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Introduction

REVIEW OF GUARDIANSHIP LAWS

1.1 This is the Victorian Law Reform Commission’s final report into Victoria’s guardianship laws. In May 2009 the Attorney-General asked the Commission to review the Guardianship and Administration Act 1986 (Vic) (G&A Act) and to report on what changes are needed to the law to ensure that it responds to the needs of people with impaired decision-making ability and advances their rights.

1.2 The G&A Act assists people with disabilities who are unable to make, or who have difficulty making, important decisions about their lives. The current law allows for the appointment of another person to make personal, financial and medical decisions when a formal decision maker is needed. This is often referred to as substitute decision making.

1.3 It is time to modernise Victoria’s guardianship laws. While the G&A Act was groundbreaking legislation when first enacted over 25 years ago, the range of people who use the legislation and the social environment in which it operates are now very different.

1.4 This report is the final step in a three-stage law reform process. The Commission published an information paper in February 2010 and a consultation paper in March 2011. This report contains the Commission’s recommendations for new guardianship laws to meet the current needs of the Victorian community.

TERMS OF REFERENCE

1.5 The terms of reference for this review are at the front of this review on page xi.

1.6 The Commission’s review has been broad-ranging. We have been asked to consider what changes are needed to the G&A Act so that it:

• complies with human rights principles
• reflects developments in policies and practices since the Act commenced
• responds to the needs of an ageing population.

1.7 The terms of reference direct the Commission to look at particular aspects of the G&A Act, including:

• the role of guardians and administrators in advancing the rights of the people they represent and in assisting them to make decisions
• whether the right balance is struck between the best interests of a represented person and their rights as set out in the United Nations’ Convention on the Rights of People with Disabilities (the Convention)
• whether the powers and duties of guardians are effective, appropriate and consistent with Australia’s obligations under the Convention and the Victorian Charter of Human Rights and Responsibilities
• the feasibility of different, less formal, decision-making models
• whether the G&A Act should be extended to apply to people who are 17 years of age.

1 Refer to the glossary for how we use the term ‘guardianship laws’ in this report.
2 There is a range of substitute decision-making appointments in current guardianship laws. A guardian or enduring guardian can make substitute decisions about personal matters for another person; an administrator or attorney can make substitute decisions about financial matters and an agent or the ‘person responsible’ can make substitute decisions about medical matters. We discuss these appointments in more detail in Chapter 3.
• the functions, powers and duties of the Public Advocate
• the role and powers of the Victorian Civil and Administrative Tribunal (VCAT) and whether the tribunal process for appointing guardians and administrators works well
• whether there should be additional ways to review decisions made by guardians and administrators and whether there should be a means to address unacceptable conduct by guardians and administrators
• whether laws regarding medical treatment and participation in research trials, including the ‘person responsible’ model, are appropriate, and how the G&A Act interacts with the Medical Treatment Act 1988 (Vic)
• whether ‘disability’ should continue to be a threshold requirement for the appointment of a guardian or an administrator or whether it should be replaced by other concepts such as ‘capacity’ or ‘vulnerability’
• whether the confidentiality provisions in the G&A Act adequately balance protection of private information and the need for transparency of decisions.

1.8 The Commission was also asked to consider appropriate interaction between the G&A Act and other relevant laws that deal with substitute decision making, or circumstances in which substitute decision making might be needed, including the:

- Instruments Act 1958 (Vic)
- Mental Health Act 1986 (Vic)
- Disability Act 2006 (Vic)
- Children, Youth and Families Act 2005 (Vic)
- Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)
- Medical Treatment Act 1988 (Vic).

1.9 We have also been asked to consider other relevant reviews of guardianship laws throughout Australia.

1.10 The terms of reference specifically exclude consideration of end-of-life decisions beyond those currently dealt with by the Medical Treatment Act 1988 (Vic).

OUR PROCESS

1.11 Because guardianship laws affect a broad range of people in our community, consultation about the effectiveness of those laws and discussions about how to improve them have been central to the Commission’s work.

CONSULTATIVE COMMITTEES

1.12 The Commission established two advisory committees to provide ongoing assistance in the law reform process. These committees have helped the Commission draw upon the experience of people who:

• work in the field
• represent the interests of people who use guardianship laws
• have researched and written about the operation of guardianship laws.

