Submission by Scope to the Victorian Law Reform Commission regarding the Review of Victoria’s Guardianship and Administration Laws.

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CONTENTS

Executive Summary.................................................................3
Introduction..................................................................................4
The Legislation's Accessibility.....................................................7
Education and Training...............................................................7
Defining a 'Decision making impairment'.....................................9
The Notion of 'Best Interests'.......................................................12
Supported Decision Making.........................................................14
The role of VCAT.................................................................18
The role of the Public Advocate..................................................19
Recommendations.................................................................21
References..................................................................................23
EXECUTIVE SUMMARY

Scope welcomes the Victorian government’s decision to request that the Victorian Law Reform Commission (VLRC) review the state’s guardianship legislation. Scope share the view of many Victorians who believe the current Victorian Guardianship and Administration Act, (The Parliament of Victoria 1986) although progressive and relevant at the time of its writing is now dated and largely not relevant to our modern day context. It is clear that the environment in which this legislation was written was far more paternalistic and restrictive for people with disabilities than it is today. There is now a clear acknowledgment of the human rights of people with disabilities, particularly in relation to their right to self-determination. Scope believes that these societal and legislative changes are a driving force behind the need for legislative reform in this area.

This review is taking place within a climate of reform around guardianship nationally and internationally. It is important that any reform around guardianship in Victoria take into consideration what has already been learnt both within Australia and overseas (Blankman 1997; Gordon 2000; Parliament of the United Kingdom 2005).

This submission, guided by the questions provided by the VLRC, focuses on areas of the legislation, which are of relevance to Scope and its service users. The areas Scope have provided commentary on are as follows:

- The legislation’s accessibility
- The need for education and training
- The definition of ‘decision making impairment’
- The notion of ‘best interests’
- Supported Decision Making
- The Power of VCAT
- The Power of the Public Advocate
This submission discusses each of these key areas and concludes with a list of recommendations. These recommendations are summarised below.

1. A rewriting of the Act using an Easy English format.
2. A commitment to further education and training.
3. A reconsideration of the requirement to have a 'disability' before a guardian can be appointed.
4. A redefinition of 'decision making impairment' to include the support of those we know and trust as a vital ingredient in what makes someone a competent decision maker.
5. The development of a practice framework/s for supporting collaboration by circles of support (including VCAT appointed guardians) in determining 'best interest'.
6. Removal of the overly paternalistic term 'best interest' from the legislation, replacing it with something similar to 'personal and social wellbeing' as proposed by the Office of the Public Advocate.
7. Additional resources to allow the further development of training and support materials around supported decision making for those who have the role of assisting vulnerable decision makers lead lives of their preference, whether they be legally appointed guardians or not.
8. An enhancement in VCAT's capacity to provide education in the area of supported decision making.
9. Consideration is given to the establishment of a Guardianship diversion program in Victoria.
10. The inclusion in the legislation the requirement for the review of Guardianship orders.

INTRODUCTION

Scope is one of the largest providers of services to people with a disability in Victoria. Scope’s mission is to support people with a disability to achieve their potential in welcoming and inclusive communities.
Scope welcomes the Victorian government’s timely decision to request that the Victorian Law Reform Commission (VLRC) review the state’s guardianship legislation. Scope recognises the opportunities this review presents for all Victorians. However, Scope’s submission clearly focuses on the relevance of this reform to the people they provide services to, particularly those with intellectual disabilities. Scope recognises the opportunities the review holds for people to live lives they prefer. Additionally, it recognises the challenges those reviewing the legislation are faced with in ensuring that society protects its citizens.

Despite its support of legislative reform, Scope recognise the vital role the current Victorian Guardianship legislation and those who implement it currently play in providing ‘protection’ for people who may otherwise be vulnerable to arbitrary decision making which may or may not be in their ‘best interest’. Scope acknowledges that Guardianship legislation and practice in Victoria has the clear intention of ensuring minimal restriction to the rights of people with intellectual disabilities. For the most part in Victoria guardianship laws and practice ensure decisions are made and services are provided in a way that promotes the ‘best interest’ of Victorians.

