Office of the Public Advocate

Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper

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Introduction

0.1 The Office of the Public Advocate (OPA) has considered the Victorian Law Reform Commission's 'Guardianship Information Paper' and welcomes the opportunity to provide the Victorian Law Reform Commission (VLRC) with its advice and answers to the questions that the VLRC has posed.

0.2 OPA has extensive experience and expertise in the operation of the *Guardianship and Administration Act 1986*. As the guardian of last resort and the holder of specific investigative powers under the guardianship legislation, the Public Advocate and her staff have unique experiences to draw upon in responding to the 'Guardianship Information Paper'.

0.3 As a recent OPA discussion paper on 'Guardianship Trends in Victoria 1988-2008' points out:

> There has been an exponential growth in the number of guardianship cases managed by OPA in the twenty years since the statutory role of guardianship was introduced. There has been a growth in the number of statutory guardians in comparison to private guardians and an increasing tendency for a higher proportion of OPA guardianship cases to be carried over compared to the proportion of new cases taken on. The latter has had a compound effect on the number of guardianship cases managed, with OPA carrying an annual number of 1383 cases in 2007/08 compared to 225 in 1987/88.[1]

0.4 In the last financial year OPA provided guardianship services in 1334 cases and temporary guardianship in 60 cases. Dementia (34%) was the most frequent disability type among guardianship clients, followed by mental illness (17%), acquired brain injury (16%) and intellectual disability (14%).[2] OPA also conducted 680 investigations to assist the Victorian Civil and Administrative Tribunal (VCAT) in its deliberations.[3] OPA also oversaw the involvement of 54 volunteer Community Guardians in 90 guardianship cases in 2008/09.[4]

0.5 OPA notes that its expertise on guardianship and guardianship-related matters comes not just from its specific guardianship activities, but also stems from other roles played by employees and volunteers at OPA. In the last financial year OPA coordinated the work of over 500 volunteer Community Visitors, who conducted 5,413 visits to a range of accommodation settings in which people with cognitive disabilities and mental ill health reside.[5] OPA also coordinates the Independent Third Person Program, which last financial year saw volunteers attend 1,425

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[1] Liz Dearn, 'Guardianship Trends in Victoria 1988-2008', OPA Discussion Paper 2009, p. 12, available at: http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/History%20of%20Guardianship%20paper%201_%20Trends.pdf.

[2] OPA, *Annual Report 2008/09*, pp. 8-9, available at http://www.publicadvocate.vic.gov.au/file/file/Report/OPA%20Annual%20Report%202009/OPAAnnualReport0809_121009Compressed.pdf?phpMyAdmin=fe8bb73b8ddef429ba268102bddcf16c.

[3] OPA, *Annual Report 2008/09*, p. 16.

[4] OPA, *Annual Report 2008/09*, p. 51.

[5] OPA, *Annual Report 2008/09*, p. 46; OPA, *Community Visitors Annual Report 2009*, p. 10.

police interviews of people with cognitive impairments or mental ill health.[6] OPA also has a heavily utilised telephone advice line, which last financial year answered 14,022 calls, a substantial proportion of which concerned guardianship and administration, and enduring powers of attorney. OPA also has an active community education program, which saw 201 presentations delivered in 2008/09 to 8,390 people. Again, a substantial proportion of these presentations concerned guardianship and administration, and enduring powers of attorney.[7]

0.6 OPA notes that its representatives have already had considerable contact with the VLRC in the course of the guardianship review, which has occurred in a number of ways. The Public Advocate has been an active member of the VLRC guardianship review reference committee. The Public Advocate, the Principal Legal Officer and the Manager of Policy and Education at OPA have each met several times with members of the VLRC team.

0.7 OPA notes that it has conducted a number of internal and external consultations, on which this submission draws. The internal consultations consisted of the following: an OPA planning morning on supported decision-making (29 July 2009); a series of lunchtime talks (over five days in September 2009) on 'Principles in the Act', 'Capacity', 'Guardianship', 'Administration', 'VCAT', 'The Public Advocate', 'Medical Treatment' and 'Privacy and Freedom of Information'; a half-day review of OPA's likely key contributions to the review (15 October 2009); and a series of update and discussion sessions (1 December 2009, 2 February 2010 and 28 April 2010). The external consultations so far have included discussions with the Victorian Disability Advocacy Network, the Self-Advocacy Resource Unit, Star Victoria, Alzheimer's Australia, Huntington's Victoria, and in February this year OPA hosted a key stakeholders forum on Supported Decision-Making. The documentary record of this forum, which constitutes the responses from five break-out groups to a series of questions, is available on OPA's website.[8]

0.8 In addition, OPA has produced a number of discussion papers on matters relevant to the review. These consist of the following papers, which will all accompany the hard copy of this submission. These papers are all available on the OPA website at the 'Research' portal:[9]

- 'Principles and Values in Victorian Guardianship Legislation'
- 'The Role of the Public Advocate'
- 'Guardianship Trends in Victoria 1988-2008'
- 'Too Much Guardianship? Reflections on Guardianship 1988-2008'

[6] OPA, *Annual Report 2008/09*, p. 49.

[7] OPA, *Annual Report 2008/09*, pp. 38, 40.

[8] OPA, 'Supported Decision-Making Forum. 24 February 2010. Summary Report', available at: http://www.publicadvocate.vic.gov.au/file/file/Research/Forums/2010/OPA%20Supported%20Decision-Making%20Forum%202010%20Summary.pdf.

[9] See OPA website, 'Research' portal, at the 'Discussion Papers' section: http://www.publicadvocate.vic.gov.au/research/132/.

- 'Supported Decision-Making: Background and Discussion Paper'
- 'Supported Decision-Making: Options for Legislative Recognition'

0.9 OPA hopes that these materials will assist the VLRC. OPA imagines that the final VLRC report will include an analysis of how guardianship has operated in Victoria since 1986 in the context of other matters affecting people with a disability, and will include consideration of the theory, purpose and practice of guardianship, as well as references to interstate and overseas systems.

0.10 The remainder of this submission is organised in response to the specific questions posed by the VLRC.

1. What parts of the law work well? What parts of the law don't work well and why? Ideas to improve the law.

1.1 The strengths of Victoria's guardianship system include the following: the independent, cheap, relatively informal and expeditious nature of tribunal hearings; the focus on the interests of represented persons in the making of guardianship orders and the carrying out of guardianship activities; the absence of conflicts of interest for guardians (in large a result of guardianship not existing on a fee-for-service basis); and the existence of checks and balances in separating public guardianship from public administration.

1.2 As the length of this submission attests, OPA has a number of ideas for how Victoria's guardianship laws might be improved. In this section we outline the main areas in which OPA believes this can happen, and we expand on some of these ideas elsewhere in this submission.

Policy, social and international context

1.3 The local and international context in which Victoria's guardianship laws operate has changed considerably since 1986. In particular:

- service provision to people with disabilities is more individualised than in the past, and fewer people with disabilities live in institutions;
- professionals have an ever increasing awareness of risk and management of risk is a significant aspect of professional practice;
- society appears more tolerant of injustice;
- rising rates of age-related illnesses may significantly increase the numbers of people who have guardianship and administration orders;
- human rights developments, particularly the adoption of the United Nations *Convention on the Rights of Persons with Disabilities*, have called into question the ease with which many societies make use of substitute decision-making in relation to people with disabilities;
- An overriding concern of OPA's concerns the question of how the protective nature of much of OPA's guardianship work sits with the individual rights emphasis that is part now of the international law context in which this

guardianship review is taking place. OPA does not want to see society lose sight of its need to protect vulnerable citizens.

Supported decision-making

1.4 On this score, OPA is very interested in seeing how supported decision-making can be encouraged, while still leaving room for guardianship (and substituted decision-making) when the need arises. The work that has already been done, or is underway, in Australia and elsewhere around supported decision-making provides a very energising impetus that encourages society to both prove and affirm its belief that people with disabilities should always be involved in the decisions that affect them.

1.5 This philosophy is consistent with OPA's founding philosophy, and indeed it is the reason why OPA labels its guardians 'Advocate/Guardians'. They are seen, and see themselves, not just as guardians but as advocates for, and supporters of, the people they represent.

1.6 Having said that, OPA is uncertain about the extent to which supported decision-making initiatives will help people with profound cognitive disabilities, or those who have no family or supports. OPA has views about the way supported decision-making initiatives might sit with current substitute decision-making laws (including guardianship and power of attorney laws). We elaborate on this in Section 15, where we point to our search for broader power of attorney laws that would encourage greater supported decision-making. We also call there for the creation of co-decision-making orders in certain circumstances, instead of standard guardianship orders.

Service Provision

1.7 As mentioned earlier, service provision to people with disabilities is increasingly becoming more individualised, and guardianship has increasingly been used as a de facto means by which service provision is negotiated. OPA here makes the point that guardianship was never intended to be a substitute for case management, or a way of dealing with inadequate service provision. OPA is of the view that guardianship is too readily used as a response to service system gaps or when other alternative solutions might be more in the interests of the person concerned.

Protection

1.8 OPA sees its role as very much about ensuring the safety of vulnerable people, and OPA is keen to ensure that society sees the role played by guardianship not just in terms of rights-restriction but in this protective capacity. Some of the key provisions of the *Convention on the Rights of Persons with Disabilities* concern the need to provide protection to vulnerable people, although this aspect of human rights discourse has tended to be lost in local discussions about guardianship (including in the terms of reference for the VLRC).[10]

[10] See further John Chesterman, 'The Review of Victoria's Guardianship Legislation: State Policy Development in an Age of Human Rights', *Australian Journal of Public Administration*, 2010, vol. 69, pp. 61-5.

1.9 Having said that, OPA would like to restrict guardianship orders to those situations of absolute necessity, and then to limit as much as possible the sorts of decisions a guardian may make (see further Section 6). But OPA recognises that a further policy response is needed in relation to people who may not be entitled to guardianship, but who are vulnerable and in need of protection. Our suggestion here is to seek new adult protection legislation.

The need for adult protection legislation

1.10 OPA strongly supports the argument that society has a duty to protect vulnerable people, including those who are not eligible for the protective mechanism of guardianship.[11]

1.11 OPA would support Victoria undertaking some of the initiatives that have been implemented in overseas jurisdictions in this regard, such as the United Kingdom and United States, and which have recently received the support of the South Australian Public Advocate.[12]

1.12 There is a pressing need for greater policy focus on adult vulnerability, and the broadening out of guardianship to cover such situations would often be unhelpful and even problematic. As the recent *Annual Report* of the South Australian Office of the Public Advocate notes, the problems with using guardianship in this way are that:

- guardianship is reactive and its use here would not lead to adequate resourcing of prevention strategies;
- guardianship would cause undue concentration to be placed on individuals who may be suffering from abuse at the hands of others;
- guardianship will not immediately lead to the taking of sometimes simple service system measures that may improve a person's quality of life; and
- the use of guardianship generally risks turning adult protection into something that is 'seen as someone else's responsibility'.[13]

1.13 A better way would be to resource a multi-pronged strategy that draws on experiences overseas and that itself has some similarities with current elder abuse initiatives.

1.14 OPA is mindful of the danger of attempting to replicate in Victoria the legislative framework for such a protection scheme without being able also to replicate in Victoria the council-level social care culture and services that exist in some overseas jurisdictions that have adult protection legislation.

1.15 But OPA considers that an adult protection initiative here is necessary, and that such a strategy would need to focus on the question of vulnerability rather than capacity. To that end, a definition of vulnerability would need to be adopted. Such a definition could be drawn from the working United Kingdom definition that the

[11] See Jonathan Herring, 'Protecting Vulnerable Adults: A Critical Review of Recent Case Law', *Child and Family Law Quarterly*, 2009, vol. 21, pp. 498-512.