1.13 The names of the committee members are listed in Appendices 1 and 2 of this report.

5 See the glossary for a definition of ‘person responsible’. Also see Chapter 13 for a description of the person responsible model.
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1.14 Discussion with these committees has provided the Commission with important information about current practice and has provided invaluable assistance in formulating reform options.

INFORMATION PAPER

1.15 The Commission’s first step in this review was the publication of an information paper in January 2010. That paper described existing law and practice and was designed to generate public discussion about areas of guardianship law that might need reform.

1.16 The Commission received 60 submissions from a wide variety of organisations and individuals in response to the information paper. The authors of these submissions are listed in Appendix 3. Most of these submissions are available on our website.6

Community consultations

1.17 In early 2010, the Commission consulted a broad range of people with disabilities and their carers and friends. We also met with advocate groups, health professionals, service-delivery groups, trustee organisations, the Public Advocate and VCAT. We conducted 53 consultations in metropolitan Melbourne and regional Victoria.

1.18 The Commission also held an open day in May 2010, which provided members of the public with an opportunity to speak to Commission staff about their views on guardianship laws. The names of people and organisations consulted are set out in Appendix 4.

1.19 The purpose of these consultations was to hear people’s views about how well guardianship laws are operating and how they might be improved.

CONSULTATION PAPER

1.20 The second stage of the Commission’s process was the publication of a consultation paper in March 2011. In this paper, the Commission explored how the law could be improved to better assist people with disabilities who have difficulty making important decisions. We expressed preliminary views about new laws and proposed a range of possible reform options. The Commission sought submissions in response to these options.

1.21 The Commission received 86 submissions from a wide variety of people and organisations, including many who had provided submissions in response to the information paper. The authors of these submissions are listed in Appendix 5. Most of these submissions are also available on our website.7

Community consultations

1.22 In early 2011, the Commission conducted a second round of community consultations to discuss the reform options contained in the consultation paper. The Commission held 64 consultations in metropolitan and regional Victoria. We also held a second open day. The names of people and organisations consulted are set out in Appendix 6.

1.23 In May 2011, the Commission used a new online public forum to invite comments on some of the consultation paper proposals. The forum provided nine case studies of how some of the proposed reforms might work in practice and asked simple questions to assist people in preparing responses.8

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6 All public submissions are available on the website. The Commission does not place submissions on the website that are confidential, contain offensive or defamatory content, or do not relate to the guardianship project.
7 All public submissions are available on the website. The Commission does not place submissions on the website that are confidential, contain offensive or defamatory content, or do not relate to the guardianship project.
8 A total of 657 visitors made 1589 visits to the forum: email from Bang the Table to Victorian Law Reform Commission, 21 June 2011.
Additional consultations

1.24 The Commission held additional consultations with groups of people with specialist expertise to discuss details of complex issues that arose during the review. The Registry Working Group comprised representatives of the Victorian Registry of Births, Deaths and Marriages, State Trustees Limited, Australian Bankers’ Association, ANZ Trustees Limited, the Public Advocate, Law Institute of Victoria and Royal District Nursing Service. That group explored the idea of a new online register of appointments. The Commission also convened a meeting of medical researchers, representatives from hospital ethics committees and staff of the Public Advocate to consider reform of laws dealing with authorisation of medical treatment and participation in medical research for people who are unable to make their own decisions about these matters. These expert groups assisted the Commission in developing recommendations included in Chapters 13, 14 and 16 of this report.

OTHER RELEVANT REVIEWS

1.25 A number of other important reviews of substituted decision-making laws have been completed recently or are still underway. Some of these reviews are directly relevant to our inquiry because they consider Victorian laws that overlap with the G&A Act. Others are useful because they examine similar laws in other Australian jurisdictions.

THE VICTORIAN PARLIAMENT LAW REFORM COMMITTEE’S INQUIRY INTO POWERS OF ATTORNEY

1.26 The Victorian Parliament Law Reform Committee (Parliamentary Committee) conducted an inquiry into powers of attorney from late 2008 until 2010. The Parliamentary Committee is a multi-party body comprising members of both Houses of Parliament.

