## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>32</td>
</tr>
<tr>
<td>An ageing population</td>
<td>32</td>
</tr>
<tr>
<td>Changing profile of people using guardianship laws</td>
<td>34</td>
</tr>
<tr>
<td>Projections of future use of guardianship laws</td>
<td>35</td>
</tr>
<tr>
<td>Different experiences of capacity</td>
<td>39</td>
</tr>
<tr>
<td>A different disability policy environment</td>
<td>40</td>
</tr>
<tr>
<td>A changing legal climate</td>
<td>42</td>
</tr>
<tr>
<td>Risk management</td>
<td>46</td>
</tr>
<tr>
<td>Increasing use of personal appointments</td>
<td>47</td>
</tr>
<tr>
<td>Abuse of vulnerable Victorians</td>
<td>48</td>
</tr>
<tr>
<td>The focus of new guardianship laws</td>
<td>48</td>
</tr>
</tbody>
</table>
Chapter 4

A changing environment

INTRODUCTION

4.1 Both the social environment in which Victorian guardianship laws operate and the range of people who use these laws have changed markedly since the passage of the Guardianship and Administration Act 1986 (Vic) (G&A Act). We consider these changes in this chapter.

4.2 New guardianship laws must evolve to cater for the contemporary needs of the many Victorians who require assistance with decision making now, or will do so in the future. While the G&A Act was groundbreaking legislation when first enacted, the law must now respond to new challenges that include:

- changes to the profile of people relying on these laws, particularly an increase in people with age-related disabilities who have become major users of guardianship laws
- new international human rights laws that emphasise participation in decision making and equal rights for people with disabilities
- changes to service delivery for people with disabilities in our community
- a new emphasis on risk management within the service sector leading to growing unease with informal arrangements
- the increasing use of mechanisms that allow people to plan ahead by nominating a person they trust to make decisions for them in the future if they are unable to do so themselves
- growing concerns about abuse of people with disabilities in the community.

4.3 Chapter 5 provides an overview of the Commission’s recommendations for responding to these challenges by modernising our guardianship laws.

AN AGEING POPULATION

4.4 As discussed in Chapter 2, the G&A Act sought to implement the recommendations of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee), which reported to the Victorian Government 30 years ago about the legal needs of people with an intellectual disability who were moving from institutional life to community living. Although the G&A Act applies to people with a broad range of disabilities, the second reading speech for the Bill reveals that it was largely seen as legislation for people with an intellectual disability. Over time, many people with other reasons for their impaired decision-making ability—most notably, age-related disabilities—have become major users of guardianship legislation.

SOME DATA

4.5 Australia’s population is ageing. The average life expectancy of Australians is almost 84 years for women and 79 years for men. In 2010, about 800,000 Australians, or 3.7 per cent of the total population, were aged 80 or more. Nearly two-thirds of those people over 80 are female.
The proportion of the Australian population over 65 has been rising since the 1970s. In 1971, 8.3 per cent of the population were aged over 65. In 2009 this figure had risen to 13.3 per cent of the population, or over 2.9 million people.

In Victoria, the number of people aged over 60 is expected to grow from one million in 2010, to 1.4 million in 2020, and to 2.4 million in 2050, representing 19, 23 and 29 per cent of the population respectively.

The number of older Australians over the age of 85 years is projected to grow more rapidly than any other age group. This figure has doubled over the past 20 years with an estimated 1.1 million Australians expected to be over the age of 85 years in 2036.

People aged 85 years and over are projected to increase their share of the total older population from 12 per cent of older Australians in 2006 to 18 per cent in 2036.

Changing Incidence of Disability in Our Community

The ageing profile of the population is the main factor affecting the incidence of disability in the community.

The results of the Australian Bureau of Statistics Survey of Disability, Ageing and Carers 2009 showed that the rate of disability increases with age. It is estimated that of the population over 90 years of age, 96 per cent have some form of disability.

Without the impact of the ageing population the overall incidence of disability in the population has remained constant for some time.

Dementia is now the leading cause of disability in Australians aged 65 and over. The prevalence of dementia doubles every five years from the age of 65. Access Economics reported that around 257,000 Australians had dementia in 2010. This is expected to increase to just over 981,000 people in 2050. There are currently

---

6 Ibid 20.
7 Ibid.
10 Ibid 5.
14 ‘Older Australians’ refers to those people aged 65 years and over.
15 ‘The term ‘dementia’ is regularly used with two different meanings. It is sometimes used as a shorthand plural term (dementias) to refer to a range of diseases, such as Alzheimer’s, that cause progressive and diffuse cerebral damage. It is also used to refer to the clinical syndrome of an acquired global impairment of intellect, memory and personality, but without impairment of consciousness’ (see John-Paul Taylor and Simon Riemenger, ‘The management of dementia’ in Michael Golder, Nancy Andreason, Juan Lopez-Ibor and John Geddes, New Oxford Textbook of Psychiatry (Oxford University Press, 2nd ed, 2009) 411.
approximately 65,000 Victorians with dementia.\textsuperscript{20} This figure is projected to increase to over 141,000 people in 2030 and to more than 246,000 people by 2050.\textsuperscript{21} Dementia prevalence in Victoria is expected to grow by an extraordinary 278 per cent between 2010 and 2050.\textsuperscript{22}

4.13 The growing incidence of dementia-related illnesses is evident worldwide, leading to significant budget allocations and planning at national government levels.\textsuperscript{23}

4.14 People with dementia often require decision-making assistance, especially as their condition progresses. Some people make personal appointments of substitute decision makers when they still have the capacity to do so, while others are able to cope with informal assistance. People who have not made a personal appointment might need a tribunal-appointed guardian or administrator to assist them with important decisions that cannot be resolved informally.

4.15 A person with an age-related disability, such as dementia, is likely to experience gradual loss of decision-making ability over time. Many people with dementia are able to make decisions with assistance from others for some time. Often, the life history of these people can serve as a useful guide for those people who assist them with decisions or make decisions for them when they are no longer able to do so.

