



14 May 2010

Professor Neil Rees
Chairperson
Victorian Law Reform Commission
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Dear Professor Rees,

Neil

Guardianship Review

The Commission is pleased to contribute a submission in response to the review by the Victorian Law Reform Commission ('VLRC') on the desirability of changes to the *Guardianship and Administration Act 1986*.

The Commission has a special interest in the appointment of guardians under the *Guardianship and Administration Act 1986*, given the relationship between guardianship arrangements and disability and the human rights implications of such arrangements.

This submission focuses on the human rights framework within which the VLRC needs to consider and resolve those matters, as a consequence of the *Charter of Human Rights and Responsibilities* ("Charter"). Our submission takes the approach of reflecting upon broad principles of policy and practice in addressing themes contained in questions set out in the VLRC's *Guardianship Information Paper*:

- Is there a need for new laws that formally recognise supported decision-making?
- Should it be necessary for a person to have a 'disability' before a guardian or administrator is appointed or is it preferable to rely on concepts such as lack of 'capacity' or 'vulnerability'?
- Is there a continuing need for substitute decision-making laws?
- How should any supported decision-making laws operate?

1. Questions raised by the Victorian Law Reform Commission

1.1 Is there a need for new laws that formally recognise supported decision-making?

Human rights relevant to guardianship

Guardianship appointments are triggered by permanent or temporary incapacity associated with disability. Disability can arise from ageing, accidents, mental illness, intellectual disability or other ill health and disability. Laws designed to recognise supported decision-making may protect the human rights of people with disability who are subject to guardianship arrangements. Guardianship can enliven a range of human rights issues, as appointments allow vital life decisions to be made by one

person on behalf of another.¹ This triggers a range of fundamental human rights including:

- recognition and equality before the law, including recognising the capacity of all persons, and ensuring protection from discrimination (section 8 of the Charter);
- medical treatment without consent (section 10 of the Charter);
- freedom of movement (section 12 of the Charter);
- privacy and reputation (section 13 of the Charter);
- protection of families (section 17 of the Charter); and
- liberty (section 21 of the Charter).

An important feature of guardianship is that a guardian is appointed to act on behalf of another person who is unable to make 'reasonable judgements' about matters relating to their own circumstances. Guardianship therefore involves arrangements that can potentially limit a person's autonomy when capacity is impaired. The challenge facing such arrangements is to ensure that the guardian, whenever possible, gives recognition and voice to the wishes of a represented person. It is important to note that the *Guardianship and Administration Act 1986* sets out the intention of Parliament that guardians should exercise their duties and functions in a manner least restrictive of a person's freedom of decision and action as possible in the circumstances and that the wishes of a person with a disability are given effect to wherever possible.²

Laws designed to regulate how and when supported decision making arrangements operate may assist to address this.

1.2 Should it be necessary for a person to have a 'disability' before a guardian or administrator is appointed or is it preferable to rely on concepts such as lack of 'capacity' or 'vulnerability'?

Capacity

Concepts such as lack of 'capacity' or 'vulnerability' acknowledge that people with diverse disabilities are often capable of making a variety of life decisions independently of others. In contrast, focusing on 'disability' as a criterion for appointment of a guardian arbitrarily implies that disability precludes a person from acting independently.³ The Commission submits that it is vital that a lack of 'capacity' be the key focus of a decision to appoint an administrator in relation to an area of decision-making.

Most people, at various points in our lives need the support of other people to make significant decisions. The community depends on the expertise and knowledge of people with special qualifications and skills to assist us to make many decisions. The Office of the Public Advocate argues that people make few decisions about important matters in isolation from others. Relying on the advice of others should not be viewed

¹ VEOHRC Submission to the Victorian Parliamentary Law Reform Commission on Powers of Attorney, (2009), p2-3
<http://www.parliament.vic.gov.au/lawreform/inquiries/Powers%20of%20Attorney/Submissions/POA52%20-%20VEOHRC.pdf>

² Section 4, *Guardianship and Administration Act 1986*

³ Penny Weller, 'Developing Law and Ethics: The Convention on the Rights of Persons with Disabilities', *Alternative Law Journal* (2010), p10

as an indication that a person lacks capacity. OPA has challenged the notion of a completely autonomous decision-maker as being a myth.⁴

International framework – the role of the CRPD

OPA has observed that the CRPD has generated renewed interest in decision-making processes involving people with disabilities. It has also been a key factor in prompting the review of Victoria's guardianship legislation. The guardianship review provides an opportune time to consider how Victorian law might recognise and facilitate supported decision-making.⁵

