, a lack of clarity in their relationships with Ministers and portfolio departments, and a lack of accountability for the exercise of their power. This lack of governance arises primarily due to a ‘hands off’ attitude assumed by many when dealing with statutory authorities.<sup>4</sup>

<sup>3</sup> Australian Government (2005) *Governance Arrangements for Australian Government Bodies*, Department of Finance & Administration, Commonwealth of Australia, p.8.

<sup>4</sup> Uhrig, *Review of Corporate Governance of Statutory Authorities*, p.5.

In implementing recommendations from the Uhrig Report, the Australian Government makes the following point in its *Governance Arrangements for Australian Government Bodies*:

Structures and governance arrangements for a body should help with implementing ... and achieving a body's goals, in a way that is accountable and transparent. Put another way, unclear governance arrangements can threaten the outcomes of a body's activities and have the potential to undermine good policies.<sup>5</sup>

While these points are specific to the statutory bodies at the Commonwealth level, they are also relevant to the governance frameworks of Victorian statutory entities, such as the Public Advocate.

The Uhrig Report provides a number of valuable insights and recommendations regarding the governance of statutory authorities. In addition, it proposes a set of governance principles, which are as follows:

### **Governance principles**

*Owners, or their representatives, need to establish, clearly, an understanding of success for the activity, including their expectations of performance.*

- Owners of an organisation need to set its purpose clearly and state their expectations of performance.

*Governance should be present and the arrangements should be appropriate for the entity given the nature of ownership and its functions.*

- The appropriate organisational structure will vary from entity to entity and will depend on functions, complexity of operations, ownership characteristics and objectives.

*To be successful, power must be: in existence; delegated; limited and exercised.*

- Power frameworks will influence the efficiency and effectiveness of decision-making and the capacity of decision-makers to produce quality outcomes.

*There should be clarity of roles within the governance arrangements of organisations to ensure that efforts are directed towards success and that responsibilities are performed in an efficient manner.*

- Those who own, govern and manage an organisation should have a clear understanding of their roles and responsibilities.

*With responsibility there needs to be accountability.*

- Individuals should understand what they are required to achieve, have the capacity to achieve and be held accountable for their performance.

*For a board of directors to be effective, it must have the full power to act, including the ability to appoint, supervise and remove senior management as well as approve strategy.*

Source: Uhrig Report, p.10

<sup>5</sup> Australian Government (2005) *Governance Arrangements for Australian Government Bodies*, Department of Finance & Administration, Commonwealth of Australia, p.32

## **2. Safeguards for guardianship decision-making**

As noted in the VLRC Information Paper, recent developments in human rights legislation and conventions have emphasised the importance of safeguards in the context of substitute decision-making.

On page 50 of its Information Paper, the VLRC acknowledges that at the time of ratification of the United Nations Convention on the Rights of People with Disabilities (the Convention), Australia issued a declaration about its understanding of the meaning of Article 12, declaring that:

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and **subject to safeguards**

As the Information Paper outlines, there are existing safeguards for administration decisions in the existing legislation (eg. lodging annual reports of accounts with VCAT). Similarly, in Victoria there are safeguards in the context of restrictive interventions in disability services (overseen by the Senior Practitioner) and practices of restraint and seclusion in mental health facilities (overseen by the Chief Psychiatrist).

There are no safeguards in regard to guardianship decisions. On page 28 of the Information Paper, VLRC points out that:

Individual decisions made by guardians and administrators cannot be formally reviewed. If a person is unhappy with a decision made by a guardian or administrator they can complain directly to that person, or apply to VCAT to have the appointment reassessed. If a person is unhappy with a decision by a Public Advocate guardian they can complain under the Public Advocate's Complaints Policy.

The Public Advocate's Complaints Policy is an internal policy. In the context of a public entity that has no clear governance framework, accountability mechanisms or limitations on its power, an internal process to resolve complaints about decisions by the Public Advocate is not an adequate safeguard in the context outlined by the Australian Government in its declaration regarding Article 12 of the Convention.

There needs to be an opportunity for people who are aggrieved by any decision of the Public Advocate to access an external, independent body to investigate the concerns or complaint and to oversee dispute resolution processes. This is of particular importance in the context of people with a disability, whose vulnerability might be compounded by a lack of family and support networks.

### **Conclusion**

With no clear governance framework and no safeguards surrounding decision-making of guardians, the Public Advocate currently operates in a context of significant power with minimal requirements for transparency, accountability and limitations on the exercise of that power. As suggested by the Uhrig Review, this could be seen as a 'hands-off' attitude towards the statutory role of the Public Advocate.

Currently, people with a disability and/or mental illness with the Public Advocate appointed as their guardian to make decisions on their behalf (often regarding important

medical and lifestyle decisions) are dependent on the professional integrity and sound judgement of individuals who are subject to minimal structural limitations and who hold significant autonomy and authority.

Furthermore, in the context of community visitors, their statutory powers are similarly guided by broad legislation. The Public Advocate has a critical role in ensuring that the volunteer work of these statutory appointments in visiting facilities is conducted within the boundaries of that legislation. Recent reports have noted some of the limitations of the role of community visitors in the context of significant legislative and policy change.<sup>6</sup> Without a strong governance framework to guide the direction of the community visitors in adapting to these broader changes, the important role they provide in the community could potentially be diminished over time.

The Public Advocate, the staff of the Office and the community visitors exercise significant legislative powers that can have major consequences for the lives of people with a disability and/or mental illness. Stronger accountability mechanisms and safeguards are appropriate in the exercise of this power over the lives of others.

To ensure that the rights of people with a disability and/or mental illness are promoted and protected, this submission recommends that the VLRC gives consideration to the need for:

- a) the introduction of a sound and appropriate governance framework to ensure the Public Advocate's roles, functions and objectives are successfully achieved as the individual's appointed to the role change over time;
- b) reducing the seven year appointment to five years in line with other executive appointments to public entities;
- c) the introduction of appropriate external safeguards to protect the rights of people with a disability and/or mental illness when the Public Advocate is appointed to make decisions.

The VLRC might also consider undertaking additional consultations in regard to specific issues relating to the governance arrangements for the Public Advocate in view of the minimal attention to this in the Information Paper, and also in view of the significance of how the Public Advocate's governance framework will inform all aspects of the functions and duties of the public entity.

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<sup>6</sup> See the Department of Human Services (DHS) (2009) *Review of the Mental Health Act 1986 Community consultation report – July 2009*. Mental Health and Drugs Division, DHS Victorian Government, Melbourne, and the Family & Community Development Committee (2009), *Inquiry into supported accommodation for Victorians with a disability and/or mental illness*, Final Report, Victorian Parliament.