The reform of guardianship law and practice is currently an active topic of interest not only in Australia but across the globe. It is Scope’s view that the Victorian Law Reform Commission should consult widely in relation to this important legislation, not only seeking input from Victorian stakeholders, but factoring in what has been learnt through law reform nationally (Queensland Law Reform Commission 1996) and internationally, particularly in relation to the significant reconstructions of adult guardianship legislation that has taken place in Canada (Gordon 2000), the United Kingdom (Parliament of the United Kingdom 2005) and Scandinavia (Blankman 1997).

Victoria’s current Guardianship and Administration Act (G&A Act) (The Parliament of Victoria 1986) was enacted 24 years ago. At this time it was regarded as a progressive piece of legislation promoting the rights and interests of people whose decision-making capacity was considered impaired. It is not surprising that 24 years later, this piece of legislation appears dated within our modern day Australian context. Today’s social, philosophical and
legislative environment is very different from that which existed at the conception of the G&A Act in 1986. The environment in which this legislation was written was far more paternalistic and restrictive for people with disabilities than it is today. Although Scope acknowledges that we still have a long way to go, today, there is an increasing acknowledgment that the human rights of people with disabilities, particularly those with intellectual disabilities, do indeed matter and should be protected. This acknowledgment is clearly present in the United Nations adoption and Australia's ratification of the Convention on the Rights of Persons with Disabilities. Additionally, Victoria's introduction of the Victorian Charter of Human Rights and Responsibilities clearly articulates the rights of all people, including those with disabilities, to lead self-determined lives.

Scope is supportive of law reform which takes into consideration the many social, philosophical and legislative changes that have taken place in our society, particularly those changes relating to people with disabilities. Scope encourages the VLRC to ensure that any legislative changes to Victoria's Guardianship laws are relevant and consistent with our modern day philosophy and legislation around the human rights of all people particularly those with decision making disability.

Current Victorian Guardianship laws contain processes for appointing one person (or more) to make decisions for another. These appointments may include guardian, administrator, enduring guardian, attorney, agent, or person responsible. For the purposes of this submission the term ‘guardian’ will be used to represent each of these substitute decision makers.

Scope has used the questions provided by VLRC to guide this submission and it is therefore structured accordingly. Although each of the questions put forward by the VLRC have been considered by Scope, this submission only provides commentary on the areas Scope believe it is qualified to comment on based on the collective experience of the organisation as a whole as well as those they provide services to. Hence this document predominately has a focus on issues around guardianship as opposed to administration.
THE LEGISLATION'S ACCESSIBILITY

Guardianship law is complex. This complexity is evident in the written language used in Victoria’s current Guardianship and Administration Act (The Parliament of Victoria 1986) and associated documentation. Scope commends organisations such as the Office of the Public Advocate and Villamanta Legal Services for the resources they have developed designed to assist the community to understand the complexities of the system. The publication, Good Guardianship: a guide for guardians appointed under the guardianship and administration act (Office of the Public Advocate 2008) and Guardianship: An information sheet (Villamanta Disability Rights Legal Service Inc. 2008) are excellent examples of these efforts.

Despite the efforts of organisation such as OPA and Villamanta Legal Services, in Scope’s experience, the system remains difficult to understand and navigate for many Victorians. Scope recommends that review of this legislation seriously consider a rewriting of the Act using an Easy English format.

EDUCATION AND TRAINING

Scope is of the view that further public and professional education and training is required in relation to the nature and availability of Guardianship legislation. Scope sees the need for more training and education for both the general public around the Act’s processes, as well as for professionals who have a role in guardianship law. Although the Office of the Public Advocate provide some excellent information sessions for all audiences, Scope believe that more resources should be provided not only for the delivery of education and training but also in marketing these activities.