### Changing Profile of People Using Guardianship Laws

4.16 The increase in the incidence of age-related disability, particularly dementia, is reflected in the people being assisted by guardianship laws. People with dementia, people with mental illness and people with acquired brain injury are now the major users of legislation designed initially with the needs of people with intellectual disabilities primarily in mind. People with dementia are likely to be the major users of guardianship laws over the next 20 years.

### The Public Advocate’s Clients

4.17 During 2010–11, the Public Advocate was guardian for 1730 people.\textsuperscript{24} There were 905 new guardianship cases, up from 749 during 2009–10.\textsuperscript{25}

---

\textsuperscript{20} Caring Places, above n 18, 15–6.
\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
\textsuperscript{23} Worldwide, the annual economic cost of dementia has been estimated as US$604 billion; Alzheimer’s Disease International, World Alzheimer Report 2011 (2011) 59–60. The New York Times reported that an estimated 13.5 million Americans will suffer from Alzheimer’s disease by 2050, up from five million in 2010 (Alzheimer’s disease is the most common form of dementia). Currently, the United States spends US$172 billion a year to care for people with Alzheimer’s disease. By 2020, it is estimated that this cost will rise to US$2 trillion, and by 2050 will increase to US$20 trillion; Sandra O’Connor, Stanley Prusiner and Ken Dychtwald, ‘The Age of Alzheimer’s’, The New York Times (New York City), 28 October 2010, A33. Legislation has recently been passed to establish an Office of the National Alzheimer’s Project which will create an ‘integrated national plan to overcome Alzheimer’s’; National Alzheimer’s Project Act, USC § 3036 (2011). Australia was the first country to make dementia a national health priority. However, the 2011 budget did not commit any additional funding to combat dementia and therefore terminated the Dementia Initiative: Helping Australians with Dementia, and their Carers – Making Dementia a National Health Priority (2005). The dementia initiative was funded as a five-year program in the 2005 federal budget. Following Australia’s initial lead, national dementia strategies have been launched in France, South Korea, England, Norway and the Netherlands and the European Commission has created an international action plan on dementia: Alzheimer’s Disease International, World Alzheimer Report 2009 (2009) 2.
\textsuperscript{24} Office of the Public Advocate (Victoria), Annual Report 2010–2011 (2011) 6. The Public Advocate is appointed as guardian by VCAT in approximately 65% of cases. In the other 35% of cases a family member or friend is appointed. The total number of new orders appointing the Public Advocate for people over the age of 65 during 2009–10 was 386; Office of the Public Advocate (Victoria) Guardianship and the Ageing Population: Profile of Victorian Guardianship Clients Aged Over 65 years (2011) 3–5.
\textsuperscript{25} Note adjustments have been made to the way guardianship matters are counted from 2009–10 to 2010–11. Client matters rather than clients are now counted: Office of the Public Advocate (Victoria), Annual Report 2010–2011 (2011) 6. In the first year of operation, the Public Advocate was appointed guardian in 225 cases: Office of the Public Advocate (Victoria), Guardianship Trends in Victoria 1988–2008 (2009) 2–3.
4.18 In 2010–11, 16 per cent of the Public Advocate’s clients had an intellectual disability. Approximately 33 per cent had dementia, making it the single largest client group. The next largest user groups were people with acquired brain injury (18 per cent) and mental illness (17 per cent).

4.19 In 2010–11, 36 per cent of the Public’s Advocate’s clients were 80 years of age or older, whereas in 1988 this figure was 26 per cent. People over the age of 65 account for 60 per cent of clients represented by the Public Advocate.

STATE TRUSTEES’ CLIENTS

4.20 As at 30 June 2011, State Trustees provided administration services for over 9000 represented persons, managing assets in excess of $800 million.

4.21 The number of new VCAT orders appointing State Trustees accounted for 40.1 per cent of the total number of administration orders made during 2010–11, a slight increase from 2009–10.

4.22 Clients over 60 years account for 39 per cent of those represented by State Trustees. People aged between 31 and 60 account for 53 per cent of clients and people under the age of 30 account for 8 per cent of clients.

4.23 The profile of those people who are represented by State Trustees differs from those represented by the Public Advocate. In 2009–10, the most significant client group by disability type were people with a mental illness, accounting for approximately 30 per cent of clients, followed by intellectual impairment (approximately 18 per cent), dementia (approximately 12 per cent), and acquired brain injury (approximately 8.5 per cent).

PROJECTIONS OF FUTURE USE OF GUARDIANSHIP LAWS

4.24 In order to gauge the number of people who might require the assistance of a guardian or an administrator in the future—and, in particular, the numbers who might need the services of the Public Advocate and State Trustees—the Commission engaged Monash University’s Centre for Population and Urban Research (CPUR),
headed by demographer Dr Bob Birrell. The Commission asked the Centre to provide estimates of the numbers of Victorian residents likely to be experiencing ‘severe’ or ‘profound’ cognitive impairment in 2020 and 2030. These research categories were chosen because they are categories used by the Australian Bureau of Statistics (ABS), the main data source for this exercise, and because it is likely that people with this level of cognitive impairment may need some form of decision-making assistance.

PROJECTIONS FOR SEVERE OR PROFOUNMD COGNITIVE IMPAIRMENT

4.25 The rate of cognitive impairment increases with age. CPUR applied the rates of people with severe or profound cognitive impairment to projections of Victoria’s population to determine the likely increase in the number of people who may need a guardian or administrator in the future.

4.26 CPUR expects the number of Victorians who are likely to have severe or profound cognitive impairment to increase over the next two decades. CPUR estimated that in 2010, 78,379 Victorians over the age of 19 had a severe or profound cognitive impairment. CPUR suggests that this will increase to 97,897 in 2020 and 124,280 in 2030, increases of 25 per cent and a further 27 per cent respectively.

38 The exercise of estimating the number of guardians and administrators likely to be appointed in the future has been difficult because VCAT’s IT system has been unable to identify the number of orders made. VCAT data appears to be limited to the number of applications and finalisations made. The Commission has been unable to link the information provided by VCAT to the information provided by the Public Advocate and State Trustees about the number of orders in which those agencies have been appointed. It has therefore been difficult to draw any definite conclusions from the data provided by VCAT.