[12] See Office of the Public Advocate (South Australia), *Annual Report 2008-09*, pp. 43-7.

[13] Office of the Public Advocate (South Australia), *Annual Report 2008-09*, p. 45.

South Australian Public Advocate quotes in his recent *Annual Report*. That definition sees a vulnerable adult as someone:

> … in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation.[14]

1.16 The adult protection strategy would need to liaise closely with current elder abuse prevention strategies being pursued in Victoria (through the Department of Planning and Community Development and the Office of Senior Victorians), and would ideally incorporate:

- Significant new funding to resource local councils or other local providers to follow up on adult protection alerts;
- A community education campaign, geared around the need to actively involve citizens in the lives of vulnerable adults;
- A 24 hour call-in line;
- A small Office of Adult Protection, whose main role would be to act as the central point for referrals and for overseeing the funding of local councils or other local providers to deliver adult protection services.

1.17 OPA plans to develop further the ideas raised here, and shall keep the VLRC aware of developments in this regard.

Deprivation of liberty and restrictive interventions

1.18 OPA nominates as a key human rights topic of the next five years, the need for Victoria (and indeed Australia) to better regulate the means by which people with disabilities are subjected to some degree of 'deprivation of liberty' or are subjected to unregulated or under-regulated restrictive interventions.

1.19 The 'Bournewood' decision of the European Court of Human Rights gave rise to the development in England of 'deprivation of liberty safeguards' for people who are subject to deprivations of liberty but who are not covered by involuntary provisions of mental health and other laws.[15] Such a development is overdue in Australia, and would be focussed in Victoria on people who suffer deprivations of liberty in a variety of settings (most notably in the disability and aged care sectors) and whose treatment is not auspiced by existing involuntary or coercive treatment laws.

1.20 While such 'deprivation of liberty safeguards' should not necessarily be housed in new guardianship legislation, the drafters of new guardianship legislation should certainly be mindful of this likely development.

1.21 One step down from deprivations of liberty are the use of chemical or physical restrictive interventions, which can involve the administration of pharmaceuticals and the use of mechanical restraints and seclusion.

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[14] Office of the Public Advocate (South Australia), *Annual Report 2008-09*, p. 43.

[15] *H.L. v United Kingdom* (European Court of Human Rights, 5 October 2004, no. 45508/99). See Damien Bruckard and Bernadette McSherry, 'Mental Health Laws for Those "Compliant" with Treatment', *Journal of Law and Medicine*, 2009, vol. 17, pp. 16-21.

1.22 The *Disability Act* defines (section 3) a 'restrictive intervention' as

> … any intervention that is used to restrict the rights or freedom of movement of a person with a disability including —
> (a) chemical restraint;
> (b) mechanical restraint;
> (c) seclusion.

'Chemical restraint' is defined (section 3) as:

> … the use, for the primary purpose of the behavioural control of a person with a disability, of a chemical substance to control or subdue the person but does not include the use of a drug prescribed by a registered medical practitioner for the treatment, or to enable the treatment, of a mental illness or a physical illness or physical condition.

1.23 OPA notes that a range of restrictive interventions are currently used in relation to people with disabilities, many of which are unregulated or under-regulated. It is routine, for instance, for some pharmaceuticals to be used for purposes of modifying the behaviour of some people with cognitive impairments or mental ill health in ways that constitute restrictive interventions. Yet the administration of these pharmaceuticals is sometimes not considered by service providers to be subject to existing restrictive intervention oversight (such as is contained in Part 7 of the *Disability Act*).

1.24 Indeed, as Section 23 of this submission discusses, the routine administration of pharmaceuticals is not even considered 'medical treatment' under the guardianship legislation, making the administration of some behaviour-modifying pharmaceuticals exempt even from the substitute consent process that applies to the medical treatment of people with cognitive impairments. While this does not technically exempt such practices from the restrictive intervention requirements of the *Disability Act*, OPA is certain that some libido suppressants and sedatives are being used without appropriate approval, and calls for such practices to be treated and regulated as restrictive interventions (something we reiterate in paragraphs 23.12 and 23.13).

1.25 While the *Disability Act* does provide mechanisms for approving the use of restrictive interventions, OPA is aware, largely through the work of its Community Visitors, that even those restrictive interventions that are recognised by service providers to be subject to Part 7 of the *Disability Act* are not always being authorised in accordance with the legislation (and this is despite strenuous activity on the part of the Office of the Senior Practitioner to ensure compliance with the legislation). For instance, Community Visitors are concerned about the quality of behaviour support plans, which often do not meet legislative requirements.[16]

1.26 OPA calls here for all restrictive interventions that apply to people with disabilities to be brought within the regulatory mechanisms established in the *Disability Act*. OPA would also like to see new guardianship legislation contain a provision about the need for all restrictive interventions to be legislatively authorised and subject to review.

[16] See here OPA, *Community Visitors Annual Report 2009*, p. 27. The term used in the *Disability Act* (e.g. section 141) is 'behaviour management plan'.

Advocacy

1.27 Another area that OPA would like to see covered in new guardianship legislation concerns the provisions relating to advocacy. Currently section 28 of the Act provides that 'a guardian acts in the best interests of a represented person if the guardian acts as far as possible … as an advocate for the represented person'. Sections 15 and 16 provide the basis for advocacy by the Public Advocate separate from guardianship.

1.28 OPA has long prided itself on being an advocate for people with disabilities, both in a general sense and in relation to the individual casework conducted by OPA staff. This is why the word 'advocate' is in the institution's name, and why OPA calls its guardians 'Advocate/Guardians'.

1.29 In OPA's view, advocacy is fundamental to all aspects of the legislation, even though the Act is largely silent about advocacy. In this regard OPA notes that:

- The Act establishes the Public Advocate (not the Public Guardian) but advocacy is not in the title of the Act.
- Acting as an advocate is the first requirement of a guardian (under section 28).
- Investigations conducted by OPA under section 16 currently are done within an advocacy framework seeking the best outcome for the person with a disability, exploring alternative options, and working with the parties to resolve issues without the need for guardianship.
- The Public Advocate is empowered to conduct individual and systemic advocacy and public education, though this mandate could be more clearly expressed.

1.30 OPA is concerned that if new legislation is also relatively silent on advocacy, there is a risk that the advocacy functions of those operating under the legislation will be forgotten, and that legalism will ensure that the appointment and operations of substitute decision-makers will become increasingly instrumental. OPA considers that a clear mandate for individual advocacy, separate from guardianship, is needed. OPA would like to see a section that deals specifically with the principles, and advocacy responsibilities, of those working under the Act.

1.31 In addition, the advocacy functions of the Public Advocate (under the current sections 15 and 16, especially section 16(1)(e) and (f)), warrant greater delineation. OPA makes suggestions along this line in Section 18 of this submission.

Mediation

1.32 A significant percentage of guardianship applications stem in part from the results of family conflict about who should be involved in making decisions for a cognitively impaired family member. OPA believes that in some, though not all, such situations, a tribunal-encouraged and auspiced mediation process may lead to better outcomes (for the represented person) than are achieved through the full guardianship application process. We note here that Justice Bell's recent review of VCAT has sought to enhance the alternative dispute resolution capacity of

VCAT,[17] and OPA would like to see greater flexibility on the part of VCAT to provide for, and even require, interested parties in guardianship hearings to engage with alternative dispute resolution processes. Naturally the interests of the person with a disability should be paramount in any mediation process.

Litigation guardianship

1.33 OPA is sometimes asked, and even on occasion required, by courts to act as a litigation guardian in order to instruct counsel representing a person with a cognitive impairment or mental illness. Sometimes it will be appropriate for OPA to act as a litigation guardian, where the substance of the court action relates to a lifestyle issue, such as access to persons. Likewise, where the matter is more exclusively financial, it will be appropriate for an administrator to be appointed litigation guardian. Since a person or body may traditionally refuse appointment as a litigation guardian, OPA would like it clearly articulated in the guardianship legislation that OPA's consent is required before it is appointed as a litigation guardian.

Administration

1.34 In addition to the number of ways in which this submission details recommendations that impact on administration, we would make the following brief suggestions:

- The mechanism by which administration fees are levied acts as a disincentive for the making of limited, as opposed to plenary, administration orders. This needs to be remedied.
- Greater specification should be placed on the standing of a person seeking an administration order.
- The specific powers of administrators should be spelt out (for instance, does an administrator have power to inspect the will of a represented person where the will is not in their possession?).
- The ability of an administrator to institute legal proceedings in a represented person's name (section 58B(2)(L)) requires greater clarification.
- Consideration should be given to whether VCAT should be able to make a will for a represented person, or alternatively whether VCAT should be empowered to make orders about the distribution of a represented person's assets.
- VCAT should have authority to require a former administrator to repay funds where there has been culpable negligence or misappropriation.
- An administrator in Victoria should be able to be appointed in relation to a missing person, as is the case in other jurisdictions.

[17] Justice Kevin Bell, *One VCAT: President's Review of VCAT* (2010), pp. 84-89.

Private Guardians

1.35 OPA would like to record here its concerns about the current practices and levels of knowledge of some private guardians. Private guardians are not currently subject to regulatory oversight (and are not, for instance, bound in the same way as OPA by the provisions of the Victorian *Charter of Human Rights and Responsibilities Act 2006*). OPA has provided some support for private guardians, through its publications and through its private guardian support program, but this support relies on private guardians actively seeking out information. OPA believes that private guardians ought to be required to submit periodic reports to VCAT, and that further resources ought to be placed into educating private guardians about their responsibilities.

2. Is a system of guardianship and administration the best way to ensure the needs of people with impaired decision-making ability are met and their rights are protected? What other alternatives might better achieve these goals?

2.1 OPA views guardianship and administration as two among many strategies that exist to protect people with impaired decision-making ability. For the reasons spelt out in this submission, OPA views guardianship and administration only to be appropriate in certain circumstances, where a cognitive impairment or mental illness inhibits decision-making and where decisions need to be made.

2.2 Other strategies exist that do not involve guardianship and administration and that help to ensure the protection of people with decision-making incapacity, including the range of laws that provide for the making of enduring powers of attorney.

2.3 In addition, a variety of laws cover the provision of disability supports, accommodation services, and restrictive interventions. These laws generally take their cue from Victoria's *Charter of Human Rights and Responsibilities Act 2006*, which seeks to protect the human rights of Victorians, and which provides that any interventions in the lives of Victorians should be the least restrictive ones possible.

2.4 OPA would like to see policy attention devoted to a number of arenas in order to decrease the community's reliance on guardianship and administration as protective devices. These arenas range from the very broad to the more narrowly service oriented. OPA would like to see an increased level of community support for, and involvement in the lives of, people with disabilities. OPA would also like to see improved provision of services to people with impaired decision-making capacity, and a reduction in the gaps in service provision that sometimes lead to the making of guardianship applications. OPA is also advocating for the introduction of broad vulnerable adult protection laws, as discussed at paragraph 1.10.

3. Is there an adequate understanding of guardianship laws in the community? What could be done to improve this?

3.1 While there is broad knowledge in the community about the existence of guardianship laws, there is considerable confusion about when guardianship and/or administration orders should be sought. Some people, for instance, believe that everyone with a serious cognitive incapacity or mental illness needs to have a guardian and/or an administrator.

3.2 The challenge for public education in this field is that information about guardianship laws tends to be known only by professionals working in the disability field, or by individuals whose personal circumstances require a knowledge of these laws.