Scope’s position on training and education for professionals who have a role in the implementation of guardianship law stems from feedback provided by some of the professionals the organisation employs. Many of Scope’s staff report feeling ill-equipped in their ability to support service users and families in the navigation of the current system. In
a forum conducted by Scope in 2005 around risks, rights and responsibilities, several staff described their feelings in this area as 'out of control'. This feeling is backed up by the literature. A recent Victorian based survey of neuropsychologists, many of whom are involved in capacity assessments on a regular basis (Mullaly, Kinsella et al. 2007), revealed they felt poorly prepared by their training to complete capacity assessments. In this study more than half of the respondents rated assessing decision-making capacity as 'time-consuming, stressful, and difficult'. The Australian Psychological Society’s Guardianship Tribunals Guidelines Working Party notes that training for assessment of decision-making capacity is occurring in postgraduate psychology courses; however, many practising psychologists have limited knowledge of the relevant legislation and the requirements of courts when making their determinations (Mullaly et al., 2007).

Scope sees a need not only for increased education and training for those working in the field, but also for people with disabilities themselves, their supporters and the general public. Scope is of the view that there are deep rooted assumptions and prejudices that exist around the ability of people with intellectual disabilities to control their own lives. It is clear that if there is to be a paradigm shift in the perception of how people with intellectual disabilities can lead lives they prefer considerable resources need to education and training. A parent of a Scope service user at a recent forum around the review of the G&A Act stated.

'There is a lack of knowledge on the community's part'

Scope recommends that any reform of current Guardianship legislation in Victoria be accompanied by a commitment to further education and training not only for professionals but also for people with intellectual disabilities and those who support them.
DEFINING A 'DECISION MAKING IMPAIRMENT'

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'?

The Victorian G&A Act states that VCAT can make an order for guardianship only if a 3 tier test is satisfied. This test is sometimes referred to in the field as the 'disability, capacity and need' test. This means, in order to qualify for a legally appointed guardian in Victoria a person must have a disability, not have the capacity to make 'reasonable judgments' because of their disability and finally, they must 'need a guardian'.

Scope has particular concerns about the need to have a 'disability' before guardianship can be granted and welcomes a review of this criterion. The G&A Act defines 'disability' broadly. According to the Act, a disability may mean 'intellectual impairment, mental disorder, brain injury, physical disability or dementia' (The Parliament of Victoria 1986). Scope is of the view that having a disability is not, in itself, an indication of the need for support to make decisions. Scope recommends that the requirement for guardianship be based on a person being 'decision making difficult', deeming whether or not they have a disability irrelevant. The challenge arises then around how a person is deemed to have 'decision making difficulty', something that is currently unclear in the legislation. This question is discussed below.

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

This question has been pondered for centuries (Ruiping 2002). As a service provider to many Victorians with disabilities and their families, Scope is well aware of the challenges those supporting people with disabilities face in determining how much support someone needs to make a decision. Scope has spent a great deal of time in recent years exploring the concept of decision making capacity with those it supports, with a particular emphasis on those with intellectual disabilities. Scope appreciates that the 'decision making capacity' is difficult to define and therefore is surrounded by controversy both in the literature and in practice. Scope has taken the position that in our contemporary world a person's ability to
make a decision should not only be related to their level of individual cognitive capacity but perhaps more so, to the degree of support available to help them make this decision.

A quote by Values in Action, an organisation in the United Kingdom eloquently expresses Scope’s view, particularly in relation to people with the most profound intellectual disabilities.

‘The starting point is not a test of capacity, but the presumption that every human being is communicating all the time and that this communication will include preferences. Preferences can be built up into expressions of choice and these into formal decisions. From this perspective, where someone lands on a continuum of capacity is not half as important as the amount and type of support they get to build preferences into choices’ (Beamer and Brookes 2001).