Capacity and autonomy are the focus of the CRPD. The CRPD is founded on an analysis of historical denial or limitation of human rights experienced by people with disabilities, using this to highlight the disability dimension of human rights. It frames disability as a construct arising from attitudinal and environmental barriers. Genuine recognition of the autonomy of people with disabilities is central to challenging it.⁶

The CRPD assumes that people with disabilities can exercise capacity, while embracing the idea that some people may need extra support to enable them to exercise the rights people in the broad community enjoy in a meaningful way. It requires support to be provided where necessary, accepting that all people are generally able to reason and understand a decision and its consequences. Capacity can depend on the information a person receives, the context in which they receive it, the level of time and effort devoted to enabling a person to process the information and how much opportunity the person has to discuss the information with someone they trust.⁷

Article 12 - Equal recognition before the law:

1. *States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
2. *States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
3. *States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*
4. *States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity 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 and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*

The overarching principle of supported decision-making is its presumption in favour of the person affected by the decision, and its emphasis on enabling the individual to exercise their legal capacity to the greatest possible extent and according to their own wishes. In a supportive system, the individual with a disability remains the

⁴ Office of the Public Advocate, *Supported decision-making Background and discussion paper* (2009) p3-4
http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2009/0909_Supported_Decision_Making.pdf

⁵ Office of the Public Advocate, *Supported Decision-Making Forum: Summary Report* (2010), p3

⁶ *International Convention on the Rights of Persons with Disabilities*, Preamble, paras (e) and (n)

⁷ Penny Weller, 'Developing Law and Ethics: The Convention on the Rights of Persons with Disabilities', p10

decision maker, and the role of support person/s is to explain issues or interpret communications from the individual when necessary.⁸

Commentators note that when a person is unable to make decisions, there is an obligation under the CRPD to provide only the sort of interventions that accord with a person's preferences. Where a person's preferences are not known, there is a requirement to ascertain the person's wishes. Once a person's preferences are known, a course of action that was contrary to these wishes must be modified. If it is impossible to verify treatment preferences, intervention should be limited to providing such treatment as is necessary until a person regains capacity to exercise control of treatment decisions.⁹

Commentators have elaborated on what "support" encompasses and identify:

- assistance in decision making;
- assistance in expressing to others a person's will and intent; and
- assistance in communicating to others someone's personal identity.

The competence of the support network or strategy is scrutinised more than the capacity of the individual with a disability.¹⁰

1.3 Is there a continuing need for substitute decision-making laws?

Article 12's implications have been the subject of debate. Some argue that Article 12 prohibits substitute decision-making, requiring States Parties to dismantle such mechanisms. An alternate view is that while Article 12 clearly requires a shift toward primary reliance upon supported decision-making, it still contemplates an ongoing, albeit much more restricted role for substitute decision-making. The Australian Government's interpretive declaration, forming part of our instrument of ratification adheres to this view:

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;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Section 32(2) of the Charter expressly permits international human rights law to be used to develop the meaning of rights protected in the Charter and their implications for responding to local issues and interpreting statutory provisions. Various provisions in the CRPD are relevant to capacity and autonomy. Article 12 is also important to interpreting the content of section 8 of the Charter.

The Commission considers that, in accordance with Australia's interpretive declaration, the appropriate approach will be to preserve the highest level of

⁸ *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities, Chapter Six: From Provisions to Practice – Implementing the Convention, Legal Capacity and Supported Decision Making*, available via <http://www.un.org/disabilities/default.asp?id=212> (21 August 2009).

⁹ Penny Weller, 'Developing Law and Ethics', p12

¹⁰ Anna Macquarie of the Canadian Association for Community Living, cited in *Expert Seminar on Freedom from Torture and Ill Treatment and Persons with Disabilities: Report*, Office of the High Commissioner for Human Rights, Geneva, 11th December 2007.

autonomy possible, while acknowledging that autonomy may sometimes need to be restricted in certain circumstances – a continuum between supported and substitute decision-making. A number of points need to be emphasised:

- departures from supported decision making – to partial or full substitute decision-making – must satisfy a test of being a reasonable limitation on the human rights of the individual subject of the decision, who would otherwise be the decision maker (the elements of such a test would be based on section 7(2) of the Charter); and
- one departure from supported decision-making with a particular person does not mean substitute decision-making must take place from then on. When the need for another decision arises, an approach based on substitution must be scrutinised and justified afresh.