1.27 The Parliamentary Committee’s inquiry considered financial powers of attorney and enduring guardianship. It recommended streamlining and simplifying power of attorney documents so Victorians can better plan for their future financial, lifestyle and healthcare needs. The committee released its report in August 2010, and its recommendations are discussed in Chapters 10 and 11 of this report.

1.28 The government response to the Parliamentary Committee’s report was tabled in Parliament on 10 February 2011. The response indicates ‘support’ or ‘support in principle’ for many of the recommendations in the report. The government response expressed support for strengthening and streamlining powers of attorney. The response also stresses the need to address and prevent the likelihood of elder abuse by encouraging Victorians to make plans through these appointments and to ensure that appropriate safeguards are in place.

1.29 Important recommendations that received support in principle include:

• consolidating the legislative framework for these laws
• developing legislative principles
• taking steps to increase general community awareness about the benefits of these personal appointments

9 The glossary defines powers of attorney and enduring guardianship.
12 Ibid.
13 Ibid.
• alerting people to the potential for abuse
• strengthening the witnessing process to guard against abuse
• introducing a register of powers of attorney.14

1.30 The government’s response notes that there is likely to be considerable overlap between recommendations in the Parliamentary Committee’s report and some of the Commission’s recommendations.15 For this reason, the government indicated that it would not finalise its response to some of the Parliamentary Committee’s recommendations until it considers the Commission’s final report on Victoria’s guardianship laws.16

1.31 The Commission has benefited greatly from the work of the Parliamentary Committee and supports most of its recommendations. Wherever possible, the Commission has sought to ensure that our recommendations complement those of the Parliamentary Committee. In those few relatively minor instances where the Commission’s conclusions differ from those of the Parliamentary Committee we have sought to provide workable alternatives.

VICTORIAN DEPARTMENT OF HEALTH REVIEW OF THE MENTAL HEALTH ACT 1986 (VIC)

1.32 The Mental Health Act 1986 (Vic) is currently being reviewed by the Victorian Department of Health. The review is examining whether the Act provides an effective legislative framework for the treatment of people with a mental illness in Victoria.

1.33 The former Victorian Minister for Mental Health released an exposure draft for new mental health legislation in October 2010.

1.34 Following the election of the Coalition government in November 2010, the new Minister for Mental Health extended the submission period until 28 February 2011 and held further consultations with the community to discuss the issues raised in those submissions.17

1.35 The Victorian Government has indicated that the Mental Health Bill will be redrafted to reflect policy changes in response to community engagement.18 The government anticipates the Bill will be introduced into Parliament in 2012, and become operational in 2013.19

1.36 The implications of that review for future guardianship laws are discussed in Chapter 24.


1.37 The Queensland Law Reform Commission completed its review of guardianship laws in 2010. The Queensland review examined a range of issues including:
• the general principles of Queensland guardianship law
• the powers of guardians, administrators and other appointments
• confidentiality provisions
• review of decisions

15 Ibid 2.
16 Ibid.
19 Ibid.
• access to medical treatment for people with impaired capacity
• the appropriateness of treatment provided
• whether there is a need for additional provisions to allow a parent to make a binding direction to appoint a guardian or administrator for their son or daughter who has impaired decision-making capacity.20


1.39 The second stage of the review focused on the principles contained in the legislation and Queensland’s guardianship laws more generally. The final report was tabled in Parliament in November 2010.22 The extensive final report, comprising four volumes, has been a useful resource for the Commission.

1.40 The Queensland Government published an initial response to the second stage of the Queensland Law Reform Commission review in October 2011. The Queensland Government notes that the report will be implemented in two phases.23

1.41 The first phase will focus on technical amendments in areas where immediate improvements to existing systems may be achieved.24 This phase is currently underway and only considers those recommendations the government supports or supports in principle.25

1.42 The second phase, concluding at the end of 2012, will consider the remaining recommendations following further consultation with relevant stakeholders.26

1.43 The Commission refers to the Queensland Government response where relevant in this report.

THE NEW SOUTH WALES LEGISLATIVE COUNCIL STANDING COMMITTEE ON SOCIAL ISSUES’ INQUIRY INTO SUBSTITUTE DECISION MAKING FOR PEOPLE LACKING CAPACITY