This view is encapsulated within the concept of ‘Supported Decision Making’ an approach which is attracting increasing attention both in the literature and in practice. Supported decision making makes the assumption that everyone can guide their own decisions with support and therefore challenges the relevance of individual decision making capacity. A discussion paper written by Scope in 2009 states:

‘A ‘Supported Decision Making’ approach makes the assumption that everyone can guide their own decisions with support. The question that is asked when using a supported decision making framework is not one around individual competence, but one around how much support someone needs to build their preferences, into choices and from there into decisions.’ (Watson and Garde 2009).

Supported Decision Making and its relevance to Guardianship laws will be discussed in more detail later in this submission. However, at this point, it is timely to highlight one key premise of supported decision making:

‘Everyone uses their support networks in making decisions that are difficult for them. Some people, particularly those with Intellectual disabilities may simply need more support than others to make decisions that reflect their preferences.’ (Watson and Garde 2009).

Scope believes that any discussion of decision making capacity should include the importance of human interdependence, particularly in relation to their decision making.
Scope is of the view that current Guardianship legislation generally fails to reflect this important premise, only deeming someone competent to make a decision if they can do so independent of support. Scope is concerned that this approach to competency is not reflective of how most people make important decisions. Scope recognize, as does much of the literature, the importance of collaboration within any human decision making process (Gordon and Verdun-Jones 1992; Byrnes 2002). Gordon (Gordon 2000) argues that,

‘in dependent decision-making is a myth; that every adult uses interdependent decision-making in the course of getting through the day’.

Gordon goes on to point out that most so called ‘competent decision makers’ use the support of accountants, lawyers, friends, family and health care professionals to assist them in their decision making. Importantly, unlike those considered ‘vulnerable decision makers’ this interdependence is not seen as an indicative of decision making incapacity.

In current practice, various types of specialist psychology reports (usually neuropsychology) that are submitted to VCAT form a central part of the evidence that the Tribunal considers when deciding whether the person is a competent decision maker. Such reports are written to assess and report on a person’s capacity at a particular time, predominately taking into consideration cognitive factors such as problem solving, memory function and language, independent of support (Shiraishi 2007; The Australian Psychological Society 2009). Scope recognises that such reports are a valuable part of the evidence VCAT should consider. However Scope is of the view that the current system places too much weight on such documentation, downplaying the interdependent aspects of the human decision making process, particularly for people who have Profound Intellectual Disabilities.

Scope would like to see a reconsideration of the terms in which someone is deemed to have ‘decision making impairment’. Scope would like the legislation to acknowledge the collaborative nature of any human decision making process in its definition of decision making impairment. Scope suggests decision making capacity be redefined to include the support of those we know and trust as a vital ingredient in what makes someone a competent decision maker.
THE NOTION OF ‘BEST INTERESTS’

Is ‘best interests’ a useful or appropriate guide for substitute decision-makers? Are there better approaches?

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

To what extent should a guardian or administrator be required to try to identify the represented person’s wishes and follow them wherever possible?

Scope is of the view that the notion of ‘best interests’ remains a useful and appropriate guide for appointed guardians. However, Scope sees a number of issues in the operationalisation of this concept, and suggests that the VLRC take these into consideration when reviewing the legislation. Scope suggests consideration be given to the renaming of this concept, as they believe the term ‘best interests’, but not the concept has overly paternalistic connotations.

There are often different perspectives on what is deemed to be in the ‘best interest’ of someone. Scope is acutely aware of the challenges faced by ‘circles of support’ in coming to a consensus around what is in the ‘best interest’ of the person they care for/about. Scope would like to see the legislation and associated documentation include resources and training that guide supporters in how to collaboratively come to a consensus around the concept of ‘best interest’ for the person they support.

