Review of Guardianship Laws
Response to Victorian Law Reform Commission Consultation Paper
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Youthlaw
About the Federation of Community Legal Centres (Victoria) Inc

The Federation is the peak body for fifty one community legal centres across Victoria. A full list of our members is available at http://www.communitylaw.org.au.

The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:
- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.
Part 2: The Direction of New Laws

Chapter 4

Question 1: Do you have any general comments about the matters identified by the Commission as influencing the need for change? Are there any other important matters that should affect the content of future guardianship laws?

The Federation welcomes the Review and commends the Commission on the Consultation Paper, which in our view provides a very helpful, thorough and clear analysis of the complexities of the current legislation and associated issues.

The work of community legal centres (CLCs) commonly entails assisting people who are disadvantaged, vulnerable or marginalised. Our clients are predominantly low-income, and include many young, elderly, Aboriginal and culturally and linguistically diverse (CALD) Victorians. The Commonwealth Government's Review of the Commonwealth Community Legal Services Program noted that collated data demonstrated that 58% of community legal sector clients received some form of income support, 82% of clients earned less than $26,000 per annum, and almost 9% of clients had some form of disability.1

Our member centres regularly assist clients with powers of attorney and in relation to guardianship and administration matters, including people who are homeless, have cognitive disabilities or are labelled as mentally ill. While it is not possible under the present Community Legal Services Information System to obtain specific data for legal assistance provided by CLCs concerning powers of attorney and guardianship/administration, these matters are recorded under the category of 'wills/probate'. For the 2009-2010 financial year, Victorian CLCs provided 3121 instances of information and 2486 advices concerning wills/probate. 1587 new cases were also opened. A significant proportion of this assistance is estimated to concern powers of attorney, guardianship or administration.

CLCs aim to provide a bridge to the justice system so that it is accessible, welcoming and fair for allVictorians. Genuine access to justice also means that there are adequate, appropriate and accessible remedies available to address violation of rights, and that all members of the community have an understanding of the legal system, their rights within it, and their options for achieving justice.

We believe that the experiences of our clients are a litmus test for the efficacy of the guardianship system. Vulnerable Victorians are more likely to need a substitute decision maker at some point in their lives, or to be subject of an application for a guardianship or administration order.

As the Consultation Paper notes, many people, including even those with professional roles in the guardianship system, find the current legislative arrangements difficult to understand. This difficulty is exacerbated for our clients, whose disadvantage and social exclusion frequently means that they are not even aware of any of the processes that affect them. Even if they do understand that an application has been made or that a hearing is to be held, they may not understand the documentation or the processes involved.

This means in turn that many people do not exercise even those fairly limited choices available in the existing system to appoint their own decision makers, to contest applications and decisions made about decision making arrangements that concern them, or even to simply add their view as one among many in the determination of their ‘best interests’.

Our clients also often feel disempowered by their decision makers and the process of decision making. The Federation therefore welcomes the Commission’s proposed shift to a framework of supported decision making, substituted judgment and the presumption of capacity, resting on a foundation of the

1 Review of the Commonwealth Community Legal Services Program (March 2008)

However, an overhaul of the guardianship system can only empower vulnerable people if complexity is genuinely reduced, the person’s wishes are honoured as much as is possible, and the goal of access to justice in all aspects of the reformed system, including legal advice and representation, is realised.

This will require considerable resources, but we believe that the Charter and the Disabilities Convention require nothing less. Irrespective of which type of decision making approach the person has – privately, publicly or statutorily appointed; public or private decision maker; supported or substitute; whether or not supported by an instructional directive; and short- or long-term – transparency, safeguards and accountability of processes must be consistent with the principles of the proposed new legislation.

**Chapter 5**

*Question 2 Do you agree with the Commission’s draft statement of purpose for new guardianship laws?*
Yes.

*Question 3 Do you agree with the Commission’s draft general principles for new guardianship laws?*
Yes.

*Question 4 Are there principles you think should be added or removed from these general principles?*
The Federation believes that principles should be added along the lines of ‘All adults have the right to have their culture and religion recognised and respected’; and ‘All adults have the right to recognition and preservation of their family relationships’.

The principle concerning the right to communicate should be qualified to include the need for accessible information to be provided about, and at all points of, the guardianship system.