39 CPUR used the data provided by the Australian Bureau of Statistics (ABS) Survey of Disability, Ageing and Carers: Summary of Findings 2003 (DAC 2003) ABS cat no 4430.0, ABS, Canberra to establish the future projections contained in their report. This report was provided to the Commission in December 2010. In early 2011, the ABS published the 2009 survey of the same name and staggered data cubes throughout 2011. The Commission has considered the data contained in the 2009 survey and notes the future projections contained in our report are based on the results of the 2003 survey as the 2009 survey findings were not released in time for inclusion in the CPUR report. The 2009 survey was largely a repeat of the 2003, with the only notable differences being content in the areas of unmet demand for assistance, social inclusion, and labour force participation. The Commission notes CPUR used a series of projections prepared by the ABS and published in 2008 for the Victoria population projection: Australian Bureau of Statistics, Population Projections, Australia, 2006 to 2101, 2008, cat no 3222.0, ABS, Canberra <http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>. This series of projections is similar to those used by the Victorian Government in the Department of Planning and Community Development publication Victoria in Future 2008: Victorian State Government Population and Household Projections 2006–2036 (September 2009). Only adults aged 20-plus are shown for the projection of those with CI shown in Table 3. The projection starts with 20-24 year olds because there was no data for the years 18 or 19 in the ABS projection. Bob Birrell, Dharma Arunachalam and Ernest Healy, Guardianship Arrangements and Demographic Trends, 2010–2030 (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 6.

40 Using the definitions contained in the DAC 2003, CPUR included the following ‘main conditions’ as potentially leading to cognitive impairment: dementia, Alzheimer’s disease, Parkinson’s disease, multiple sclerosis, cerebral palsy, other diseases of the nervous system, stroke, head injury/acquired brain damage, complications/consequences of surgery and medical care n.e.c. (not elsewhere classified), schizophrenia, depression/mood affective diseases (excluding postnatal depression), mental retardation/intellectual disability, autism and related disorders (including Retts syndrome), intellectual and development disorders n.e.c., mental and behavioural disorders n.f.d. (not further defined), other mental and behavioural disorders and intellectual and development disorders: Bob Birrell, Dharma Arunachalam and Ernest Healy, Guardianship Arrangements and Demographic Trends, 2010–2030 (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 6.

41 The DAC 2003 survey classified the conditions potentially leading to cognitive impairment into four stages: those experiencing profound limitation, severe limitation, moderate limitation and mild limitation. For the purposes of the CPUR study only those with profound or severe limitation/disability were regarded as likely to experience a level of cognitive impairment that may likely lead to the need for the appointment of a guardian or administrator: Bob Birrell, Dharma Arunachalam and Ernest Healy, Guardianship Arrangements and Demographic Trends, 2010–2030 (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 3.

42 The number of people in supported residential care is also likely to grow substantially over the two decades as the community ages and life expectancy increases. Projections prepared for the Commission by Monash University’s Centre for Population and Urban Research project that by 2030 there will be a 76% increase in the number of people with a cognitive impairment living in cared accommodation relative to 2010. This is higher than the total increase in the numbers project to be cognitively impaired. The reason for this outcome is the relatively rapid growth in the numbers of persons in the retirement ages. Bob Birrell, Dharma Arunachalam and Ernest Healy, Guardianship Arrangements and Demographic Trends, 2010–2030 (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 7.

43 Based on data from DAC 2003 CPUR estimates that approximately 2% of Victorians have severe or profound cognitive impairment: Bob Birrell, Dharma Arunachalam and Ernest Healy, Guardianship Arrangements and Demographic Trends, 2010–2030 (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 8.

44 These percentages have been derived by the Commission and are based on projections formulated by CPUR. CPUR used figures from the DAC 2003 multiplied by the projected population of Victoria in 2020 and 2030. See also Australian Bureau of Statistics, Population Projections, Australia, 2006 to 2101, 2008, cat no 3222.0, ABS, Canberra <http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>.
IMPLICATIONS AND PROJECTIONS FOR GUARDIANSHIP CASES

4.27 It is difficult to assess with any precision the number of people who may need a tribunal-appointed guardian or administrator in the future because of the challenge in predicting the prevalence of various alternate strategies—most notably, the personal appointment of an enduring guardian or attorney—that would minimise the need for a VCAT appointment. It is also difficult to predict actions that might increase need, such as insistence by aged care homes and financial institutions that they will only deal with a formally appointed substitute decision maker of a person without capacity.

4.28 CPUR calculates that approximately two per cent of Victorians with severe or profound cognitive impairment have the Public Advocate as their guardian. This calculation is based on a figure of 1574 Victorians who were under the guardianship of the Public Advocate during 2009–10 as a percentage of the estimated total number of Victorians who were severely or profoundly cognitively impaired in 2010 (78,379).45

4.29 This percentage is probably conservative as the demand for guardians and administrators is likely to grow as more government agencies and private sector organisations insist upon dealing with a formally appointed substitute decision maker in order to minimise their own exposure to risk.

4.30 CPUR suggests that the number of people under the guardianship of the Public Advocate is likely to increase to 1958 people in 2020 and to 2486 in 2030, an increase of 25 per cent from 2010 to 2020 and an increase of 27 per cent from 2020 to 2030.46

Table 1: Projected number of guardianship cases in Victoria in 2020 and 2030

<table>
<thead>
<tr>
<th></th>
<th>2010</th>
<th>2020</th>
<th>2030</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of cognitively impaired</td>
<td>78,379</td>
<td>97,897</td>
<td>124,280</td>
</tr>
<tr>
<td>Share in guardianship</td>
<td>2.01%</td>
<td>2.01%</td>
<td>2.01%</td>
</tr>
<tr>
<td>Number in guardianship</td>
<td>1574</td>
<td>1958</td>
<td>2486</td>
</tr>
</tbody>
</table>

Source: Calculated from projections of those with cognitive impairment contained in Bob Birrell, Dharma Arunachalam and Ernest Healy, Centre for Population and Urban Research, Guardianship Arrangements and Demographic Trends, 2010-2030 (2010).