There is a growing acknowledgment both in the literature and amongst service users and providers of an increase in risk-aversion within disability services (Green 2004; Green 2007; Chesterman 2010). Chesterman (2010) suggests, and he is not alone in this view, that this risk aversion:

‘has ramifications for people who are subject to guardianship applications and guardianship orders, whose choices can be overridden by overly cautious concerns about risk’.
In a forum conducted by Scope in 2005 around risks, rights and responsibilities, Scope service users described what they perceived to be an imbalance between their need to take risks and service provider’s perception of their duty of care. Service users stated:

“I went and did travel training, yet still I had to see the psychologist to prove I was competent to travel on my own. The staff were not sure if I understood about the risks, yet they happily take those same risks every day”

“Nagged constantly about lifestyle issues such as smoking, diet, weight management, usually by smoking, overweight staff”

“Not involved in discussion about manual handling, transport and general health and well-being issues, like being told I am using MY wheelchair in an “unsafe” manner”.

Scope recognizes the importance of acknowledging the potential risks of a decision both for the decision maker and others affected by the decision. However, equally important, is consideration of whether there may be any risk of lost opportunities for personal development if the person does not engage in an activity that maybe perceived as risky (Pepin, Watson et al. 2010). Scope would like to see further acknowledgment by VCAT of the value of risk when considering the making of guardianship orders.

Scope would like to see the development of a practice framework/s for supporting collaboration by circles of support (including VCAT appointed guardians) in determining ‘best interest’ similar to that which has been developed as part of the United Kingdom’s Mental Capacity Act (Parliament of the United Kingdom 2005). The Mental Capacity Act is accompanied by a range of resources including a ‘best interest checklist’ (Department of Health 2005) which identifies the factors that must be taken into account when determining what is in someone’s best interests. Other guidance materials which have been developed as part of the implementation of this Act include, a Code of Conduct (Department of Health 2005) and Core set of training materials (Department of Health 2007). A resource that has been used in Scope services successful is the use of ‘The Person Centered Risk Assessment’ (Kinsella 2000). Here in Victoria a range of resources, supports and training are currently being developed to assist those supporting people with Intellectual disabilities in their
decision making (Watson and Joseph In Press). Scope recommends that any review of the Victorian legislation consider the further development, coordination and use of tools and resources such as those developed here and overseas.

Additionally, Scope is supportive of the Office of the Public Advocate’s recommendation around removing the term ‘best interest’ from the legislation. Like OPA they believe that this terminology is overly paternalistic. Scope would like to see consideration be given to a replacement of this term to something similar to ‘personal and social wellbeing’ as proposed by OPA in their submission.

SUPPORTED DECISION MAKING

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

The principles of supported decision making are gradually appearing in adult guardianship legislation across the globe, with Canada largely taking the lead (Gordon 2000) and Western Europe following close behind (Blankman 1997). Focus on Supported Decision-Making in more recent times has largely been driven by the United Nations Convention on the Rights of Persons with Disabilities (2006), which is strongly supportive of this approach as a viable alternative to court-ordered guardianship. Scope too is supportive of this approach and this is clearly evidenced by its focus on Supported Decision Making principles over the past decade. Of particular relevance to this submission is Scope’s development of a Supported Decision Making Framework (Watson 2010). This framework has been developed with the needs of people with Profound Intellectual Disabilities and those who support them in mind.

The terminology surrounding the principles of Supported Decision-Making varies with the concept being referred to in some arenas as Assisted Decision-making and in others as Interdependent (as opposed to independent) Decision-making. Just as the terminology varies, so too does the form in which Supported Decision-making is operationalised. Barbara Carter, in her recent paper ‘Supported Decision-making: Background and discussion paper’ clearly outlines the various forms Supported Decision-making appears to be taking (Carter
2009). These forms although varied in the level of formality they impose, share what Scope see as the fundamental principles of supported decision making, which are:

- Everyone can make decisions with support;
- Everyone responds to things they experience. These responses are often interpreted as preferences by people who know someone well. These preferences can be used as the building blocks of decisions;
- There is significant value in human beings supporting one another to make decisions;
- Everyone uses their support networks in making decisions that are difficult for them.