The Federation also submits that to avoid any doubt or ambiguity, the general principles should include, along similar lines to section 5 of the Charter of Human Rights and Responsibilities Act 2006 (Vic), a provision such as:

‘A human right or freedom not included in this section that arises or is recognised under the International Convention on the Rights of Persons with Disabilities must not be taken to be abrogated or limited only because the right or freedom is not included in this section or is only partly included.’

We believe that this addition to the legislation is particularly important if disability is to retain a status in VCAT’s assessment of whether a person needs a substitute decision maker (see our response to Q50).

**Chapter 6**

*Question 5 Do you agree with the Commission’s proposal that Victoria’s various substitute decision-making laws be consolidated into one single Act?*
Yes. For ease of understanding and to ensure consistency in terminology, the Federation believes that the substitute decision making laws currently found in the Guardianship and Administration Act 1986 (Vic) (G&A Act), the Medical Treatment Act 1988 (Vic) (Medical Treatment Act) and the Instruments Act 1958 (Vic) (Instruments Act) should be consolidated into one framework. These changes must be accompanied by extensive community and professional education appropriately tailored to the different target groups identified in the Consultation Paper (see our response to Qs 10, 11 & 12 below).
Question 6 Do you agree with the Commission’s proposal that the term ‘medical decision maker’ or ‘health decision maker’ should replace ‘person responsible’ in legislation? If so, which one do you prefer?
Yes, because these alternative terms are much clearer about the function of the decision maker. If the realm of the decision making is not to include non-conventional medicine such as chiropractic or acupuncture, then ‘medical’ would be more appropriate; otherwise ‘health’ is the preferred term.

Question 7 Do you agree with the Commission’s proposal that the term ‘guardian’ should be replaced with ‘adult guardian’?
‘Personal decision maker’ is probably clearer than ‘adult guardian’ to most people.

Question 8 Do you agree with the Commission’s proposal that the term ‘administrator’ should be replaced with ‘financial guardian’?
‘Financial decision maker’ is probably clearer than ‘financial guardian’ to most people.

Question 9 Should the terminology used for powers of attorney be better integrated with the terminology for guardianship and administration? What terms should be used?
Yes. General power of attorney could become ‘financial decision maker’; enduring power of attorney could become ‘enduring financial decision maker’; enduring guardian could become ‘enduring personal decision maker’. If there is a need to distinguish between a financial decision maker appointed by the person and one publicly appointed (by VCAT), the former could be qualified as ‘personally appointed financial decision maker’; however, context should be sufficient to distinguish them.

Question 10 Do you have any specific ideas about how to better target education about guardianship laws towards:
- People with disabilities
- Family, friends and carers of people with disabilities
- CALD groups
- Indigenous communities
- Older people
- Young people
- Health and community sector professionals
- Lawyers?

and

Question 11 Should the Public Advocate play a greater role in producing community education materials and educating the community about substitute decision-making? What other bodies could play a role?

and

Question 12 Would an education and awareness campaign assist the community to better understand and make use of guardianship laws?
Widespread and ongoing community and professional education will be essential to assist the community to understand the proposed framework. The Victorian Government should conduct a public education campaign to raise community awareness regarding the various instruments, powers and their effects. An important part of this campaign entails adequately funding existing networks already conducting effective community legal education, such as community legal centres and other local community organisations.

These bodies have a proven track record of targeting specific communities using locally appropriate strategies. In the community legal sector, this work includes such projects as Money Help (Consumer Action Law Centre), the Z-card project aimed at raising awareness of young people concerning debt (St Kilda Legal Service and Consumer Action Law Centre), Sisters’ Day Out run by Aboriginal Family Violence Prevention and Legal Service, the website ‘Bursting the Bubble’ constructed by Domestic
Violence Resource Centre, and the use of internet technology to provide legal advice to young people (Youthlaw).

In terms of professional education, the Law Institute of Victoria should be encouraged to provide low cost professional education regarding guardianship laws, in conjunction with private legal education providers such as the Leo Cussen Institute. The Victorian Government should devise a special education campaign targeted at banks, nursing homes, Centrelink and other organisations that deal regularly with older people and people with limited capacity, to ensure that their employees have a good working knowledge of guardianship laws.

In addition, increased specialised training is necessary for VCAT Guardianship List members. This should include thorough and updated information on the social, health and financial support services available to people throughout Victoria, enabling members to make the least restrictive order possible in the circumstances.