Implications for VCAT applications

4.31 According to VCAT, there were 1872 guardianship applications and 2772 administration applications in 2009–10.47 The Commission has estimated the number of guardianship and administration applications VCAT might receive in 2020 and 2030.48

45 Office of the Public Advocate, Annual Report 2009–2010, (2010)5. This figure relates to the number of people under the guardianship of the Public Advocate during 2009–10 and includes the number of new appointments made and active appointments carried over from the previous financial year. The Public Advocate reports that she was guardian for 1730 people during 2010–11, an increase of 156 from 2009–10: OPA, Annual Report 2010–11, above n 26, 6. The most recent figure was not available for inclusion in the CPUR report. See also Bob Birrell, Dharma Arunachalam and Ernest Healy, Guardianship Arrangements and Demographic Trends, 2010–2030 (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 9.

46 Data provided by the Public Advocate detailed the age distribution and disability type of those people represented by the Office of the Public Advocate over the age of 80 account for 41 percent of cases: Office of the Public Advocate (Victoria), Annual Report 2009–2010 (2010) 5. The age distribution is comparable to the estimate of the share of cognitively impaired persons in Victoria in 2010 in the 80 years plus age group. This can be interpreted to imply that for the guardianship group the characteristics of the Victorian population with a cognitive impairment is reflected in the demographic of clients of the Public Advocate: Bob Birrell, Dharma Arunachalam and Ernest Healy, Guardianship Arrangements and Demographic Trends, 2010–2030 (2010), prepared for the Victorian Law Reform Commission by the Centre for Population and Urban Research, Monash University (unpublished) 8.

47 The present IT system at VCAT is only able to establish how many applications are made in a given period. From that information VCAT is not able to identify how many orders were made, or how many people were the subject of orders; email from Victorian Civil and Administrative Tribunal to Victorian Law Reform Commission, 10 February 2011. The Public Advocate and State Trustees provide information about the number of VCAT orders appointing those respective agencies.

48 To arrive at these figures the Commission applied the projected increase of the number of Victorians with a severe or profound cognitive impairment between 2010 and 2020 (25%) and 2030 (27%) to the number of guardianship and administration applications VCAT received during 2009–10.
4.32 VCAT can expect to receive 5796 guardianship and administration applications in 2020 and 7357 applications in 2030, an increase of approximately 25 and 27 per cent during each 10-year period.\(^{49}\) While these figures are broad estimations only, they provide a useful indication of future workload.

**IMPLICATIONS AND PROJECTIONS FOR ADMINISTRATION CASES**

4.33 State Trustees is the administrator for a very different group of people than those who have the Public Advocate as their guardian. State Trustees’ clients are younger than the Public Advocate’s and the reasons for their impaired decision making capacity differ. The average age of clients of State Trustees is 56 years.\(^{50}\) People over the age of 81 years account for only 13 per cent of total clients. Unlike people represented by the Public Advocate, 30 per cent of the people represented by State Trustees have a mental illness.\(^{51}\)

4.34 CPUR suggested that it is not advisable to use the projected figures for Victorians with severe or profound cognitive impairment when seeking to provide estimates of the number of people State Trustees could expect to represent in 2020 and 2030.\(^{52}\) However, in line with the growth in the population of Victoria, and the accompanying increase in the incidence of age-related disability, State Trustees can expect to manage a considerably larger number of clients in the future.

**SUMMARY OF DATA**

4.35 In summary, the data relating to severe and profound cognitive impairment in Victoria reveals that:

- The rate of severe and profound cognitive impairment increases as people age.
- In the age bracket 70–79 there are more men than women who experience severe or profound cognitive impairment. This changes in the 80 plus age group, presumably because women generally outlive men.
- The number of Victorians with that level of impairment is likely to increase by approximately 25 per cent between 2010 and 2020.
- The number of people under guardianship of the Public Advocate is likely to increase by approximately 25 per cent between 2010 and 2020.
- Victorian Civil and Administrative Tribunal (VCAT) applications for guardianship or administration orders are likely to increase by approximately 25 per cent between 2010 and 2020.
- It is anticipated that State Trustees will also be called on to manage a much larger number of clients in the future.

**OTHER FACTORS INFLUENCING THE PROFILE OF PEOPLE USING GUARDIANSHIP**

4.36 Many other factors are likely to affect the content and operation of guardianship laws in the future. Some relevant issues are:

- The growing number of people in Victoria from culturally and linguistically diverse backgrounds, particularly among older people, means that the future system

\(^{49}\) These calculations are derived from the number of guardianship and administration applications VCAT received during 2009–10 (4644) multiplied by the approximate increase in the number of Victorians with severe or profound cognitive impairment in 2020 (25%) and 2030 (27%) as projected by CPUR.

\(^{50}\) This figure is for the 2009–10 financial year. The average age of female clients is 60 years and 53 years for males: email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

\(^{51}\) This figure is for the 2009–10 financial year. By condition type, mental illness accounts for approximately 30 per cent of State Trustees clients. Conditions are classified as follows: depression 0.04%, paranoid schizophrenia 4.54%, bipolar disorder 1.15%, Munchausen’s disease 0.01%, schizophrenia 14.13%, mental illness 9.48%, Korsakoff’s disease 0.17%: email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

will need to be more accessible to people from a range of linguistic and cultural backgrounds.  

- An ageing population in regional areas will put greater pressures on a system that is currently largely centralised.
- The growing awareness of a lack of engagement of Indigenous Victorians with guardianship laws, and their overall under-representation as users of disability services, highlights the need for the system to be more accessible and relevant to Aboriginal and Torres Strait Islander people.
- There have been calls by the families of people with lifelong decision-making disabilities to be appointed as guardians even when there is no immediate need for a formal substitute decision maker.
- There have been calls by and on behalf of some people with a mental illness to have the choice of using guardianship laws when they are unable to make decisions for themselves about psychiatric treatment and place of residence.