3.3 OPA would like to note that it provides a significant amount of public information about guardianship. OPA's heavily utilised telephone advice service provides information about guardianship and administration, and OPA's website and publications are significant resources in this field. OPA's community education program also delivers information about guardianship to thousands of people each year (see paragraph 0.5). The State Trustees also consider community education about guardianship and administration to constitute a significant aspect of its role.

3.4 OPA would like to see increased resources placed into community education, and suggests that these resources could be part of a broader strategy aimed at increasing the options for, and awareness of, the various avenues by which people with cognitive impairments or mental illnesses can live without requiring the making of guardianship or administration orders. Such avenues include, but are not limited to:

- Increased support amongst community members for people with disabilities, including the provision of resources to assist in greater supported decision-making;
- Better uptake of enduring powers of attorney;
- Improved service delivery strategies that reduce the service gaps that can result in guardianship applications.

4. How should developments in policies and practices for people with disabilities be reflected in guardianship and administration laws?

Principles in the legislation

4.1 OPA has proposed that a number of new principles and new objects be incorporated into new guardianship legislation. The suggestions on this point have been made in the position paper entitled 'Principles and Values in Victorian Guardianship Legislation' which accompanies this submission.[18]

[18] Barbara Carter, 'Principles and Values in Victorian Guardianship Legislation', OPA Discussion Paper 2009, available at:

4.2 The proposed principles and objects outlined in that paper (section 1) are as follows:

> **Purpose**
> The Purpose of the Act is to fulfil the responsibility of the State to protect and promote the dignity and well-being of people with a disability. To this end the Act establishes the Public Advocate, mechanisms for the appointment of guardians and administrators where needed and regimes for medical decision-making.
>
> **Preamble**
> This Act is premised upon the following commitments and acknowledgements:
> • All people have inherent dignity and the responsibility to respect and foster the dignity of others.
> • All people have rights that must be respected in accordance with national and state legislation and international instruments.
> • All people are entitled to the support and services they require to lead a life of basic human dignity.
> • Victoria is committed to being an inclusive society where all people are valued.
> • Victoria is committed to being a safe society, where people live their lives free from abuse, neglect and exploitation.
> • Victoria is committed to supporting people with disabilities that may hinder their participation in society or prevent them from reaching their potential.
>
> **Objects of the Act / values**
> It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that:
> a) the human dignity and rights of the person with a disability are protected and promoted;
> b) the personal and social well-being of the person with a disability is promoted;
> c) the person with a disability is able to live in safety and security;
> d) any limitations on the rights and freedom of a person are reasonable, proportionate and justified.

5. People with age-related disabilities and acquired brain injuries are now the main users of guardianship and administration. Do you think the system needs to change to reflect this situation and prepare for the future?

5.1 While the premise of this question is accurate, the demographic changes are not necessarily as stark as may first be imagined, as OPA's recent 'Guardianship Trends in Victoria 1988-2008' points out.

5.2 That paper notes that:

> New age data available from VCAT and OPA suggests that while there have been large increases in overall numbers of older guardianship and administration clients, as a proportion of the whole client group, increases have not been as significant as expected. For example, the proportion of new clients over 80 years of age increased from 26% to 32% in the ten years from 1987/88 to 1997/98 and from 32% to 35% in

http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2009/Principles%20and%20values%20in%20Victorian%20guardianship%20legislation.pdf

the ten years from 1997/98 to 2007/08. There was only a marginal increase in new clients in the 60+ age group over the whole twenty year period - from 63% in 1987/88 to 67% in 2007/08.

Shortcomings in available data mean that it is not possible to provide an analysis of trends in relation to disability types for people on guardianship for the twenty year period. As such, this paper is limited to the following observations: The proportion of orders received for people with dementia between 2001/02 and 2008/09 fluctuated between 30% and 35%. Between 1999/00 and 2008/09, an average of 10% of new guardianship orders were for people with an intellectual disability and 10.5% were for people with a mental illness. The disability trends data above contrasts with figures for the first ten years of guardianship, where figures for clients with an intellectual disability and mental illness were higher (29% and 22% respectively).[19]

5.3 There is no doubt that an increasing number of the people who are subject to guardianship are people who once had capacity. Such people may have developed age-related dementia or acquired a brain injury. With increasing numbers of people falling into this category, it makes sense for renewed efforts to be put into promoting the increased uptake of instruments such as enduring powers of attorney, by which people can plan ahead and appoint others to make decisions for them in the event of their later incapacity. We discuss this possibility further in Section 25. (OPA notes here that it does not favour any changes to the guardianship system that would categorise people according to whether they at some point had capacity.)

5.4 OPA would also like to see improved legislative recognition of advance statements (see Sections 25 and 26).

5.5 OPA would also point out that guardianship cases are becoming increasingly more complex. In addition to rising rates of dementia, people with profound cognitive disabilities are living for longer. They are also less and less likely to be residing in institutions. As a result, the decisions which guardians are required to make are becoming more complex. Added to this, and consistent with developments in supported decision-making, it is expected that guardians will be required to involve represented persons and significant others more and more in determining courses of action, which will add to the complex and time-intensive nature of the role of guardian. At the same time, OPA is calling for guardianship orders to be more narrowly confined than presently they are. All of this will need to be borne in mind when future guardianship models are developed.

6. Disability. 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'?

7. What are the best ways of assessing whether a person's decision-making capacity is impaired?

[19] Dearn, 'Guardianship Trends in Victoria 1988-2008', pp. 12-13.

6.1 OPA sees considerable merit in international moves to ensure that all people are viewed to have legal capacity, which is a stance that receives support from the common law in Australia and that receives its most prominent modern statement in Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*. OPA also recognises the ongoing need for substitute decision-making in some situations, and recognises that the failure to provide this would constitute an egregious breach of society's duty to protect its most vulnerable members. The challenge then presents itself as how best to provide protection without unduly circumscribing the ability of people to make their own choices.

6.2 The first premise, in OPA's view, must be that all people are presumed, unless there is evidence to the contrary, to have capacity to make the decisions that affect them. The second premise must be that any capacity assessment is decision-specific.

6.3 When considering whether a person has capacity to make decisions, the much-discussed options are to make decision-making capacity assessable on the basis of a person's status (such as the presence of a cognitive disability), their functioning (an inability to make a decision), or the outcomes of their decision making (where any decision or lack of decision is measured against social norms).[20]

6.4 OPA favours a situation where a person's capacity in relation to a particular decision is assessed through a functional test, in which VCAT determines whether the person has the capacity to make the decision in question. OPA does not support a specifically itemised test of decision-making capacity, since different types of impairment call for different types of assessment. The task for the tribunal, then, is to ask: does the person have the functional ability to make the decision in question? In answering this question VCAT would be expected to draw on relevant clinical expertise. OPA believes the legislation should guide VCAT specifically along these lines.

6.5 This is preferable to a simple status test or criterion, which would be unjustifiably discriminatory were that status to be the presence of a disability, and which would be too capacious of subjective interpretation if the status were a broad requirement, for instance, that the person be 'vulnerable'. Equally a functional test is preferable to an outcome-based approach, where society's views on the reasonableness of decisions would unduly encroach on personal autonomy.

6.6 The current provisions – which require a person to have a 'disability', to be unable 'to make reasonable judgments', and to be 'in need of a guardian' – are too broad. The current criteria are predicated on a complete and final loss of broad decision-making capacity (which may have been the result of a life-long condition or a sudden illness or accident). But some people, such as those experiencing mental illness or dementia-related illnesses, have fluctuating capacity levels, and may therefore currently be subject to broad guardianship orders where they actually have capacity to make some decisions. This is one of the reasons why OPA would like to tighten the guardianship capacity criteria: to ensure that a decision really needs to be made, and made by someone else.

[20] See, for instance, Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future', *Syracuse Journal of International Law and Commerce*, 2007, vol. 34, pp. 429-62, at pp. 431-2.

6.7 OPA believes there is a need for the legislation to specifically incorporate the concept of impairment as a guardianship criterion (which we prefer to 'disability'), but to tie that to decision-making ability. OPA thus calls for the legislation to be similar in this respect to Queensland and A.C.T. legislation.[21]

6.8 If new guardianship legislation adopted a functional test, but did not require impairment in decision-making ability, then there would be no obligation on VCAT to investigate the reasons for a person's inability to make decisions, and there would be no requirement for clinical engagement or expertise to evidence that inability. If the criterion were simply that the person is unable to make their own decision, then many people, in addition to those with recognised decision-making impairments, would potentially be covered, and the inability of such people to make decisions would tend only to be evidenced by examining the outcomes of their decision-making processes. Thus if the inability to make a decision is not linked to a problem in the mind or brain, then the tendency will be for VCAT to concentrate on the outcomes of a person's thinking, rather than on the thought processes that led to those outcomes. This would constitute, in OPA's view, an admittedly subtle but inappropriate change that would see guardianship used to protect people from making unreasonable decisions rather than to protect people with decision-making impairments. OPA does not believe that guardianship should be used in this way.

6.9 It is worth noting here that even jurisdictions with stand-alone capacity legislation, such as the United Kingdom, still involve impairment in their capacity criteria. In the United Kingdom a person is said to lack capacity if at the relevant time they have 'an impairment of, or a disturbance in the functioning of, the mind or brain', which can be temporary or permanent.[22]

6.10 There is an argument that the current legislation effectively discriminates on the basis of disability, and that the use of 'impairment' in future legislation would result in discrimination on that basis. OPA acknowledges this, but suggests that this discrimination is positive discrimination. If guardianship is seen simply as rights-restricting, then such an analysis seems hard to make. But OPA considers that guardianship is rights-enhancing (in that it serves to protect people), and thus the discrimination is positive, in favour of those people with cognitive impairments or mental illnesses who are in need of, and entitled to, its protection.

6.11 OPA considers that there is cause for broadly defining 'impairment' so as potentially to incorporate more than those conditions that currently exist in the definition of 'disability' (which includes, in section 3 of the current Act, only 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'). In particular, OPA would favour the term capturing some forms of addictive behaviour, such as alcoholism. (Equally, of course, some people who satisfy the current criteria would no longer be captured by OPA's proposed decision-specific criteria.)

6.12 OPA thus proposes that a guardianship order should only be made where a person has an impairment that renders the person unable to make or give effect to their own decision about a particular health or welfare matter, and either:

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[21] *Guardianship and Administration Act 2000* (Qld), section 12 and schedule 4; *Guardianship and Management of Property Act 1991* (ACT), sections 5 and 7.

[22] *Mental Capacity Act 2005* (UK), section 2(1) and (2).

- a decision is required, or
- the person's health or welfare is at serious risk with regard to that matter.

6.13 OPA realises that restricting guardianship only to people with decision-making impairments will leave a class of vulnerable people unable to access guardianship. That does not mean that other steps should not be taken to protect that group of people. That is why OPA has called for the adoption of new adult protection legislation (see paragraph 1.10).

6.14 The next question is, if capacity is decision-specific, and a person is found to be lacking capacity in relation to a particular decision, how can a substitute decision-maker be empowered to make decisions without encroaching on areas where the person may have the capacity to make their own decisions? This in some regards is an inescapable problem, since it is not practical for a guardian to be attending VCAT for an assessment of a person's capacity to make every decision that may need to be made.

6.15 OPA's compromise position here is to seek to circumscribe as much as possible the authority given to guardians. In particular, OPA proposes that a guardianship order should specify as narrowly as feasible the decision-making power possessed by the guardian. This power may consist solely of the power to make one particular decision, though it may also extend to enable the making of subsequent ancillary decisions, where those ancillary decisions are closely connected to the matter that has given rise to the guardianship application.