1.44 This New South Wales Upper House committee was asked to consider whether any New South Wales legislation should be changed to better provide for the management of estates of people incapable of managing their own affairs and the guardianship of people who have disabilities.27

1.45 The committee released its report in February 2010 and we refer to its recommendations when they are relevant to specific issues throughout this report.28

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25 Ibid.
26 Ibid.
28 Standing Committee on Social Issues, NSW Legislative Council, Substitute Decision-making for People Lacking Capacity (2010).
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1.46 In March 2011, the former New South Wales Government provided a response to the committee’s inquiry. It broadly supported the recommendations and indicated that it would refer some issues to the New South Wales Law Reform Commission for further consideration, including defining capacity in legislation, supported decision making by public agencies and the legal authorisation of a guardian to consent to the use of restrictive practices.29

STRUCTURE OF THIS REPORT

1.47 In Chapters 2, 3 and 4 the Commission briefly examines the history of guardianship laws and provides an overview of the current legislative scheme. We then consider changes to the setting in which the laws operate. We examine the effect of an ageing population, changing community attitudes to people with disabilities and developments in policy and practices for people with disabilities. We also consider developments in the human rights environment.

1.48 Chapter 5 provides an overview of the Commission’s views about the public policy that should underpin the new guardianship laws. It also contains an outline of the Commission’s recommendations about the structure of a new and accessible Guardianship Act.

1.49 Chapter 6 contains the overarching principles that should be included in new guardianship legislation. In Chapter 7, we recommend new statutory descriptions of the central concepts of capacity and incapacity and describe the principles that should guide capacity assessments.

1.50 The Commission’s recommendation for a new continuum of decision-making assistance is then described in more detail. We begin by examining new supported and co-decision-making arrangements in Chapters 8 and 9. These mechanisms complement existing substitute decision-making arrangements by providing a broader array of legal arrangements to cater for different levels of impaired decision-making ability.

1.51 We then consider substitute decision making. Chapter 10 considers reforms to the personal appointments of substitute decision makers. Chapter 11 considers the mechanisms by which people can give advance written instructions about particular decisions they would like made if they lose capacity in the future.

1.52 Chapter 12 examines the appointment of substitute decision makers by VCAT. The Commission proposes changes to:

- the criteria that VCAT must consider before appointing a substitute decision maker and the decisions those substitute decision makers are empowered to make
- who should be appointed to decision-making roles
- the relationship between substitute decision makers
- when appointments should be reassessed.

We also consider the issue of succession planning.

1.53 Chapter 13 contains the Commission’s proposals for refining the law of substituted consent for medical treatment. Chapter 14 deals with substituted consent for participation in medical research.

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1.54 In Chapter 15, the Commission recommends new legal safeguards for people without capacity who experience total and on-going restraint of their liberty. These reforms apply to people living in hospitals, supported accommodation and residential facilities that are supervised to an appropriate level by a government body.

1.55 In Chapter 16, the Commission recommends the establishment of a new online register of personal and VCAT appointments of substitute decision makers and supporters.

1.56 Chapter 17 addresses the responsibilities of substitute decision makers. It recommends new principles to guide decision makers. Chapter 18 deals with accountability mechanisms for substitute decision makers. There is also a recommendation for a new public wrong to apply to all decision makers and supporters who abuse their powers. Chapter 19 contains the Commission’s recommendation that, in some instances, it should be possible to seek a review of the merits of a decision made by a substitute decision maker who is either the Public Advocate or a remunerated administrator.

1.57 Chapter 20 recommends reforms to the functions and powers of the Public Advocate. Chapter 21 contains recommendations designed to improve the VCAT Guardianship List processes.

1.58 Chapters 22, 23, 24 and 25 consider the interaction of the G&A Act with other laws that deal with substitute decision making. We consider the Children, Youth and Families Act 2005 (Vic), the Disability Act 2006 (Vic), the Mental Health Act 1986 (Vic) and the Crimes (Mental Impairment Unfitness to be Tried) Act 1997 (Vic).

1.59 Chapter 26 contains the Commission’s recommendations for clarifying the law when a substitute decision maker conducts legal proceedings on behalf of a represented person. Chapter 27 considers Victorian recognition of appointments made under the guardianship laws of other states and territories and contains recommendations for transitional provisions between existing laws and the new legislation recommended by the Commission.