4.37 This report contains many recommendations that seek to make guardianship laws more accessible and responsive to the varying needs of a diverse Victorian community.

DIFFERENT EXPERIENCES OF CAPACITY

4.38 The difficult concept of ‘capacity’ lies at the centre of Victoria’s guardianship laws. ‘Capacity’ is used throughout the law as a shorthand term to refer to a level of cognitive ability that a person must have before they can make a decision that is recognised as being legally valid, such as entering into a binding contract, or before they can lawfully participate in various activities of adult life, such as marrying or having a sexual relationship with another person.

4.39 Guardianship law currently draws a convenient, but artificial, distinction between those people who have capacity and those who do not. At present, the law only has one response to the needs of someone with impaired decision-making ability: the appointment of a substitute decision maker.

4.40 Issues of capacity can be very different, however, for the many groups of people who now use guardianship laws. A person with an age-related disability, for example, is

53 The culturally and linguistically diverse (CALD) population is ageing more rapidly than the Australian-born population. According to the Australian Institute of Health and Welfare, people aged 65 years and older from CALD backgrounds are expected to increase by 66% over a 15-year period, while the corresponding increase for the Australian-born population is projected to be 23%. Dane Gibson et al, Australian Institute of Health and Welfare, Projections of Older Immigrants: People from Culturally and Linguistically Diverse Backgrounds 1996–2026, Australia (2001) 12. Based on these projections, AIHW estimates that by 2011, one in every five people aged 80 and over will be from CALD backgrounds; at 12. Access Economics reports that there are currently no epidemiological data on dementia incidence and prevalence rates among CALD populations in Australia: Keeping Dementia Front of Mind, above n 16, 11.

54 Although VCAT currently conducts regular hearings throughout regional Victoria, the Office of the Public Advocate is based only in Melbourne. State Trustees has offices in Melbourne, Glen Waverley, Dandenong and Bendigo. The proportion of older people in rural and regional Victoria is greater than in metropolitan Melbourne. According to the Department of Planning and Community Development (Victoria), in 2006, 21% of regional Victorians were aged 60 years or over, compared to 17% in metropolitan areas. By 2020, it is predicted that 28% of the regional population will be over 60, estimated to increase to 35% in 2050: Ageing in Victoria, above n 8, 6. As at 22 July 2010, the Managers of the Advocate Guardian program within the Office of the Public Advocate estimate that 30-40% of their guardianship clients are in regional and rural areas (principally the regional centres such as Shepparton, Ballarat, Geelong and the Mornington Peninsula). Email from Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.

55 While the 2006 census data indicated that 2.4% of the total Australian population are Indigenous, they represent only 0.6% of people using disability services in Victoria. The Census revealed that Indigenous Australians aged under 65 years were 2.4 times as likely as non-Indigenous Australians of the same age to need assistance with activities of daily living: see Australian Bureau of Statistics, Experimental Estimates of Aboriginal and Torres Strait Islander Australians, June 2006, cat no 3238.0.55.001, ABS, Canberra. See also Australian Institute of Health and Welfare, Aboriginal and Torres Strait Islander people with Disability: Wellbeing, Participation and Support (2011) 2; Australian Institute of Health and Welfare, Australia’s Welfare 2009 (2009-8); Parliament of Victoria, Inquiry into Supported Accommodation for Victorians with a Disability and Mental Illness (2009) 32. The Commission heard from a representative from the Victorian Aboriginal Disability Network that many Aboriginal people have very little knowledge of the guardianship system after their child turns 18 or what services they are entitled to. There is a need for more education and better transitioning between the youth system and adult guardianship systems: consultation with Jody Saxton-Barney, Project Coordinator 2009-2011, Victorian Aboriginal Disability Network (3 August 2011).

56 Submission CP 59 (Carers Victoria).

57 See Chapter 24.
likely to experience a gradual loss of capacity over time. A person with an acquired brain injury might recover important areas of capacity over time. A person with a mental illness might experience fluctuating capacity.

4.41 The Cocks Committee did not consider people’s different experiences of impaired decision-making ability. In Chapter 7, the Commission proposes a more sophisticated response to impaired decision-making ability: there should be a spectrum of measures to support people to participate in those activities where legal capacity is required.

A DIFFERENT DISABILITY POLICY ENVIRONMENT

4.42 New guardianship laws must also respond to the significant changes to public policy concerning people with disabilities since the G&A Act was enacted in 1986.

4.43 The notion of ‘protection’ was a central part of the task set for the Cocks Committee. It was asked ‘to formulate proposals for legislation to deal with the protection of intellectually handicapped persons’. The Committee was acutely aware, however, of the ‘possibility that [guardianship] legislation … can be used to restrict as well as to protect an individual’. In response, the Committee sought to ensure that guardianship would become a last resort, for use after other less restrictive options had been considered.

4.44 The Cocks Committee said that new legislation should ensure that a guardian is appointed to make decisions only in those areas in which a person cannot make decisions for himself[sic]. A concept of limited guardianship would help to ensure that the protective service is ‘tailor-made’ to accommodate the strengths and weaknesses of the individual and would be consistent with an important principle which first arose in the educational context (that of the least restrictive alternative).

4.45 While notions of vulnerability and protection should continue to influence public policies concerning some people with disabilities, the human rights perspectives of equality and citizenship of people with disabilities are now influential. These matters are reflected in the United Nations’ Convention on the Rights of Persons with Disabilities (the Convention), which is discussed below. They are also reflected in changes to policy underpinning the provision of services for people with disabilities. There is now much greater emphasis upon people with disabilities being supported to be active, participating members of our community.

A DIFFERENT APPROACH TO THE WAY DISABILITY SERVICES ARE DELIVERED

Deinstitutionalisation

4.46 The movement of people with intellectual disabilities and mental illness from large-scale institutions into community-based living during the 1970s and the 1980s was accompanied by important changes to the way in which services associated with daily living were provided to these people. These profound changes meant that a single institutional service no longer exercised day-to-day decision-making control over the...
lives of most people with an intellectual disability or a mental illness. People with disabilities were more likely to be interacting with local shops and services in the same way as other members of the community.