6.16 Thus where a guardian is appointed to make a medical care decision, the guardianship order might extend beyond empowering the guardian to make a particular decision, and might also enable the guardian to make subsequent health decisions that are closely connected to the medical care decision (such as follow-up treatment). It would not be appropriate, however, for the guardian in that situation to be given power to make decisions about the person's general health care.

6.17 Consistent with all of this, OPA supports the removal of plenary guardianship powers (see further Section 13).

8. Best interests. Is 'best interests' a useful or appropriate guide for substitute decision-makers? Are there better approaches?

8.1 OPA would like the phrase 'best interests' to be removed from the guardianship legislation. OPA considers that this phrase has taken on negative connotations through its usage over time. The phrase has regularly been used (in child welfare legislation as well as in guardianship laws and elsewhere) as a rationale for overriding a person's expression of free will, and while the phrase was a positive development when it was first coined, it has come to constitute something of a euphemism for overriding free will. For that reason OPA believes it should be replaced and that a phrase such as 'personal and social well-being' would now be preferable.

8.2 OPA's view on this matter has been articulated in the position paper entitled 'Principles and Values in Victorian Guardianship Legislation', which accompanies this submission.

8.3 The proposal in that paper is that new legislation state that:

> 1) A guardian must act in a way that promotes the personal and social well-being of the represented person.
> 2) Without limiting subsection (1), a guardian promotes the personal and social well-being of a represented person if the guardian acts as far as possible:
> a) as an advocate for the represented person;
> b) to foster the represented person's dignity;
> c) to make the judgments and decisions that the person would have made after due consideration if able to do so, to the extent that this would not cause him or her undue harm;
> d) in consultation with the represented person, taking into account as far as possible his or her wishes
> e) in consultation with important people in the life of the represented person
> f) in a way that fosters the person's positive relationships, friendships and connections with others;
> g) to preserve and foster the person's capacity for self-determination;
> h) so that the person lives in safety and security and is protected from abuse, exploitation and neglect;
> i) so that the person is able to participate in and contribute to the community to the extent that s/he is able and wishes to do so;
> j) with respect for the person's cultural and/or ethnic values and circumstances.[23]

8.4 OPA has long taken the view that a represented person's wishes should wherever possible be followed, and indeed respect for a person's wishes constitutes part of the current legislative definition of acting in someone's best interests (and would continue to be essential were the above suggestion adopted).

8.5 It is important to note that this requirement is germane not only for the work of guardians but also for administrators. This gives rise to some complex questions in that respect, which include the following. What specific matters should be borne in mind by an administrator if they are to act in the interests of a person? Should such considerations include the life goals of the person, their financial well-being, their ability to pay for their own funeral? How should administrators prioritise the different elements of acting in someone's interests when those aspects come into conflict? For instance, if a person is able to afford a holiday that they have long wanted to take, should an administrator permit money to be spent in this way even if it means the person will be unlikely to have sufficient funds to cover their own funeral expenses? A clearer set of principles in the legislation would assist administrators in making such decisions.

[23] Carter, 'Principles and Values in Victorian Guardianship Legislation', section 7 (see also section 4.2).

9. Does the notion of 'best interests' decision-making allow for the right of a person to take risks and make bad decisions? Should it?

10. To what extent should a guardian or administrator be required to try to identify the represented person's wishes and following them wherever possible?

9.1 The question of when a person should be allowed to take risks and make bad decisions is a complex one, and OPA notes the work of David Green, a former Public Advocate, on the topic of risk.[24] OPA does not believe that risk-taking and poor decision making should alone be grounds for a guardianship order, and OPA believes there should be a clause, such as is proposed in paragraph 8.3, that a guardian promotes the personal and social well-being of the represented person if he or she makes the judgement that the person would have made had they possessed the ability to do so, to the extent that this would not cause the represented person undue harm. While the focus of the guardianship legislation is properly on the represented person, OPA does not believe a guardian should be placed in the position of making bad or harmful decisions for a person, simply because this is what the person would have done. Guardians should not become agents of harm.

9.2 Thus OPA believes that a guardian should identify and follow a represented person's wishes wherever possible, but not in such situations where to do so would cause undue harm.

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

11.1 Yes, there is a continuing need for substitute decision-making laws. OPA supports the greater use of diversionary strategies that will alleviate the need for guardianship applications, including the greater use of enduring powers of attorney (which enable substitute decisions to be made by people appointed by the donor), and increased resourcing of supported decision-making initiatives (as outlined elsewhere in this submission). OPA also recognises the need to limit the situations in which guardianship and/or administration orders can be made. But OPA recognises that there continues to be a place for substitute decision-making laws, where other options do not exist and where the person's well-being would otherwise be placed in jeopardy.

[24] David Green's work has been completed under an Australian Research Council grant at La Trobe University, with OPA as one of the industry partners. See, for instance, David Green, 'Risk and Social Work Practice', *Australian Social Work*, 2007, vol. 60, pp. 395-409.

12. Do we need to have two types of substitute decision-makers (administrators and guardians) for financial and personal decisions? Would it be preferable for VCAT to have a range of different financial, medical and lifestyle powers it could provide to one decision-maker?

12.1 OPA supports the current practice whereby VCAT can appoint individuals to act as both guardians and administrators for people whom those individuals know and with whom they have a close relationship (though please see the comments at paragraph 1.35 regarding the lack of oversight that exists here). Such individuals are then empowered to make financial and personal decisions for the represented person. OPA believes this situation should be able to continue, and sees no significant advantage in using the different terminology proposed ('financial, medical and lifestyle powers') to that currently in use (guardianship and administration). OPA confines the rest of its answer to this question to the role of last resort (or public/professional) guardians and administrators.

12.2 OPA believes extra safeguards are needed when the roles of administrator and guardian are being played by public or professional entities, and believes this is best provided by ensuring that public guardians continue to operate separately from professional administrators.

12.3 OPA accepts that some administration duties can encroach on guardianship decisions, and vice versa. This can happen, most routinely, when a decision is being made about the sale of a house, which will involve a decision about both financial management (administration) as well as accommodation (guardianship). The disadvantages of this degree of overlap, which we discuss further in paragraph 12.12, are more than met by the advantages of keeping the roles of professional administrators separate from those of public guardians.

12.4 A key argument for continuing to separate public guardianship from professional administration is the idea that this separation of functions is in the interests of clients. The argument is that this distinction:

- Stops too much power over a person's life residing in one person or organisation.
- Enables financial decisions to be made within an understandably 'cautious' cultural environment, while enabling guardianship decisions to be informed by the range of rights-promoting and tolerance-promoting principles that have always underpinned the work of OPA.

12.5 This argument is supported in various legislative and policy documents, including the *Disability Act* (section 6(1)(f)), which states that:

> … services for persons with an intellectual disability should be designed and provided in a manner that ensures that a particular disability service provider cannot exercise control over all or most aspects of the life of a person with an intellectual disability.

12.6 The New South Wales government recently endorsed the argument that the separation of financial decisions by public trustees from other decisions is in the interests of citizens. While the New South Wales Public Guardian was previously the same person as the Protective Commissioner (who had last resort administration powers), the Public Guardian is now distinct from the recently-created New South Wales Trustee and Guardian (who now exercises last resort

administration). In describing the need for these changes, the New South Wales Attorney-General argued:

> The bill provides that the position of Public Guardian will continue, but it does not provide that the Public Guardian will be the NSW Trustee and Guardian … This engenders a clear delineation between the roles of guardian and financial manager, ensuring no one statutory officer has the power to make decisions in all areas of a person's life and is consistent with other Australian jurisdictions.[25]

12.7 We note also that the New South Wales Legislative Council Standing Committee on Social Issues, in its recent report on *Substitute Decision-Making for People Lacking Capacity*, recommended the re-naming of the New South Wales Trustee and Guardian, in order to make clear its separation from the Public Guardian.[26]

12.8 If VCAT were able to appoint a public entity to make all the financial, lifestyle and personal decisions for represented persons, there would be one of two possible institutional effects. One possibility would be that the current roles of administrator and guardian (and the organisations that fulfil these roles) would be merged. The other possibility would be that the last-resort organisations would be empowered to exercise some of each other's powers in relation to particular people.

12.9 OPA takes the view that neither of these situations would improve the current system, and moreover believes that such an initiative would be damaging. The first option would certainly, and the second option would inevitably, erode the particular role that OPA has managed to play in acting both as last resort guardian and as a general advocate for the rights of people with disabilities. In both cases OPA's role as last-resort guardian would be shared, if not subsumed, by the role of last-resort administrator. This would, at the very least, lead to public confusion about OPA's institutional role, which itself would be damaging.

12.10 Since its creation OPA has played a key role in defending the rights of people with disabilities and in promoting tolerance of people with disabilities. A key danger that would be posed by OPA assuming even a small amount of administration duties, or by professional administrators taking a role in public guardianship, would be that some of OPA's systemic roles would be diluted if not altogether jettisoned. A serious challenge would be faced here, if OPA were to maintain its public credibility and broad advocacy functions.

12.11 The particular concerns would be:

- Could OPA continue to be an advocate for the rights of people with disabilities if it had the responsibility of managing the finances of people with disabilities? Would this be an insurmountable conflict of interest? (Some say the exercise of guardianship powers now presents OPA with a conflict of interest, though the response to this has been that OPA's guardianship

[25] *New South Wales Parliamentary Debates*, Legislative Council, 23 June 2009, p. 16486. See also New South Wales Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity* (2010), pp. 11-12.

[26] New South Wales Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, p. 127.

activities ground the systemic advocacy work of OPA in a unique way). Would the public continue to trust OPA to fulfil its advocacy functions?

- How would this change affect the ability of OPA to attract appropriate employees? (Would individual caseworkers still fairly have the term 'advocate' in their job title?)
- Would there be a need to establish a separate Public Advocate (without a casework function)? Such a role, divorced from a casework function, would inevitably be politically vulnerable.
- What would happen to OPA's community-based programs? An organisation that played a far more managerial role in relation to people's lives and was no longer as clearly an advocate for the rights of people with disabilities would struggle to attract the volunteers needed to ensure the survival of the Community Visitors, Community Guardianship and Independent Third Person programs.

12.12 As indicated earlier, OPA acknowledges that there is occasionally overlap between OPA's guardianship work and that of professional administrators. On this score, we note that OPA and the most common professional administrator, State Trustees, have regular meetings, and that a new protocol between the organisations is currently being negotiated. OPA believes that this will enable those points of crossover to continue to be managed, while ensuring that represented persons continue to enjoy the safeguards that come with separating the roles of public guardian from those of professional administrator.

13. Should plenary guardianship and administration orders be retained? Or, should VCAT be required to identify in each case the range of decisions which can be made on a person's behalf?

13.1 The view OPA has expressed in Section 6 is that guardianship criteria should be more narrowly constrained and be decision-specific. OPA takes the view that all people, including those subject to guardianship, should be able to make those decisions that they are able to make. Consistent with this, we would like to see the scope given to guardians to make substitute decisions narrowed as much as is practicable.

13.2 OPA is aware that some administrative difficulties are presented by a desire to limit the breadth of guardianship orders. For instance, a person with fluctuating capacity, such as a person with dementia or with an episodic mental health problem, may be subject to a guardianship order when later they retain capacity for a time in relation to a particular decision that is made on their behalf. Yet it is not practicable for VCAT to undertake a capacity assessment for every decision that might be made about a person's life.

13.3 That difficulty accompanies any guardianship system (and it is worth noting that people should always be ready to move to revoke a guardianship order when it is no longer necessary). As indicated in paragraph 6.15, OPA thinks the best way here will be to limit the realm of a guardian's decision-making power as narrowly as possible.