Carter affirms the United Nations Convention commitment to recognise ‘supported decision-making as the first resort: the preferred alternative and, where necessary, precursor to guardianship’. It is clear that the Convention advocates for a shift of thinking from substitute decision-making to supported decision-making. Scope would like to see this premise incorporated into current Victorian guardianship legislation.

Although globally, supported decision-making has yet to be specifically examined by the courts, the emergence of a statutory recognition of this alternative to a court-appointed guardian or substitute decision-maker is beginning to have an impact on the judiciary in Canada. In the Ontario case of Re Koch Quinn J. the judge made it clear that if an adult was able to make decisions with the help of others then mental capacity existed (Gordon 2000). The Judge endorsed a number of key concepts which Scope believes are at the heart of a supported decision making approach. Justice Quinn in his finding made his view clear, that, mental capacity exists if the person is able to carry out a decision with the help of others.

Acknowledging the importance of assistance in making decisions as highlighted by Justice Quinn, a tenet of the supported decision making approach is the presence of a circle of support including the ‘core member’ (the person needing support). A Circle of Support’s role is to collectively represent the person’s wishes and best interests, identify and weigh up the available range of choices, implement decisions and review the impact of decisions, both positive and negative, on the person and others.
A circle of support obviously varies in its level of formality. Many Scope service users benefit greatly from the informal nature of support provided by people who care for and about them. Others however, appear to benefit from a more formally developed and maintained circle of support. Regardless of the level of formality adopted in Guardianship legislation, Scope emphasizes the need to recognize their importance as vital aspects in the self determination of people with intellectual disabilities. Although current legislation doesn’t exclude the appointment of more than one guardian Scope would like to see a greater emphasis on circles of support as a way of achieving more collaborative and representative decision making. An advantage of this approach is that it shifts the decision making responsibility from a single individual, to a group of people representing the wishes of the person with the disability. Because a circle of support comprises a team of people important to the person with a disability, this model allows for broad representation from family, friends, advocates, and support workers.

Despite the value of such networks, Scope is acutely aware that many of those they provide services to do not have an existing unpaid network of people in their life who are willing and able to support them through a decision making process. This is a sad reality for many people, particularly those who have been institutionalized from a young age and as a consequence have limited, if any, community supports. Scope would like to see additional attention and resource given to the establishment, training and nurturing of circles of support. Scope emphasize the importance of additional resources for such an activity, as existing community based organizations do not currently have the capacity to expand their workload. Scope suggest that any additional resource seek to establish, strengthen and extend the natural supports that might be present in a vulnerable decision maker’s life, rather than substituting them by professional services. Specifically, Scope would like consideration, within the context of this review, to be given to schemes such as volunteer social advocacy (sometimes referred to as “citizen advocacy”). Within such a model, a support network is intentionally established to act as a support, providing information, advice, and a voice for the person’s decisions. Such a ‘purpose built’ network is clearly not ideal. However, without such a support network, Supported Decision Making for many would merely be a pipe dream.
Although Scope is optimistic about the future of Supported Decision Making as an approach, it recognizes that it is an emerging paradigm which is yet to be clearly defined either in the literature or practice. Aware of the lack of evidence in this evolving area Scope is committed to strengthening the evidence base of a supported decision making approach through their research (Watson and Joseph In Press).

At this early stage in its conception, Scope caution against the over formalization of ‘supported decision making’ through legislation. Scope is concerned that the official recognition of supported decision making in the form of a statutorily prescribed option, may undermine, or even destroy, what may be best preserved as an informal arrangement involving caring and trusting relationships. Scope believes that legal formalism is no compensation for the absence of a network of people who know, love and care for someone. Scope believes that in any formalized scheme of supported decision-making great care must be taken not to disrupt existing and effective networks of support that surround the affected person. Supported decision-making is more than a formal legal status granted by a court; it is a process that occurs over time and that will invariably require more than a short-term commitment to address a particular need. In the case of those Scope support supported decision making is likely to only be effective if there is a long-term commitment on the part of the people providing support. In the case of many young adults with disabilities this could mean a lifetime commitment on the part of a member of the person’s support network.