**Service reorientation**

4.47 Over time, the service system for many people with a disability has changed to a more individualised approach. The system has gone from one dominated largely by government, which either funded or directly provided services, to one that is principally concerned with individual package funding.63

4.48 This approach saw funds allocated, either directly or notionally, to the person with the disability. The person with the disability could then use those funds in flexible ways to meet their needs, either by ‘buying’ disability services, or through other channels, such as buying extra support within their ordinary community networks, rather than relying on a more formal disability service system.

4.49 The number of people receiving individual support packages from the Department of Human Services’ Disability Services program has grown from 6920 in 2003–04 to 14,852 in 2010–11.64

4.50 Two recent reports by the Productivity Commission65 suggest that the delivery of services for aged people in Australia and for those with a disability might be re-structured over the next few years. Any changes might increase the need for formal substitute decision-making arrangements.

4.51 In August 2011 the Productivity Commission produced a report concerning disability care and support throughout Australia.66 The Productivity Commission noted that ‘current disability support arrangements are inequitable, under funded, fragmented, and inefficient and give people with a disability little choice’.67 The Commission’s recommendation to establish a National Disability Insurance Scheme,68 which has received bi-partisan support, seeks to provide Australians with a guarantee of support if they acquire a significant disability.69

4.52 The Productivity Commission also recently released a report containing options for reforming Australia’s aged care system.70 It recommended structural reform of the aged care system to ensure the wellbeing of older people is protected and promoted. The terms of reference directed the Productivity Commission to address issues arising from Australia’s ageing and increasingly diverse population, increasing demand for aged care services and a significant shift in the types of care expected.71


65 The Productivity Commission is an independent research and advisory body to the Australian Government. For more information, see the Productivity Commission website <http://www.pc.gov.au>.

66 Productivity Commission, Disability Care and Support, Inquiry Report No 54 (2011) (‘Disability Care and Support’).

67 Ibid vol 1, 5.

68 For example, people with permanent or significant disability would receive an entitlement to particular supports, and would be able to decide what service providers they wanted, or indeed if they wanted a service provider to coordinate services for them. The person could elect to receive an individualised budget under self-directed funding if they wanted to manage their budget directly, and were able to do so: Disability Care and Support, above n 66, vol 1, 19, 63. While the Productivity Commission’s recommendation for a non-means tested national insurance scheme received a commitment from government and bi-partisan support, the proposed 7 year timeframe for the full introduction of the scheme has raised concern from unions: see Australian Council of Trade Unions, ‘National Disability Insurance Scheme is a Reform Whose Time has Come’ (Media Release, 10 August 2011) <http://www.actu.org.au/ Images/Dynamic/attachments/7357/acturelease110810-disability.pdf>.

69 Disability Care and Support, above n 66, vol 1, 10–17.


71 Ibid v–vi.
A changing environment

4.53 A single national care co-contribution regime was recommended, involving private and government contributions which would apply across the aged care system—in the community or in a residential aged care facility. A focus of the report is on providing older people with a choice of care that is individualised and enabling.

New laws and changes to service delivery

4.54 The State Disability Plan 2002–2012 (State Plan) brought a new focus on building accessible and supportive communities and a whole-of-government approach to disability planning supports and service regulation. This shift away from facility-based services was subsequently reflected in the Disability Act 2006 (Vic). While the earlier legislation, the Intellectually Disabled Persons’ Services Act 1986 (Vic) (IDPS Act), was essentially an Act to regulate disability service provision, the Disability Act (which replaced the IDPS Act and Disability Services Act 1991 (Vic)) has a broader focus. It includes, for example, provisions for Disability Action Plans across government departments and establishes a Disability Advisory Council to provide whole-of-government advice to the Minister.

4.55 The introduction of the Disability Act expanded the service focus of the IDPS Act. While the IDPS Act provided a framework to plan and access services to meet a person’s needs in specific areas of their life—such as work, education and community participation—the Disability Act sought to place much greater emphasis on supporting families, informal networks and local communities to respond to the needs and goals of the person with the disability.

4.56 All of these differences reflected changes in approaches to people with disabilities and to the services they use. They represent a shift from seeing people with a disability as recipients of services to recognising them as people who are active, participating members of society. This change is an important consideration in the development of any new laws.

A CHANGING LEGAL CLIMATE

UNITED NATIONS’ CONVENTION

4.57 Australia is a state party to a number of international conventions concerned with protecting and promoting human rights, including the rights of people with disabilities. The United Nations’ Convention on the Rights of Persons with Disabilities (the Convention) is the most comprehensive international human rights statement of the rights of people with disabilities. It protects and promotes a broad range of civil, political, economic, cultural and social rights for people with disabilities, almost all of which are directly or indirectly relevant to guardianship laws.

---

72 Ibid xxvi–ii.
73 Ibid xxi.
74 Disability Act 2006 (Vic) ss 11–12, 38.
75 Intellectually Disabled Persons’ Services Act 1986 (Vic) ss 3, 9, as repealed by Disability Act 2006 (Vic) s 222(1).
76 Disability Act 2006 (Vic) s 52(2).
79 Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others: Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1.
Although many of the rights protected by the Convention were already protected by other United Nations human rights treaties, such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, these conventions make few specific references to the rights of people with disabilities. A disability-specific convention was seen as necessary to increase the visibility of people with disabilities as holders of human rights, to provide more targeted statements and protections relevant to people with disabilities, and to improve research and monitoring of the status of people with disabilities. It has been described as ‘the first international instrument which looks at people with disabilities from the perspective of human rights and not from a perspective of medical or social politics’.

When Australia ratifies an international convention, it accepts an obligation in good faith to implement its provisions in domestic laws. The Convention was ratified by Australia on 17 July 2008. On 21 August 2009, Australia ratified the Convention’s Optional Protocol, which allows individual citizens to make a complaint to the Committee on the Rights of Persons with Disabilities about violations of the Convention by state parties. The Committee oversees the implementation of the Convention. The Convention’s overall purpose is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.