13.4 Consistent with this, OPA would also like to see an end to the making of plenary guardianship orders. (We understand that a corresponding end to plenary administration orders would create difficulties in its implications for the remuneration of administrators, and this is a policy question that needs to be resolved).

13.5 OPA also proposes that VCAT be empowered to make co-decision-making orders (as discussed in paragraph 15.8), where it appears to the tribunal that the person is, or may be, able to take an active role in making the decisions that affect them. Such an order would be made where VCAT considers that the involvement of a co-decision maker will provide the best balance between protection of the person, and recognition of the person's ability to make their own decisions.

13.6 OPA here notes that even if the powers of a guardian are limited in the ways proposed by OPA, the impact of a guardianship order on a represented person will continue to be significant. Moreover, guardians will still need to consider the holistic nature of any individual in making guardianship decisions. It would be a danger to think that the narrowly-constrained authority of a guardian – for instance, the authority to make one decision – could properly and professionally be exercised without considering how the decision fits into a person's life.

14. Are there any decisions substituted decision-makers cannot make at the moment that you think they should be able to? Are there some decisions that substituted decision-makers should not be able to make?

14.1 OPA is satisfied with the current decisions that substitute decision-makers cannot make (including the decisions to marry, to vote and to have a special procedure), but would favour the creation of a list of such decisions in new guardianship legislation.

14.2 OPA would like the guardianship legislation to be clearer about the inability of guardians to make substitute decisions regarding the children of represented persons. Likewise the role of guardians in relation to Children's Court and Family Court proceedings is in need of greater clarity. OPA is concerned that guardians are sometimes asked to make decisions on behalf of people with cognitive impairments or mental illnesses which in effect operate to by-pass court processes. This happens, for instance, when a guardian is asked to consent, on a parent's behalf, to a proposed course of action regarding a child. This can have the effect of abbreviating a court process. OPA is concerned that in this situation the guardian's consent (which is informed by the interests of the represented person) can inappropriately take the place of a court's decision as to what should happen to the child (which would be premised on the best interests of the child).

15. Is there a need for new laws that formally recognise supported decision-making? How should any supported decision-making laws operate?

15.1 OPA takes the view that supported decision-making presents some real possibilities for the greater freedom of people with disabilities and for the greater

inclusion of support networks in the lives of people with profound disabilities. In addition to writing two discussion papers on the topic, OPA also hosted a forum on supported decision-making in February this year, where a range of invited participants considered the possibilities presented by supported decision-making.[27]

15.2 Many important supported decision-making initiatives, we note, can happen with no or minimal legislative change, and OPA wishes to record its strong support of any initiatives that seek to increase the independence of people with disabilities. OPA also strongly supports any initiatives that promise to increase the involvement of members of the general public in the lives of people with cognitive impairments or mental ill health.

15.3 OPA would also take the opportunity here to note that many of OPA's proposed reforms to enduring power of attorney laws (discussed further in Section 25) would, if implemented, result in enduring powers of attorney being able to be used much more readily than at present to facilitate supported decision-making.

15.4 OPA has made two key calls for reform to power of attorney laws: that activation of an enduring power of attorney should be possible immediately upon signing (currently this is only possible for Enduring Powers of Attorney (Financial)); and that in the exercise of powers under enduring powers of attorney, greater weight should be required to be given to the views of those who have executed the documents (whom we have argued should now be called principals). This is discussed further in Section 25.

15.5 These changes, if adopted, would more readily enable enduring powers of attorney to exist as tools of supported decision-making. For instance, if the call for immediate activation of enduring powers of attorney were accepted, then attorneys would be able to gather information on a principal's behalf without necessarily then making decisions for the principal. It would only be when principals were demonstrated to have lost capacity in relation to a decision that they would no longer be able to make their own determinations. (Even then, their views would still need to be given serious consideration.)[28]

15.6 In OPA's discussion paper 'Supported Decision-Making: Options for Legislative Recognition', we considered a range of supported decision-making mechanisms that have been implemented overseas, particularly in Canada (including supported decision-making authorisations, supported decision-making agreements and representation agreements), and we made the following observation:

> Observation 1. The case for legislating in Victoria to recognise representation agreements is not yet convincing. This observation is made in view of the existence of general powers of attorney and three kinds of enduring powers of attorney in Victoria, and the various calls that have been made in the current review of them for these instruments to allow greater scope for supported decision-making.[29]

[27] OPA, 'Supported Decision-Making Forum. 24 February 2010. Summary Report'.

[28] See further John Chesterman, 'Supported Decision-Making: Options for Legislative Recognition', OPA Discussion Paper 2010, pp. 6-7, available at: http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/Supported%20Decision-Making_%20Options%20for%20Legislative%20Recognition%202010.pdf.

[29] Chesterman, 'Supported Decision-Making: Options for Legislative Recognition'.

15.7 OPA is still not convinced that the supported decision-making mechanisms mentioned above – including supported decision-making authorisations, supported decision-making agreements and representation agreements – would necessarily be of assistance in Victoria. OPA has two concerns here. First, such instruments are likely to be confused with powers of attorney. Second, OPA is concerned about the possibility that such instruments might be abused. OPA, nevertheless, may have cause to revisit this stance if the current review of power of attorney laws does not result in the changes OPA is seeking.

15.8 OPA's discussion paper 'Supported Decision-Making: Options for Legislative Recognition' also considered a possible supported decision-making alternative to guardianship orders that exists in Alberta, and which could be applied here in situations where VCAT could be convinced that a supporter could play an assisting role. We favour such legislative reform, as we noted in our discussion paper.

> Observation 2. New guardianship legislation could enable the Victorian Civil and Administrative Tribunal (VCAT) to make a Co-Decision-Making Order where:
> 1. A person meets the criteria for guardianship; and
> 2. VCAT determines that the person has sufficient capabilities to be able to contribute significantly to any guardianship decisions that need to be made.
> Both co-decision-makers would need to agree in making any decisions under the order. Failure to agree would provide grounds for the revocation of the order.[30]

16. Should VCAT have the power to review individual decisions made by guardians and administrators? If so, who should be able to ask for a review of a decision?

16.1 As the 'Guardianship Information Paper' makes clear, guardians' decisions at present are not reviewable (the course of action currently available is to challenge at VCAT the appointment of a guardian, rather than the decisions a guardian has made). OPA supports the idea that guardians' decisions should be subject to review. This review should be a merits review that is conducted by a VCAT member, who should be able to collect any information necessary to review the decision.

16.2 The challenges in developing an appropriate review mechanism will include the need to:

- Determine what constitutes a guardianship decision. For instance, does a guardian's reluctance to seek discharge of a represented person from hospital constitute a guardianship decision?
- Determine an appropriate policy on unnecessary/vexatious challenges of guardianship decisions.
- Determine who can seek a review (other than the represented person).

[30] Chesterman, 'Supported Decision-Making: Options for Legislative Recognition'.

- Determine who should be given notice of any challenge to a guardianship decision (should this routinely include relevant service providers, family members, and so on).
- Determine the basis on which a review would succeed (in terms of the current legislation, the basis would probably be that the decision was not in the best interests of the represented person).
- Determine the power of the reviewing body (to make a new decision, to remit the matter to the guardian for re-consideration, and so on).
- Ascertain whether some decisions (particularly irreversible ones) might not be subject to review.

16.3 In view of the above, and without seeking to provide legislative drafting responses to all of the above challenges, OPA calls for new legislation to do the following:

- Define what constitutes a guardianship decision.
- Limit the standing of applicants seeking the review of guardianship decisions to the represented person, their immediate family members and others who have now, or historically have had, significant involvement in the life of the represented person.
- Provide that service of the review application be made to family members and service providers, and any other people nominated by the represented person.
- Provide that the review should consider whether the decision was in the interests of the personal and social well-being of the person.
- Provide the reviewer with the power to remove the guardian, to remit the decision back to the guardian, or to substitute a new decision.
- Provide VCAT with the authority to label a person a vexatious litigant and thereby limit that person's ability to seek review of a particular guardian's decisions, or guardianship decisions generally.

16.4 OPA would also like to make here a point about the mechanism by which the appointment of a guardian can be challenged. Justice Bell's recent review of VCAT has recommended that 'An appeal tribunal should be established within VCAT'.[31] OPA supports that recommendation, and takes the view that the appointment of a guardian by VCAT should itself be subject to such an internal appeals mechanism (in preference to the current situation, where an application is made to remove a guardian).

16.5 OPA considers that a review mechanism should not replace the current provisions under section 30 that enable a guardian to seek the advice of VCAT on the scope or exercise of the guardian's authority.

[31] Justice Kevin Bell, *One VCAT: President's Review of VCAT*, p. 60.

17. What powers, if any, should VCAT have to deal with substitute decision-makers who abuse their power?

17.1 OPA considers that substitute decision-makers who abuse their power should be subject to immediate removal, and should also be subject to criminal sanctions where the abuse has been malevolent or recklessly indifferent to the well-being of the represented person. Provisions to this effect should be placed in new guardianship legislation.

18. Public Advocate. Should there be any changes to the functions and powers of the Public Advocate?

18.1 OPA recently prepared a discussion paper on the role of the Public Advocate.[32] That paper outlines many of the changes that OPA would like to see in new guardianship legislation, which include the following:

- The continued linking of advocacy and guardianship functions at OPA. While the criteria for the making of guardianship orders will, we hope, be narrowed in ways set out in this submission, the broader individual and systemic advocacy functions of the Public Advocate, in relation to all people with a disability, should continue and, in the ways described here, be expanded.
- To this end, new guardianship legislation should contain the provision of a clear systemic advocacy role for the Public Advocate on behalf of all people with a disability (which is not restricted to the narrower subset of people whose decision-making impairment satisfies one of the criteria for the making of a guardianship or administration order).
- New guardianship legislation should specifically outline the ability of the Public Advocate to report on, and provide advocacy in, individual situations where people have a disability, or where people are otherwise vulnerable due to a lack of autonomy.
- The Public Advocate's investigative powers should be extended to include situations of neglect (in addition to situations of apparent abuse and exploitation, section 16 (1)(h)). In addition these powers should be cross-referenced with, and applied to, the powers of the Public Advocate under the *Disability Act* (Part 5, sections 74(4), 76(7), and Part 8, sections 191(4), 194 and 196(2)).
- The Public Advocate should specifically be able to table any report before the Victorian Parliament.
- New guardianship legislation should specify the Public Advocate's ability to delegate guardianship authority to staff and volunteers at OPA and to other individuals (currently VCAT typically gives pre-approval for delegation to

[32] Barbara Carter, 'The Role of the Public Advocate', OPA Discussion Paper 2010, available at: http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/Role%20of%20public%20advocate%20position%20paper.doc.

occur for OPA staff, but delegation to volunteer Community Guardians or other individuals requires specific VCAT approval).

- Legislative oversight of the Community Visitors program should be streamlined into one piece of legislation (preferably new guardianship legislation), and all of OPA's programs should be funded through one government department (preferably the Department of Justice). Currently the Community Visitors program is established by three different Acts and is partially funded by the Department of Human Services, while most of OPA's operations are funded through the Department of Justice.
- The guardianship legislation should be modernised in relation to the activities of the Public Advocate, which would include removing functions such as supporting 'the establishment of organizations … for the purpose of … instituting citizen advocacy programs …' (section 15 (b)).