Question 13 What type of data do you think needs to be collected and made available and from what bodies?
A more accessible, rights-compliant and effective guardianship system must be supported by a reliable evidence base. As the Consultation Paper discusses, this is not available at present. At best, different and disparate aspects of the system produce some basic data, but there is not usually any way to link such information to answer broader social questions about the context of guardianship and the specific processes which underpin it for individuals.

For example, evidence-based practice should enable analysis of the impact of legal representation and the presence of interested parties on guardianship and administration hearing outcomes and reassessments. Better data is also needed on the gender and ethnicity of, and specific disabilities experienced by, people who have state-appointed administrators or guardians, compared to those who have personal appointments or to those who have neither.

This type of data is important for service planning and community support organisation funding decisions, as well as in order to increase transparency and accountability of guardianship and administration processes. Accordingly, as the major administrator in Victoria, State Trustees must publish at least basic demographic data about its clients.

The new system also needs to be able to collect at least basic data on all types of decision making arrangements, including personal appointments (via the Register – see our response to Q28).

Part 3: Supported Decision Making

Chapter 7
Question 14 Do you agree with the Commission's proposal to introduce new supported decision-making arrangements?
and
Question 15 Do you agree with any or all of the proposed roles of supporters and co-decision makers?
and
Question 16 What steps would need to be taken in order to ensure that these appointments operated fairly and efficiently?
The Federation welcomes the Commission's proposal to introduce the role of supporter, because these proposed arrangements are both potentially more consistent with the human rights of people with disabilities, and more in line with the current everyday informal practice of many people.

However, we have reservations about the utility and potential fairness of the co-decision maker role. Our clients are vulnerable to coercion and abuse under existing arrangements, and it is difficult to see
how a person in a co-decision making arrangement could be sufficiently protected without sacrificing the benefits of this model.

Targeted consultation will also be required at the implementation stage to ensure that new arrangements do not add to the existing complexity. In this respect, the co-decision making model, because legal validity of any decision rests on full and free agreement between the parties, seems likely to increase complexity without much associated benefit.

It will be especially important to substantially resource the new arrangements to make sure that the most appropriate agreement or order is made for the particular person’s circumstances, and that there are associated processes of scrutiny and accountability in order to reduce the risk of abuse or coercion. Members of Victorian communities, including persons potentially subject to an order or agreement, family members, third parties and advocates will also need considerable assistance to understand the differences between the various options.

Deciding between various options, assisting people to understand the differences, and implementing the arrangements could be very resource-intensive. It is also important that persons in those types of informal arrangements that currently work well are not subject to unnecessary regulatory burdens.

'Question 17 Do you agree that the Public Advocate should not be a ‘supporter’ or a co-decision maker?

and

Question 18 Do you think that the Public Advocate should play a role in training supporters and co-decision makers, and monitoring supported decision-making arrangements?

and

Question 19 Should the Public Advocate establish and coordinate a volunteer support program to assist people who do not have family or friends willing and able to take on these roles?

We agree that the Public Advocate should not be a ‘supporter’ or a co-decision maker, not only for resource reasons but because there is already a tension between the Public Advocate’s existing functions of advocate, investigator and guardian which would be exacerbated by taking on these new roles. Our preference is for a new independent body to be established that could also take on guardianship, and perhaps some administration as an alternative to State Trustees.

However, subject to sufficient resourcing, a training role for the Public Advocate would be appropriate. Monitoring and regulation must be done independently (see our responses to Chapter 20 and Q136).

While people who do not have suitable family and friends to take on a supporter role clearly need an alternative, we do not believe that a volunteer support program is the best solution. A volunteer program risks being a ‘second best’ option for those people in the community who are already significantly disadvantaged and socially excluded. Our experience is that volunteer programs can be proposed as a solution in lieu of proper resourcing, and consequently they may not always be supported by consistent selection and service standards, and rigorous training and monitoring. If a volunteer program is ultimately the preferred option, there must at least be an associated financial commitment to maintaining standards and providing ongoing training.

'Question 20 Should ‘supporter’ or ‘co decision-maker’ arrangements apply to financial matters, or be limited to personal decision-making?

Supporter arrangements should apply to both financial and personal decision making, provided they are registered and there are accessible avenues to challenge abuse of powers. This is both in the interests of consistency and due to the fact that in our experience, some of the greatest present frustrations for our clients concern administrators’ decision making.
In addition, as noted in the Consultation Paper, lifestyle and financial decisions frequently overlap. If the options for financial decision making do not include supporter arrangements, this could mean that in practice more empowering lifestyle decision making arrangements are effectively trumped by (financial) substitute decision-making.