Despite Scope’s reluctance to support an ‘over formalization’ of Support Decision Making within the legislation, it believes that its principles should indeed be embodied within the legislation. Specifically, Scope would like to see the following principles and assumptions embedded within the legislation and associated documentation. Additionally they believe that these principles should be clearly communicated to appointed guardians:

i. Everyone can make decisions with support;
ii. Everyone responds to things they experience. These responses are often interpreted as preferences by people who know someone well. These preferences can be used as the building blocks of decisions;

iii. Everyone uses their support networks in making decisions that are difficult for them.

Scope sees a clear need for additional resources to allow the further development of training and support materials around supported decision making for those who have the role of assisting vulnerable decision makers lead lives of their preference, whether they be legally appointed guardians or not. Without such a commitment Scope do not believe that a true culture shift, as the one alluded to in the UN Convention is possible.

Scope share the concerns of John Chesterman which he highlights in his recent paper (Chesterman 2010). Chesterman writes:

Advocates of supported decision-making realise that significant resources are needed to enable it to work properly, but one of its chief attractions to government is likely to be that it promises to reduce government spending on unnecessary state intervention. The danger then is that a push for an individual rights-enhanced life for people with disabilities will dovetail in with a fiscally conservative governmental approach. This runs the risk ultimately of meeting neither the wishes of advocates of supported decision-making, nor the protective responsibility of the state to care for its most disadvantaged members.

THE ROLE VCAT

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

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?

'Guardianship can be used to both preserve and detract from client autonomy. Like many traditional common law actions (and like kryptonite, the word
In Scope's view, VCAT play an important role in preserving the self determination of people who are referred to them regardless of whether they appoint a guardian for them or not. The process itself provides an opportunity for people with intellectual disabilities and their potential guardians to be educated and supported in the implementation of supported decision making principles. Scope calls for an enhancement in VCAT's capacity to provide education in this area.

Although not the norm in practice, the legislation currently allows for the appointment of more than one guardian with the view to promote collaborative decision making. Collaborative decision making such as this is at the heart of a supported decision making approach. Scope believes that the appointment of more than one guardian by VCAT should be the norm, rather than the exception. As already discussed a Supported Decision Making approach reflects how most people make decisions, particularly those considered important.

'Guardianship orders are usually made for twelve months and administration orders for three years before they are reassessed by VCAT. There are no provisions for the review of the actual decisions that guardians or administrators make.' (Victorian Law Reform Commission 2010)

Scope believe that there should be a provision for the review of Guardianship orders, and would like this considered within the review of the current legislation.

THE ROLE OF THE PUBLIC ADVOCATE

Should there be any changes to the functions and powers of the Public Advocate?
Throughout this submission, Scope has highlighted their concerns around the self-determination of Victorians with the most Profound Intellectual Disability being given opportunities to live lives they prefer. For these people the capacity issue rarely gets formally raised and therefore the legal process of guardianship rarely gets invoked. Instead, those supporting the person generally ‘bumble through’, as suggested by Kapp (Kapp 2002) without any external assistance. Scope would like to see consideration be given to the dedication of additional resources and supports to assist those who fall into this category. Scope believes that those who support these people would benefit from support and training around the principals of supported decision making. Scope suggests that this role may be carried out by the Office of the Public Advocate, clearly with additional resources.