19. Should there be any changes to the functions, powers or procedures of VCAT?

19.1 OPA considers that Australia's use of tribunals to decide upon guardianship matters amounts to a great strength of our guardianship system. The relatively informal and investigatory model that is evidenced in VCAT's Guardianship List is preferable to the more formal and adversarial nature of most court proceedings. OPA does, however, note that more formality now accompanies VCAT hearings and processes than existed when the Guardianship and Administration Board was in operation, and likewise the membership of VCAT is less specialised in the disability field than was the case with the Board. We also note that Justice Bell has recently noted the concern of community groups about the 'creeping legalism' at VCAT,[33] and OPA shares this concern.

19.2 OPA believes that there are some areas in which VCAT's operations might be improved.

19.3 In Section 21 of this submission we discuss the nature of the investigations OPA conducts for VCAT and the status of these reports as regards privacy laws (and the need for transparency in VCAT hearings).

19.4 The current *VCAT Act* states that:

> The Tribunal may refer any matter relating to a proceeding under the *Guardianship and Administration Act 1986* to a government department, public authority, service provider, the Public Advocate or a guardian or administrator appointed under that Act for investigation and report.[34]

19.5 OPA would like to see VCAT make greater use of this power, particularly in so far as VCAT has the power to order a service provider to report on its failure to provide a service. This would constitute an important judicial means of ensuring

[33] Justice Kevin Bell, *One VCAT: President's Review of VCAT*, p. 21.

[34] *Victorian Civil and Administrative Tribunal Act 1998*, schedule 1, section 35 (1).

appropriate service provision for people with profound disabilities where services are not being provided. It may also help to address the present inappropriate use of guardianship as a mechanism for obtaining services and dealing with the deficiencies of the service system.

19.6 OPA believes that the coercive powers in the current legislation should be retained. Section 26 enables a guardianship order to be enforced, and section 27 enables VCAT to authorise the Public Advocate to visit and remove a person who is being detained unlawfully or who is at serious risk. OPA recognises that there is scope for these powers to be better expressed to ensure their consistency with the 'least restrictive' requirements of the *Charter of Human Rights and Responsibilities Act 2006*, but their broad retention is considered imperative. Section 27, which enables an assessment to be made of the person, could be rephrased so that it applies only to people who have, or are thought on reasonable grounds to have, a decision-making impairment.

19.7 One area where OPA would like VCAT's powers to be increased concerns access to persons in private accommodation. Many of OPA's guardianship clients reside in private accommodation, and this trend is likely to become more pronounced in future years. OPA would like VCAT to be specifically empowered to order that a guardian be able to access a represented person in private accommodation.

19.8 OPA would also like schedule 1 of the *VCAT Act* to authorise VCAT to commission investigation reports from OPA and other agencies in relation to matters before the tribunal under the *Disability Act*. This would enable VCAT to be informed by OPA (or indeed by a government department or a service provider) on matters relevant, for instance, to the review of treatment plans or discharge plans for residents in residential treatment facilities.

19.9 OPA would also like the VCAT and guardianship legislation to be clearer about the situations in which, and the mechanisms by which, guardianship orders are kept in place in order to ensure that decisions made under those orders are not overturned (a typical concern here is that a person may be removed from their accommodation once a guardianship order – under which the accommodation decision was made – is revoked).

19.10 Finally, OPA has been advised by the VLRC of a significant policy suggestion concerning the possible future merger of certain protective jurisdictions exercised currently by three judicial/semi-judicial bodies. OPA believes there is merit in the proposal for a new Protective Tribunal to be established, which would incorporate VCAT's current Guardianship List, the Mental Health Review Board, and the Family Division of the Children's Court. OPA looks forward to hearing more about the details of this proposal.

20. Should VCAT have the power to appoint a guardian or administrator for a person under 18 years old?

20.1 As the 'Guardianship Information Paper' makes clear (paragraph 3.72), the *Guardianship and Administration Act* enables the appointment of guardians and administrators for adults, and the *Children, Youth and Families Act 2005* enables

substitute decisions to be made in relation to children under 17 years of age. OPA recognises that this gap can most easily be closed by amending the guardianship legislation so as to enable VCAT to appoint guardians and administrators (where other conditions are met) in relation to children from the age of 17.

20.2 OPA, however, wishes to register its concerns that this carries with it significant service system risks. In particular, OPA is concerned that this has the potential to see guardianship become a means through which social service commitments may be diminished or completely withdrawn once an individual turns 17, and that closure of the existing gap carries with it the danger that guardianship will be increasingly asked to provide case management for people leaving state care, instead of being provided by a proper 'leaving care team'.

20.3 OPA supports broadening out the jurisdiction of VCAT to make orders for special procedures. Currently VCAT cannot make such orders in relation to children, yet OPA is of the view that VCAT is in some ways in a better position to make such decisions for children with a disability than the Family Court, which currently has this power. OPA submits that VCAT should share with the Family Court the ability – in certain limited situations – to order special procedures to be performed on children.

21. Should there be any changes to the way the law operates to ensure the right balance is struck between privacy and transparency?

21.1 OPA currently investigates and provides reports at the request of VCAT.[35] These reports can be highly critical of individuals who have had dealings with represented persons (and proposed represented persons). OPA has in the past been the subject of private legal action, based on material contained in its reports.

21.2 OPA recognises that the interests of transparency dictate that information on which VCAT relies should, as much as possible, be in the public realm. At the same time, some information is provided to OPA in confidence and much information that OPA provides to VCAT is highly sensitive. The public release of such material could be damaging to the reputations of people involved in guardianship applications and to the interests of those people who are the subjects of guardianship applications.

21.3 At present VCAT members are responsible for weighing up these matters and determining to whom OPA reports should be made available. OPA would like to see that continue, though it would be beneficial for the legislation to provide a series of considerations which VCAT members should bear in mind in making such decisions. Such considerations would include:

- the need for transparency in tribunal hearings,
- the need for fairness in allowing individuals to rebut allegations against them,
- the need to protect reputations and to protect information relating to personal affairs,

[35] *Guardianship and Administration Act*, section 16 (1).

- the need to protect the confidentiality under which information may originally have been supplied,
- the need not to cause serious harm to any person's safety or health,
- the need not to damage the personal relationships of represented persons/proposed represented persons.

21.4 In addition, OPA would like to see its reports have the status of court documents, so as to provide clear protection against defamation suits when such reports have been presented in good faith.

22. Should the terms 'guardian' and 'administrator' be retained? If not, what term or terms should replace them?

22.1 OPA believes that the title 'guardian' should remain. Among possible alternatives, one term that was suggested in one of our meetings with the VLRC was 'agent' (which, in OPA's view, has connotations of a business relationship). Another suggestion from within OPA has been 'decision-maker'. On balance OPA prefers the term 'guardian', which has strong resonance in the community.

22.2 OPA does not feel strongly about retention of the term 'administrator', which could be replaced with 'financial manager'. Among the problems caused by the term 'administrator', it is confusing in the context of the term 'letters of administration', when someone dies intestate or when a company goes into liquidation. 'Financial manager', meanwhile, does have the connotation of a professional voluntarily-entered relationship. But, on balance, OPA would be happy to see the term 'administrator' replaced by 'financial manager'.

23. Do the 'medical treatment' provisions in the *G&A Act* work effectively?

23.1 Overall the 'medical treatment' aspects of the guardianship legislation work well. However, there are a number of ways in which the current provisions could be improved.

23.2 Most significantly, there is widespread uncertainty about the distinction between withholding consent to medical treatment and refusing medical treatment, and we deal with this further from paragraph 24.2.

Person responsible

23.3 OPA is of the view that the 'person responsible' system under the guardianship legislation is working well, even though the term 'next of kin' remains in constant usage. We note that the person responsible hierarchy is not replicated in relation to substitute consent for non-psychiatric treatment under the *Mental Health Act* (a point we discuss further in paragraph 28.2).

Definition of 'medical treatment'

23.4 OPA considers that the current definition of 'medical treatment' (section 3) in the guardianship legislation needs tightening and, in some instances, expanding.

OPA notes that the guardianship legislation defines medical treatment in one way, while the *Medical Treatment Act* (section 3) defines medical treatment differently, while the *Mental Health Act* has a definition of 'non-psychiatric treatment' (section 83), which differs again. OPA calls for these differences to be removed.

23.5 If we confine our attention just to the guardianship legislation, the definition of 'medical treatment' there gives rise to some questions. Among the many specific queries dealt with by OPA is the question of whether a mammogram, for instance, constitutes medical treatment (it has been viewed as such, but only when the mammogram is performed under the supervision of a medical practitioner, not when it forms part of a non-practitioner-scrutinised screening process). Likewise a query has concerned whether chemotherapy is medical treatment (or is it the administration of a pharmaceutical?). OPA has developed working definitions that guide our practice here, but greater legislative articulation is warranted.

23.6 In terms of the form such legislative articulation might take, OPA would like to see new guardianship legislation follow the lead of legislation such as the *Family Violence Protection Act 2008* (Vic), which provides examples alongside its legislative definitions (see, for instance, section 5 of that Act).

23.7 OPA also notes that the term 'health care' appears in the guardianship legislation in relation to the powers of a plenary guardian (section 24) and in the notes concerning the appointment of enduring guardians (schedule 4, form 1). But just how 'health care' relates to 'medical treatment' is not entirely clear.

Pharmaceuticals

23.8 Currently the standard 'administration of a pharmaceutical' is not included in the definition of 'medical treatment', which would run contrary to most people's expectations. This means that consent of a person responsible is not usually required in relation to the administration of a prescribed pharmaceutical to a person who is unable themselves to consent to it. (We note, however, that some institutions, such as aged care facilities, routinely in any case seek the signature of family members to consent to the administration of pharmaceuticals to a relative.)

23.9 As noted above, the guardianship legislation defines 'medical treatment' differently to the *Medical Treatment Act* (section 3), which differs again from the *Mental Health Act* definition of 'non-psychiatric treatment' (section 83). This means, for instance, that the standard administration of a prescription pharmaceutical will not constitute medical treatment under the guardianship legislation, and therefore substitute consent is not required (when the person cannot consent to it). And yet the standard administration of a prescription pharmaceutical will constitute medical treatment under the *Medical Treatment Act* and also often constitutes 'non-psychiatric treatment' under the *Mental Health Act*, meaning that substitute consent needs to be provided where the person cannot themselves consent.

23.10 The confusion that can be caused by the various definitions in these three Acts can be seen in the following scenarios. An agent appointed by an Enduring Power of Attorney (Medical Treatment) under the *Medical Treatment Act* may seek to refuse the administration of a pharmaceutical to the donor, which the *Medical Treatment Act* defines as 'medical treatment'. Yet consent for the administration may not, according to the guardianship legislation, actually be required. Likewise,

an agent may seek to refuse to consent to the administration of 'non-psychiatric treatment', in the form of a prescription pharmaceutical, under the *Mental Health Act*, but were the treatment viewed according to the guardianship legislation, such consent again may not actually be required.

23.11 The advantage of exempting the standard 'administration of a pharmaceutical' from the definition of 'medical treatment' in the guardianship legislation is that a person responsible does not need to be located in order to consent to routine tablet taking (by a person who is unable to give consent). But there are strong reasons why such protection should be required. Some pharmaceuticals constitute interventions that are more significant than some of the procedures that are currently captured by the definition of medical treatment, while some pharmaceuticals also carry possible side effects that are every bit as serious as the side effects that may flow from an operation. In addition, by dictating that the administration of pharmaceuticals is usually not 'medical treatment', the person responsible cannot agree to a person receiving a pharmaceutical that they may actually wish them to receive (but which may not be suggested without their advocacy for it). OPA calls for the administration of prescription pharmaceuticals to be included in the guardianship legislation's definition of medical treatment.