The Convention represents a movement beyond providing protection for people with disabilities to taking positive steps to maximise their participation in all aspects of life. It stresses a state’s obligation to promote active participation by championing equal access to different aspects of community life, and recognising the right of people with disabilities to enjoy legal capacity on an equal basis with other people. In the Commission’s view, this means that disability alone should never constitute a ‘capacity disqualification’ and that all reasonable efforts should be made to assist people with impaired capacity to participate to the fullest extent possible in decisions about themselves.

**VICTORIAN CHARTER**

Victoria is one of two Australian jurisdictions to have a charter of rights. The Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter) establishes a legislative framework for the protection and promotion of human rights in Victoria. The Charter came into full operation on 1 January 2008.
4.62 The Charter establishes a ‘dialogue model’ of human rights protection in which the government, courts and parliament are assigned specific roles to ensure that human rights are protected and promoted in Victoria. The Charter provides that new Victorian laws should be, as far as possible, consistent with human rights and that, whenever possible, existing laws should be interpreted so that they are compatible with the Charter.

4.63 Some of the rights recognised by the Charter that are particularly relevant to the content of new Victorian guardianship laws are:

- the right to recognition as a person before the law
- equal protection before the law and protection from discrimination
- protection from cruel, inhuman, degrading treatment or punishment and not being subjected to medical or scientific experimentation or treatment without consent
- freedom of movement and a person’s right to choose where they live
- the right to privacy
- protection against the removal of a person’s property without lawful reason
- the right to liberty and security, including freedom from detention without lawful reason
- the right to have a proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

4.64 The Charter applies to the actions of government departments and public authorities, but not to private individuals or groups. The Charter makes it unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right.

4.65 A public authority that acts in a way that is incompatible with a Charter right cannot be sued for that conduct alone. However, the breach of the Charter may be used as an additional ground in a non-Charter cause of action relating to the other unlawful conduct of the authority. In other words, a breach of the Charter does not give rise to a freestanding cause of action, but may be used as part of an existing cause of action. There is no entitlement to damages for breach of the Charter.
While the actions of the Public Advocate are directly subject to the Charter, including when the Public Advocate is acting as guardian of last resort for a represented person, the actions of a private guardian are not. Similarly, the Charter does not apply to private administrators, but probably does apply to State Trustees.

The Charter binds VCAT in relation to the general administration of the Guardianship List and otherwise binds VCAT to the extent that it has certain functions under the Charter. The Charter right to a fair hearing applies to VCAT when making decisions under the G&A Act.

The Charter expanded the rights of the Victorian Ombudsman to include ‘the power to enquire into or investigate whether any administrative action is incompatible with the Charter’.

The Charter acknowledges that human rights, in general, are not absolute, but may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.

When determining whether any limitations on rights are reasonable, the relevant factors to consider include:

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- whether there is a less restrictive way that is reasonably available to achieve the purpose of the limitation
- any other relevant factors.

The Charter rights have served as a helpful guide for the Commission when designing new guardianship laws. Along with the Convention, the Charter has informed the development of principles to underpin new guardianship laws.

Recent High Court consideration of the Charter

The Charter was recently considered by the High Court in *Momcilovic v The Queen*. A majority of the High Court effectively upheld Victoria’s dialogue model of human rights. Six of the seven High Court justices held that section 32 was constitutionally valid, and four of the seven held, for different reasons, that although a declaration of inconsistent interpretation is a non-judicial function, it too is constitutionally valid.

---

109 Ibid [851].
110 Ombudsman Act 1973 (Vic) s 13(1A).
111 Charter of Human Rights and Responsibilities Act 2006 (Vic) s 7(2).
112 Ibid s 7(2).
113 Momcilovic v The Queen [2011] HCA 34 (8 September 2011).
114 Ibid [95] (French CJ), [171] (Gummow J), [280] (Hayne J), [537] (Crennan and Kiefel JJ), [684] (Bell J); Charter of Human Rights and Responsibilities Act 2004 (Vic) s 36(2).
115 Momcilovic v The Queen [2011] HCA 34 (8 September 2011) [92]–[97] (French CJ), [661] (Bell J), [600]–[603] (Crennan and Kiefel JJ). Justices Gummow, Hayne and Heydon held that section 36 conferred a non-judicial power on a state court that was incompatible with its exercise of federal judicial power, and therefore offended the Kable principle and was invalid: [140] (Gummow J), [280] (Hayne J), [457] (Heydon J).
Chapter 4

A changing environment

Government review of the operation of the Charter

4.73 The Attorney-General announced a review of the Charter in April 2011.116 The Parliamentary Scrutiny of Acts and Regulations Committee was directed to consider options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.117

4.74 The Review of the Victorian Charter of Human Rights and Responsibilities Act 2006 final report was tabled in Parliament on 14 September 2011.118 The Victorian Government has six months to prepare a response to the Charter review.

RISK MANAGEMENT

THE ROLE OF INFORMAL ARRANGEMENTS

4.75 As noted in Chapter 2, the Cocks Committee was concerned about the ‘possibility that [guardianship] legislation … can be used to restrict as well as to protect an individual’.119 The Committee therefore sought to ensure that guardianship would be a last resort, for use only after other less restrictive options had been considered. This view was subsequently reflected in the G&A Act.

4.76 The G&A Act provides that VCAT must consider arrangements less restrictive of a person’s freedom of decision and action before appointing a guardian or an administrator.120 In practice, VCAT is unlikely to find there is a need to appoint a guardian or administrator if informal arrangements, such as family members making decisions on behalf of a person with a disability, appear to be operating successfully.121 The Commission supports the continued use of informal arrangements where they are operating fairly and effectively.

4.77 The Cocks Committee envisaged that guardianship and administration orders would be needed relatively rarely.122 A growing concern with risk management throughout society generally has subsequently eroded those early intentions. It is now much more common for third parties, such as financial institutions, medical professionals and disability service providers, to seek authorisation from formally appointed decision makers, rather than to rely upon informal arrangements, when providing services to a person who lacks capacity.