In addition, Scope suggest consideration be given to the establishment of a Guardianship diversion program in Victoria. Guardianship diversion programs are being used in some parts of North America with reported favourable outcomes (Hartman 1996; Kapp 2002). This program, in line with the current legislation’s notion of ‘least restrictive option’ would work to insure that all possible alternatives to guardianship are explored. While guardianship and administration are already referred to in current legislation as options of last resort Scope believe this has been far from the reality. A Guardianship Diversion Program would encourage supported decision making approaches as an alternative to guardianship. Scope is acutely aware that there is a significant number of Victorians who do not currently have an adequate natural support network, and it is for this reason the appointment of a public guardian through the Office of the Public Advocate is necessary. Scope envisages that a Guardianship diversion program would assist in the identification, establishment, nurturing and support of natural supports for these people. In addition, Scope sees this program providing regular training and education to these and already established support networks throughout the state. Scope suggests that this role may be carried out by the Office of the Public Advocate, clearly with additional resources.
RECOMMENDATIONS

1. Scope recommends a rewriting of the Act using an Easy English format.

2. Scope recommends that any reform of current Guardianship legislation in Victoria be accompanied by a commitment to further education and training not only for professionals but also for people with intellectual disabilities and those who support them.

3. Scope is of the view that having a disability is not, in itself, an indication of the need for support to make decisions. Scope recommends that the requirement for guardianship be based on a person having 'decision making difficulty', deeming whether or not they have a disability irrelevant.

4. Scope recommends a review of the way decision making capacity is determined. Scope has taken the position that in our contemporary world a person’s ability to make a decision should not only be related to their level of individual cognitive capacity but perhaps more so, to the degree of support available to help them make this decision.

5. Scope would like to see a reconsideration of the terms in which someone is deemed to have ‘decision making impairment’. Scope would like the legislation to acknowledge the collaborative nature of any human decision making process in its definition of decision making impairment. Scope suggests decision making capacity be redefined to include the support of those we know and trust as a vital ingredient in what makes someone a competent decision maker.

6. Scope would like to see the development of a practice framework/s for supporting collaboration by circles of support (including VCAT appointed guardians) in determining 'best interest' similar to that which has been developed as part of the United Kingdom’s Mental Capacity Act (Parliament of the United Kingdom 2005).
7. Scope is supportive of the Office of the Public Advocate’s recommendation around removing the term ‘best interest’ from the legislation. Like OPA they believe that this terminology is overly paternalistic. Scope would like to see consideration be given to a replacement of this term to something similar to ‘personal and social wellbeing’ as proposed by OPA in their submission.

8. Scope sees a clear need for additional resources to allow the further development of training and support materials around supported decision making for those who have the role of assisting vulnerable decision makers lead lives of their preference, whether they be legally appointed guardians or not. Without such a commitment Scope do not believe that a true culture shift, as the one alluded to in the UN Convention is possible.

9. The Guardianship process provides an opportunity for people with intellectual disabilities and their potential guardians to be educated and supported in the implementation of supported decision making principles. Scope call for an enhancement in VCAT’s capacity to provide education in this area.

10. Scope suggest consideration be given to the establishment of a Guardianship diversion program in Victoria. Guardianship diversion programs are being used in some parts of North America with reported favourable outcomes (Hartman 1996; Kapp 2002). This program, in line with the current legislation’s notion of ‘least restrictive option’ would work to insure that all possible alternatives to guardianship are explored. While guardianship and administration are already referred to in current legislation as options of last resort Scope believe this has been far from the reality. A Guardianship Diversion Program would encourage supported decision making approaches as an alternative to guardianship. Scope is acutely aware that there is a significant number of Victorians who do not currently have an adequate natural support network, and it is for this reason the appointment of a public guardian through the Office of the Public Advocate is necessary. Scope envisages that a Guardianship diversion program would assist in the identification,
establishment, nurturing and support of natural supports for these people. Scope suggests that this role may be carried out by the Office of the Public Advocate, clearly with additional resources.

11. Scope believe that there should be a provision for the review of Guardianship orders, and would like this considered within the review of the current legislation.

REFERENCES


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