23.12 In addition, OPA is aware that some pharmaceuticals are routinely being administered in order to bring about behaviour modification (such as libido suppressants, sedatives and psychotropic medications). The administration of pharmaceuticals in this way should be viewed as a form of chemical restraint, though OPA suspects this is often not the view of service providers. The use of pharmaceuticals in this way ought, in OPA's view, to be governed by mechanisms such as those that already exist in the *Disability Act* (as discussed at paragraph 1.24).

23.13 OPA understands that there will be situations where the administration of a pharmaceutical has both medical and behaviour modification justifications. Valium, for instance, may be prescribed both for the relief of anxiety and to sedate a patient. OPA's view is that where the primary purpose of the administration is behaviour modification then this should be defined as a restrictive intervention and regulated accordingly.

Registered practitioners

23.14 The current definition of 'medical treatment' applies to treatment 'normally carried out by … a registered practitioner'. OPA suggests that thought be given to broadening out the range of health professionals whose activities should specifically be subject to the consent and substitute consent provisions of the Act. These people would include nurse practitioners, naturopaths, physiotherapists, alternative/natural medicine practitioners and Chinese medicine suppliers.

Consent via notices lodged with OPA

23.15 OPA notes that the Section 42M process (by which a registered practitioner can overrule a person responsible's decision not to consent to proposed treatment) is not being utilised (OPA did not register any such notices in the last financial year). Instead, practitioners appear to be applying for guardianship in such cases,

which may be a more restrictive intervention than is necessary in the particular person's circumstances.

23.16 OPA considers that the Section 42M process should continue to be available, but calls for these notices to be lodged at VCAT. OPA further calls for an extensive education campaign to be targeted towards medical practitioners in order to advise them of this less restrictive option to guardianship.

23.17 Likewise, the Section 42T provisions (regarding medical research where there is no person responsible) appear to be being under-utilised. Just 14 Section 42T notices were lodged with OPA in the last financial year.[36]

23.18 OPA also calls for the Section 42T process to continue, but again calls for these notices to be lodged at VCAT. OPA also calls here for an extensive education campaign to be targeted towards medical practitioners in order to advise them of this process.

23.19 Contrastingly, Section 42K notices are routinely, if not unproblematically, being utilised (354 were lodged with OPA in the last financial year).[37] A Section 42K notice is required to be lodged where medical treatment is to be provided but there is no 'person responsible' available to consent to it. OPA has recently undertaken a review of Section 42K notices.[38] This review was conducted by Simonette Foletti, who reviewed 1193 notices that were lodged over four distinct calendar years. Ms Foletti's review informs this section of OPA's submission.

23.20 OPA's view is that the standard of Section 42K notices is of variable quality (there is some uncertainty among medical professionals about the sorts of procedures that require a Section 42K notice). In addition, OPA suspects that there is a significant degree of non-compliance with the legislation, where procedures are performed without appropriate authorisation and without completion of a Section 42K notice.

23.21 When the Section 42K process was initiated in Victoria the view was expressed in the Victorian parliament that OPA would 'monitor the type and volume of services which practitioners give to incompetent persons' and that OPA would 'be able to monitor any perceived overservicing of patients by practitioners'.[39] The enacted legislation does not require these functions to be performed and nor is OPA the appropriate body to conduct such auditing (this power would more appropriately reside with a body such as the Office of the Health Services Commissioner).

23.22 In essence, the Victorian system does not so much require substitute consent as it more accurately requires the registration of a document in the absence of consent. Other jurisdictions – such as New South Wales and Queensland – make the distinction between minor and major treatment (in Queensland there is the distinction between 'minor and uncontroversial' treatment and other treatment).

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[36] OPA, *Annual Report 2008-2009*, p. 39.

[37] OPA, *Annual Report 2008-2009*, p. 38.

[38] Simonette Foletti, 'Review of the Administration of Section 42K Notices by the Office of the Public Advocate', confidential internal OPA report, February 2010.

[39] *Victorian Parliamentary Debates*, Legislative Assembly, 22 April 1999, p. 595. Foletti, 'Review of the Administration of Section 42K Notices by the Office of the Public Advocate', p. 13.

These jurisdictions enable minor treatment to be carried out without substitute consent, but require substitute consent for major treatment. The Adult Guardian can provide last resort consent in Queensland, and the Guardianship Tribunal provides it in New South Wales.[40]

23.23 OPA takes the view that where medical treatment is to be performed on a person without capacity to consent to it, and no person responsible is available to consent on the patient's behalf, that the following legislative changes should apply.

23.24 Victorian legislation, and accompanying regulations, should distinguish between 'minor and uncontroversial treatment' and major treatment, and should require substitute consent for the latter.

23.25 Minor and uncontroversial treatment should be able to be performed after a second practitioner agrees with the proposed course of action. This should be evidenced by a note on the patient's file which is supported by the signature of the second practitioner (this proposal was suggested to us by the VLRC in one of our meetings). Where the person is in a regional or rural setting, the giving of a second opinion may need to take place through a documented telephone call.

23.26 Treatment that is not 'minor and uncontroversial', or any treatment to which the person objects, should require the substitute consent of a guardian. The guardian may be any individual appointed by VCAT or, as a last resort, OPA. OPA recognises that this process is more laborious than that which exists in some other jurisdictions. But OPA would be concerned if VCAT were not involved in this process, as OPA's other substitute decision-making powers routinely require VCAT's authorisation, and OPA sees no reason why this should not also be the case with significant medical treatment decisions. In keeping with the tenor of this submission, any guardianship order made in these circumstances would restrict the authority of the guardian as much as possible to the power to make the particular medical decision that needs to be made.

23.27 Where OPA is empowered in this way to make a medical treatment decision, OPA of course would need to satisfy itself that the treatment was in the interests of the patient's personal and social well-being before agreeing to it.

24. Do the medical treatment provisions in the *G&A Act* and the *Medical Treatment Act* work together effectively? If not, how could the law be improved?

24.1 As noted in the previous section, the guardianship legislation and the *Medical Treatment Act* provide differing definitions of 'medical treatment'. We have called for these differences to be removed.

24.2 In addition, as also indicated above, there is widespread uncertainty about the distinction between withholding consent to medical treatment and refusing medical treatment.

[40] Foletti, 'Review of the Administration of Section 42K Notices by the Office of the Public Advocate', pp. 14-20.

Withholding consent and refusing treatment

24.3 OPA can attest, through the work of its Advocate/Guardians and through telephone calls to OPA's advice service, that even skilled practitioners are unable to distinguish withholding consent to treatment from refusing treatment.

24.4 A 'person responsible' under the guardianship legislation can withhold consent to medical treatment, while only a small number of people can refuse medical treatment under the *Medical Treatment Act* (namely an agent appointed under an Enduring Power of Attorney (Medical Treatment), a guardian and the person themselves). Part of the reason for the confusion stems from the fact that the two concepts can overlap. But withholding consent to treatment relates generally to the decision whether or not to initiate new treatment, while refusing treatment covers both current and proposed treatment.

24.5 We note here that there is also confusion about the reach of the power to withhold consent and the power to refuse treatment. Both powers can only be exercised if treatment is actually being offered. OPA occasionally deals with situations where relatives would like to force medical providers to continue or initiate treatment.

24.6 OPA suspects that many Refusal of Treatment Certificates lodged at VCAT are incomplete or inappropriately completed (by, for instance, containing reference to conditions that are not current). OPA would be interested to know whether VCAT records support this supposition.

24.7 OPA does not believe that the people of Victoria are ready to jettison completely the distinction between refusing medical treatment and withholding consent to medical treatment. To do so would either require expanding the category of persons capable of deciding to refuse treatment by, for instance, extending it to all persons responsible (the concern here would routinely be about estranged family members exercising such power). Or it would require abolishing the ability of anyone to refuse treatment (which many would regard as a retrograde step).

24.8 Even so, there are some steps that might be taken to reduce the number of situations in which there is confusion about the difference between refusing treatment and withholding consent to treatment. One of the main ways in which the *Medical Treatment Act* sits awkwardly with the *Guardianship and Administration Act* concerns the ability of enduring guardians to withhold consent to medical procedures and the ability of agents, under Enduring Powers of Attorney (Medical Treatment), to refuse treatment. (This has been noted by the VLRC in the 'Guardianship Information Paper'). As OPA noted last year in its submission to the Law Reform Committee's inquiry into powers of attorney:

> While an enduring guardian can withhold consent to medical treatment on behalf of a principal, a medical practitioner can overrule this decision using a section 42M certificate (under the *Guardianship and Administration Act*). An enduring guardian then needs to apply to VCAT if they wish to challenge such a decision by a medical practitioner. Conversely, an agent appointed under the *Medical Treatment Act* who refuses treatment on the donor's behalf can only have this decision challenged (by a medical practitioner, or indeed by anyone else) through an application to VCAT. As

the forms in Schedule 4 of the *Guardianship and Administration Act* correctly state: 'If you wish to appoint a person who can, unless the Tribunal otherwise determines, refuse medical treatment on your behalf, you will need to appoint a person as your agent under the *Medical Treatment Act 1988*'.[41]

24.9 As OPA noted in its submission, if the power of enduring guardians to refuse medical treatment were strengthened, this inconsistency could be removed.[42] The fact that the Section 42M provision is so rarely used (see paragraph 23.15) only heightens, in OPA's view, the need for consistency. OPA's proposal thus is that enduring guardians be empowered to refuse medical treatment, and that such decisions only be challengeable by application to VCAT.[43]

25. Enduring Powers. Do the laws concerning Enduring Powers of Guardianship, Enduring Powers of Attorney (Financial) and Enduring Powers of Attorney (Medical Treatment) work effectively? Do these powers operate in harmony with VCAT appointments of guardians and administrators?

25.1 As the VLRC knows, the legislation regulating powers of attorney is currently under review in Victoria by the Victorian Parliament's Law Reform Committee. OPA is one of the key agencies responsible for promoting the use of enduring powers of attorney, and in responding to public inquiries concerning the use and abuse of enduring powers of attorney. As OPA commented in its extensive submission to the Law Reform Committee, most of the calls received by OPA's telephone advice service each year relate to two areas: enduring powers of attorney, and guardianship and administration. OPA staff members also give over 200 presentations each year, which typically involve specific detail on enduring powers of attorney. OPA also co-produces the highly regarded 'Take Control' booklet and DVD, which provide information about, and encourage the use of, enduring powers of attorney.[44]

25.2 OPA thus has unique expertise on this topic, which has been drawn upon in OPA's submission to the Victorian Law Reform Committee, and in oral evidence before the committee.[45] In its contributions to the review of powers of attorney,

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[41] OPA, 'Submission by the Victorian Office of the Public Advocate to the Victorian Law Reform Committee's Inquiry into Powers of Attorney', p. 19, available at: http://www.parliament.vic.gov.au/lawreform/inquiries/Powers%20of%20Attorney/Submissions/POA9%20-%20Office%20of%20the%20Public%20Advocate.pdf and at http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2009/OPA%20Powers%20of%20Attorney%20submission%204%20August%202009.pdf?phpMyAdmin=fe8bb73b8ddef429ba268102bddcf16c.

[42] We thank former Public Advocate Julian Gardner, who proposed this idea to OPA's John Chesterman in a conversation on 26 June 2009.

[43] OPA, 'Submission … to the Victorian Law Reform Committee's Inquiry into Powers of Attorney', p. 19.

[44] OPA, 'Submission … to the Victorian Law Reform Committee's Inquiry into Powers of Attorney', p. 5.

[45] The transcript of John Chesterman's evidence before the committee can be viewed at http://www.parliament.vic.gov.au/lawreform/inquiries/Powers%20of%20Attorney/Transcripts/2009-10-22%20OPA.pdf.