4.78 The Cocks Committee suggested that there would be no need for ‘parents of an intellectually handicapped person’ to apply for guardianship as a matter of course once their child approaches 18 years of age.123 The Committee observed that seeking consent from a parent in relation to personal matters was standard practice and while this consent is ‘informal’, it is considered functionally adequate.124 The Committee believed that this authority would not be challenged and therefore an application for guardianship in the great majority of these cases would serve no real purpose.125

---

116 Victoria, Gazette: Special, No S 128, 19 April 2011. The review is in accordance with s 44(1), which calls for the Attorney-General to cause a review to be made of the first four years of operation of the Charter and to lay a copy before each House of Parliament on or before 1 October 2011: Charter of Human Rights and Responsibilities Act 2006 (Vic) s 44(1).

117 Victoria, Gazette: Special, No S 128, 19 April 2011.


119 Report of the Minister’s Committee, above n 1, 25.

120 Guardianship and Administration Act 1986 (Vic) ss 42(1a), 22(2)(a), 46(2)(a).

121 Springvale Legal Service, Thomson Reuters, Lawyer’s Practice Manual Victoria, vol 1 (at Update 133) [8.2.201] [8.8.201].

122 The Cocks Committee anticipated that, in most situations, informal arrangements would be sufficient to respond to the needs of people whose decision-making abilities were impaired: Report of the Minister’s Committee, above n 1, 19.

123 Ibid.

124 Ibid.

125 Ibid.
Informal arrangements have sometimes provided a person with limited decision-making ability an opportunity to participate in decisions that affect their lives. There is now strong anecdotal evidence, however, that an increasing emphasis upon risk management throughout our community is making it much more difficult for people to rely upon informal arrangements when a decision needs to be made, or an authorisation given, on behalf of a person who is unable to do so themselves.

Community responses suggest that service providers often play a ‘de facto’ substitute decision-making role. This can create tension between family members of the person in question and service providers. Some community responses also noted an increased concern with risk management in the service and banking systems. There also appears to be a growing unwillingness by services to rely on informal arrangements that are not legally binding.

Some carers expressed frustration about their dealings with utilities providers in attempts to negotiate bills, or connect or transfer services without formal legal authority to do so.

Carers Victoria argued that there is an increasing need for the formalisation of previously informal supported and substitute decision-making arrangements involving parents/carers and their adult child with a disability. They maintain that this is due to changes in Victoria since 1986, particularly the introduction of privacy laws and the increasing focus on risk minimisation by service providers, corporate organisations and government agencies that challenge informal arrangements.

**INCREASING USE OF PERSONAL APPOINTMENTS**

In recent years, there has also been increased emphasis upon creating new legal mechanisms that permit people with capacity to appoint another person to make decisions for them when they are no longer able to do so. These appointments remove the need for a court or tribunal to appoint a substitute decision maker for a person who has lost capacity.

In Victoria, it is now possible for an adult with capacity to appoint another person to make decisions for them about financial, medical and a range of personal matters once they lack the capacity to make these decisions. Most of this body of law has developed quite separately from other guardianship laws. While these appointments should be encouraged, there is now a great need for the laws concerning personal appointments of substitute decision makers to be more closely aligned with laws dealing with tribunal and automatic appointments.

The Commission’s recommendations for better integration of the personal appointment and tribunal appointment schemes are discussed in Chapter 10. Many, but not all, of these personal appointments were considered by the Victorian Parliament’s Law Reform Committee in the report of its Inquiry into Powers of Attorney published in August 2010. The Committee’s views have influenced the Commission’s recommendations about new guardianship laws.

127 See, e.g., roundtable with carers in Hastings (in partnership with Carers Victoria) (29 March 2011); Submission IP 3 (Stephanie Mortimer).
128 See, e.g., consultations with Australian Bankers’ Association (16 March 2010), Julian Gardner (26 March 2010) and Royal District Nursing Service (9 March 2011); Submission CP 27 (Catholic Archdiocese of Melbourne).
130 Roundtables with metropolitan carers (in partnership with Carers Victoria) (24 March 2011) and carers, service providers and advocates in Bendigo (in partnership with Regional Information & Advocacy Council) (30 March 2011).
131 Submission CP 59 (Carers Victoria).
132 *Instruments Act 1958* (Vic) pt XI A.
133 *Medical Treatment Act* (Vic) s 5A.
134 *Guardianship and Administration Act* (Vic) pt 4 div 5A.
ABUSE OF VULNERABLE VICTORIANS
4.86 The Commission is also aware of increasing community concerns about abuse of vulnerable people and the misuse of substitute decision-making powers. State Trustees has commissioned research about financial abuse of elderly people.\textsuperscript{136} We discuss the issue of abuse further in Chapter 10, where we consider personal appointments, and in Chapter 18, where we consider accountability mechanisms for substitute decision makers.

THE FOCUS OF NEW GUARDIANSHIP LAWS
4.87 The many changes to the demographic, policy, service and legal environment must be considered when designing new guardianship laws that will serve the current and future needs of the Victorian community.
4.88 The Commission believes that new guardianship laws should:

- be more flexible to better reflect the reality that people’s experiences of decision-making impairment differs
- offer a greater range of mechanisms to assist people with decision-making difficulties
- be integrated so that they become one coherent body of legal rules
- involve people with impaired decision-making ability in decisions that affect them to the greatest extent possible
- more clearly articulate roles and responsibilities of those providing decision-making assistance under legislation
- provide better safeguards against abuse of vulnerable members of our community.

4.89 In the following chapter the Commission identifies policies we believe should guide new guardianship legislation and provides an overview of the recommended structure of a new Guardianship Act.

\textsuperscript{136} For more about the Protecting Elders Assets Study prepared by Peteris Darzins et al, Faculty of Medicine, Nursing and Health Sciences, Monash University (2009–2011) for State Trustees see: <http://www.statetrustees.com.au/financial-elder-abuse/financial-elder-abuse-research-project>. 