1.4 How should any supported decision-making laws operate?

ACT Government's approach

The ACT government is currently considering whether to introduce a single law dealing with incapacity that would apply to all decisions and conditions when a person does not possess mental capacity to make a particular decision. Under this model, the decision-making capacity of a person is the central criterion for intervention in a person's life.¹¹

This proposition recognises that all people are presumed to have capacity unless it is proven that they lack capacity. The Commission endorses the view of the Law Institute of Victoria that when a person is considering whether someone lacks capacity, they must consider the following principles:¹²

- Capacity is decision specific. A person might be able to make decisions involving day-to-day finances, but not those involving more complex financial transactions, such as sale of a home, or whether to enter into aged care;
- Capacity is time specific, so that a person's capacity to make financial, lifestyle or medical treatment decisions may fluctuate over time.

These principles should be set out clearly in the legislation, to provide guidance to those making capacity assessments. In the context of guardianship, the courts have recognised that evidence of a cognitive impairment is generally insufficient of itself to show that a person lacks capacity to make a specific decision, or specific types of decisions. While presence of cognitive impairment, such as a diagnosis of dementia or a mental illness is a precondition to a finding that a person lacks capacity, it is not determinative. There must be lay evidence suggesting that the person does not understand the issues before them, the possible approaches to these issues or appreciate the reasonably foreseeable consequences of these approaches.

Implications of supported decision-making being the default approach

Requiring guardians to orient their role around a presumption in favour of supported decision-making demands resources being made available to assist individuals to understand what this means, and equip them with the strategies to implement such an approach. It means guardians need to be equipped with information regarding the strategies they can employ to adhere to a supported decision-making approach, including sources of advice for the performance of their role. Those providing guidance for the management of situations where a guardian believes substitute

¹¹ Law Institute of Victoria, *Inquiry into Powers of Attorney - Submission to the Parliament of Victoria Law Reform Committee*, (2009) p9

¹² *Ibid*

decision-making is necessary would need to articulate the considerations relevant to identifying when substitute decision-making is permissible¹³.

Safeguards

Any regime that permits another person to influence or determine critical life issues for another requires significant safeguards. Implementation of safeguards is a specific obligation under Article 12 of the CRPD. As we set out in our 2009 Submission to the Victorian Parliamentary Law Reform Commission, the Commission proposes to identify broad principles that need to be considered and addressed. These include:

- **Preventative safeguards:** Clarity at the time guardianship instruments are being drafted and executed is one of the best means of preventing difficulties and abuse. Those executing instruments need to understand what they are doing (which should include access to free legal advice where needed), and those being nominated need to be clear about the expectations on them – both of the person nominating them, and under the general law. This is the point at which both parties should explore supported decision-making and assess when substitute decision-making might need to be considered. The work of the Office of the Public Advocate provides a strong foundation for this.
- **Automatic and ad-hoc monitoring:** The Commission considers that a level of monitoring is required (including review that can be initiated by a concerned third party). The way in which monitoring is framed becomes important. Monitoring can itself operate as a form of support and assistance for guardians, especially those performing their role in circumstances involving a level of crisis or grief.
- **Monitoring and review of the decision-making process and not just the substantive decision:** Any system of safeguards needs to be as concerned with decision-making methodology in given scenarios as it is with the substantive decisions that are being made.
- **Resources and support:** those acting as guardians need to have access to resources and support to assist them perform their responsibilities. Critically, if the need arises, independent support should also be available to the person who executed the instrument.

2. Conclusion

Guardianship arrangements involve the appointment of a person to act in another person's best interests. Guardianship therefore involves arrangements that can potentially limit a person's autonomy. The challenge of regulating guardianship is achieving a balance between promoting the capacity of people with disabilities to exercise supported decision-making and facilitating substitute decision making when this is not possible. An accessible and robust framework designed to preserve individual autonomy is essential, while acknowledging that autonomy may need to be restricted in certain circumstances, based on whether such a limitation is reasonably and demonstrably justified under section 7(2) of the Charter. A supported decision-

¹³ VEOHRC Submission to the VPLRC on the *Inquiry into Powers of Attorney* (2009), page 6.

These considerations would be based upon section 7 of the Charter, which sets down a framework for identifying where it may be permissible to limit human rights. Section 7 is naturally expressed in broad, abstract terms, but is readily capable of tailoring and application to a range of scenarios.

making framework must be backed with appropriate resources and a range of safeguards.

The Commission would welcome any questions the VLRC may have about this submission.

Yours sincerely

Dr Helen Szoke
Commissioner