OPA has sought extensive reform, both in order to guard against the abuse of enduring powers of attorney, and to better enable enduring powers of attorney to operate as instruments of supported decision-making. In terms of their overall benefit, as OPA commented in its submission:

> [The] Public Advocate continues to advocate for the benefit of EPAs as an effective means by which individuals can retain some control over their affairs in the event of their incapacity, through the assistance of a trusted person.[46]

25.3 Having said that, OPA is aware of many situations where enduring powers of attorney are abused, and much of OPA's submission to the Law Reform Committee was geared towards limiting the likelihood of abuse. OPA's recommendations in this regard included tighter witnessing requirements and the proposed use of a new category of 'interested persons', who would be required to receive information about the operation of enduring powers of attorney.[47]

25.4 Three of the key recommendations made by OPA in its submission to the Law Reform Committee are as follows:

> Recommendation 1: All legislation creating and regulating powers of attorney should reside in one Power of Attorneys Act.
>
> Recommendation 5: One form combining the EPA (Financial), EPA (Medical Treatment) and Enduring Power of Guardianship should be created, called an EPA (Financial, Medical and Guardianship), which requires only one set of signatures.
>
> Recommendation 18: A system of EPA registration, similar to that used in the United Kingdom, should be adopted in Victoria, and EPAs should only be operative once they have been registered. A notice period should apply to registration, and any persons nominated on the EPA as 'interested persons' by the principal should have to be advised of any registration application. VCAT should be empowered to hear any challenge to the registration of an EPA.[48]

25.5 OPA does believe that enduring powers of attorney generally operate in harmony with the appointment by VCAT of administrators and guardians, though OPA does seek significant reform to the laws governing enduring powers of attorney, as indicated above and elsewhere in OPA's submission to the Victorian Law Reform Committee.

26. Directions provided by people in enduring powers or other documents are generally not legally binding. Should 'advance directives' about personal, medical or financial matters have more authority?

26.1 OPA believes that advance directives should receive greater legislative weight than currently they do, but does not believe they should become legally binding in

[46] OPA, 'Submission … to the Victorian Law Reform Committee's Inquiry into Powers of Attorney', p. 7.

[47] See OPA, 'Submission … to the Victorian Law Reform Committee's Inquiry into Powers of Attorney', recommendations 7, 10-13, 16-17.

[48] See OPA, 'Submission … to the Victorian Law Reform Committee's Inquiry into Powers of Attorney', pp. 10, 11, 23.

and of themselves. There are many situations in which an advance directive might not be said to constitute a person's current informed decisions about a particular matter. Lindy Willmott mentions some such situations in a recent article on this topic.[49] People can, for instance, view a projected decision some time in the future differently when they come to be in the actual position to make that decision.

26.2 At the same time, OPA believes as a general principle that all people who are entrusted to act on behalf of non-competent patients – such as agents and attorneys under enduring powers of attorney, guardians, and persons responsible – should legislatively be required at least to give serious consideration to any advance directive that has been signed by the patient. Moreover OPA supports the retention of the current provisions in the *Medical Treatment Act* governing the situations in which Refusal of Treatment Certificates must be honoured (and we note again that there is considerable confusion regarding the relationship between a Refusal of Treatment Certificate and the decision not to consent to treatment).

27. What role should guardians have for people who may be affected by the *Crimes (Mental Impairment and Unfitness to be Tried) Act*?

27.1 In keeping with OPA's proposals regarding new guardianship criteria, guardians should only have a role under the *Crimes (Mental Impairment and Unfitness to be Tried) Act* where a guardianship-type decision needs to be made (regarding, for instance, accommodation or health care). Aside from this, guardians should have no specific role in relation to this Act. OPA may, in certain circumstances, have an advocacy role in relation to a person who is subject to this legislation.

28. Should there be separate mental health and guardianship laws?
29. How should mental health and guardianship laws overlap?

28.1 OPA is of the view that there should be separate guardianship and mental health laws. At the same time, OPA recognises that there is some necessary overlap between the two sets of laws. Oftentimes the treatment of a person with a serious mental illness will involve both psychiatric and non-psychiatric treatment. Guardianship legislation may well have a role in relation to non-psychiatric treatment and in relation to other aspects of a mental health patient's life, such as the making of accommodation decisions or in relation to 'access to persons'. OPA does propose that new guardianship legislation should specify that a person should never be subject to the coercive provisions of more than one of these sets of laws at any one time.

28.2 We note that the 'person responsible' system under the guardianship legislation does not apply in relation to non-psychiatric treatment under the *Mental Health Act* (section 85 of which restricts possible substitute decision-makers to agents under Enduring Powers of Attorney (Medical Treatment), individuals appointed by VCAT, and enduring guardians, as well as the 'authorized psychiatrist'). OPA's experience tends to be that authorized psychiatrists are reluctant to

[49] Lindy Willmott, 'Advance Directives and the Promotion of Autonomy: A Comparative Australian Statutory Analysis', *Journal of Law and Medicine*, 2010, vol. 17, pp. 556-81, at pp. 575-6.

approve non-psychiatric treatment. The fact then that the 'person responsible' hierarchy does not apply, means that people receiving psychiatric treatment are unnecessarily, in OPA's view, being the subject of guardianship applications (in order for consent to be provided for non-psychiatric treatment).

28.3 We also note, as mentioned in paragraph 23.9, that 'medical treatment' is defined differently in the guardianship legislation to the way that 'non-psychiatric treatment' is defined in the *Mental Health Act*. This leads to inconsistencies, as already noted, in the administration of pharmaceuticals, and has historically resulted in differential treatment as regards other medical interventions, such as the provision of contraception.

28.4 OPA's view is that the provision of non-psychiatric treatment under the *Mental Health Act* should be in accord with the medical treatment provisions in the guardianship legislation and in the *Medical Treatment Act*.

28.5 There is currently some confusion about the role of guardianship in relation to accommodation decisions of people receiving psychiatric treatment. At a practical level, OPA is particularly concerned about situations where represented persons are discharged from psychiatric hospitals without guardians being informed.

28.6 On a more technical level, there is confusion surrounding accommodation decisions concerning people on Community Treatment Orders. The technical distinction that is usually made about this matter is that a guardian's decision about accommodation will not be required where the accommodation placement in question forms part of the person's psychiatric treatment. Conversely, a guardian's appointment and decision about accommodation might be required where the particular accommodation setting is not an integral part of the person's psychiatric treatment.

28.7 OPA believes that greater legislative specificity about this matter in guardianship legislation (and also in mental health legislation) would assist here, to the effect that:

- A guardian may make accommodation decisions for people on Community Treatment Orders where the particular accommodation placement is not, in the view of the person's psychiatrist, a core component of the person's psychiatric treatment.

28.8 In addition, guardians with accommodation powers can and do, at present, consent to the placement of represented persons in psychogeriatric residential care. The distinction made between psychogeriatric residential care and other mental health residences is that the main reason for admission to psychogeriatric care is the need to provide accommodation, rather than the need to provide psychiatric treatment. OPA would like this exception to be incorporated into new guardianship legislation (and also in mental health legislation) to clarify that a guardian with the appropriate authority can consent to the placement of a represented person in psychogeriatric residential care.

30. Should guardians be able to consent to psychiatric treatment in some circumstances?

30.1 Guardians cannot currently consent on behalf of a represented person to the receipt of psychiatric treatment. This treatment is either received voluntarily by the person, or is ordered on an involuntary basis. The Public Advocate has a memorandum of understanding with the Chief Psychiatrist which details this, and OPA sees no reason why this should change.

30.2 OPA acknowledges, as mentioned in the previous section, that some confusion exists around the sorts of decisions that guardians may make on behalf of people receiving psychiatric treatment (especially concerning accommodation), but remains convinced that guardians should not have a role in consenting to psychiatric treatment.

31. Is the law clear about when to seek a Supervised Treatment Order and when to seek a guardianship order?

31.1 OPA draws a clear distinction between the mechanisms by which a society seeks to provide protection for an individual, and the mechanisms by which a society seeks to protect its members from dangerous people. Guardianship is one example of the former, and the Supervised Treatment Order is an example of the latter. Guardianship, in OPA's view, should never be used as a means of protecting society from dangerous individuals. Therefore, in OPA's view, the question of when guardianship might be sought, as against when a Supervised Treatment Order might be sought, is relatively clear. The law, in OPA's view, ought to reflect this clarity, and could easily do so if new guardianship legislation contained the principle that a guardianship order should only be made when this is in the interests of the represented person, and should not be made in order to protect society from the person.

31.2 OPA is currently conducting a study on the first two years of the operation of Supervised Treatment Orders, with a report due to go to the Office of the Senior Practitioner in July 2010. This report is likely to find that the regulation of Supervised Treatment Orders constitutes a marked improvement over the unregulated restrictions that used to be placed on some people with disabilities in order to protect society from them.

31.3 Currently Supervised Treatment Orders can only be made in relation to people with intellectual disabilities. One of the questions that OPA's report will generate concerns whether Supervised Treatment Orders ought to be available in relation to other people (see paragraphs 32.2 to 32.3). In addition, since Supervised Treatment Orders constitute a form of civil detention, the nature and efficacy of the treatment received by people on Supervised Treatment Orders constitutes a very significant human rights matter. This is another area that OPA's report will address.

32. What do you think is the best legislative approach for people who are a serious risk to themselves or others but are not covered by the involuntary treatment provisions of the *Mental Health Act 1986*, or the compulsory treatment provisions of the *Disability Act 2006*?

32.1 In answering this question, OPA reiterates its view that guardianship should only ever be used to protect the represented person from harm, not to protect society from the represented person. Guardianship is one mechanism by which society can act to protect individuals. The proposed adult protection regime (paragraph 1.10ff) is another. OPA recognises that there are some people who constitute a risk to others and who are not presently covered by the compulsory provisions in the *Mental Health Act* or the *Disability Act*, or indeed by other compulsory legislation (such as the *Public Health and Wellbeing Act 2008*).

32.2 One of the initial reasons for restricting Supervised Treatment Orders only to people with intellectual disabilities was that there was evidence that the treatment provided under a Supervised Treatment Order would benefit the target group. That same evidence was not there for other groups. As Minister Garbutt said in her second reading speech in 2006:

> At this time these provisions relate only to people with an intellectual disability. This is because the provisions seek to regulate what is already occurring. It has been suggested that the provisions should be extended to people with an acquired brain injury. Currently, there is little evidence regarding the involvement of people with an acquired brain injury in the criminal justice system and whether there are appropriate treatment models available. It is premature for people with an acquired brain injury to be subject to compulsory treatment in the absence of this evidence. An undertaking has been made to the public advocate to commence research into this matter prior to any future inclusion of people with an acquired brain injury under these type of provisions.[50]

32.3 OPA submits that the time has come now for compulsory provisions in the *Disability Act* to be broadened to cover other people who exhibit seriously dangerous behaviour. In addition to existing criteria, OPA submits that the requirement for the person to have an intellectual disability be replaced by a requirement that the person has a cognitive impairment. Naturally, compulsory treatment could only be ordered where expert clinical opinion suggested that treatment would benefit the person, and VCAT would need to be assured before an order could be made that an appropriate treatment regime could be devised and delivered.

Conclusion

33.1 OPA thanks the VLRC for the opportunity to contribute to the ongoing review of Victoria's guardianship laws, and would be happy to elaborate, in writing or in person, on anything raised in this submission.

[50] *Victorian Parliamentary Debates*, Legislative Assembly, 1 March 2006, p. 418.