Question 21 Do you agree with the suggested training and monitoring roles for the Public Advocate? Are there any other functions the Public Advocate should perform in relation to supporters? and

Question 22 What safeguards do you think are necessary to protect supported people from abuse? See our responses to Qs 17-19 and Chapters 19-20.

Part 4: Personal appointments

Chapter 8

Question 23 Should all enduring powers be activated at the same time? If so, when should this occur? The Federation believes that the enduring guardian power and enduring power of attorney (financial) should be able to be activated immediately upon signing. We do not see any need for the enduring power of attorney (medical) to be activated immediately, because the person has capacity at this stage by definition. In contrast, there may be situations in which it is helpful to the donor to have the guardian or financial attorney act on their behalf if they retain full capacity, provided they consent.

As the Consultation Paper notes, citing the Public Advocate (at 8.97), it may also be helpful to a donor who subsequently has restricted capacity to be able to use the attorney mechanism for supported decision making. This approach would be more consistent with the proposed legislative and policy changes which recognise that the issue of whether a person has capacity depends on the decision required, and for many people may change, including fluctuating, over time. It would also be consistent with the proposed continuum of participation and support for decision making.

Question 24 Should parents and carers of children with disabilities be able to file a document with VCAT that states their wishes about future guardianship or administration arrangements? and

Question 25 Should these wishes be a factor VCAT is required to consider when it appoints a substitute decision maker or supporter? The Federation supports a model where parents and carers of children with disabilities may file documents with VCAT stating their wishes about future guardianship and administration arrangements. We believe that a requirement for VCAT to consider these wishes as a factor in making an appointment for a substitute decision maker or supporter strikes an appropriate balance between the needs and family history of the child, and necessary independent oversight and safeguards.

Question 26 Should the number of enduring appointments be reduced from three to two by removing the option of appointing an agent under the Medical Treatment Act 1988 (Vic) and by requiring people to use an enduring guardianship appointment for medical treatment matters? and

Question 27 Should there only be one type of appointment with a range of possible powers? The Federation believes there is merit in reducing the number of enduring appointments to two (Option A). As the Consultation Paper proposes (at 8.134), for clarity it is logical that the number and type of personal appointments mirror those available to VCAT (see our response to Q55).

It is also important that the resulting documentation is clear and concise, and therefore the option of making two appointments (and probably two forms) probably strikes the appropriate balance.
The Federation supports making it possible for a person appointing an enduring guardian to be able to use that appointee to make medical treatment decisions. However, it remains important that if a person wishes to donate the power to refuse medical treatment to a separate person from any appointee who has other guardianship powers, that they be able to do so.

**Question 28 Should an online registration system be created for enduring powers?**
Yes. An online registration system should be created for all powers, including supported decision making instruments and advance directives.

**Question 29 Which organisation should hold the register?**
The Registry of Births, Deaths and Marriages.

**Question 30 Should registration be voluntary or compulsory?**
Registration should be compulsory and accessible in a range of formats, including directly online or via lodging a paper form. Registration should be free to holders of a Health Care Card.

**Question 31 If registration is compulsory, what effect should this have on unregistered appointments?**
and

**Question 32 When is the best time for registration to occur?**
Registration at the time the documents are created should be encouraged as policy, but registration at any time should be able to validate the power if the donor retains capacity.

Given our response to Q23, it may not always be clear from the details on the Register when a particular power is activated. If there is likely to be any doubt in relation to a particular appointment, donors or attorneys could be encouraged to either clarify on registration or notify the Registry of Births, Deaths and Marriages when a power has been activated.

Unregistered documents where the donor no longer has capacity should be able to be approved by VCAT if there is sufficient evidence that the power was validly donated.

**Question 33 Who should have access to the register? What safeguards could be put in place to protect an individual’s privacy while allowing appropriate people to access it?**
We support the concept of providing a PIN to the donor and the appointee, but we believe that it is essential that the donor’s privacy is safeguarded. This raises complexities which will need extensive stakeholder discussion before implementation.

For instance, if a person has appointed someone to manage their finances during periods of mental illness, but for the rest of the time they manage their affairs themselves, to release the information to a bank could be an invasion of privacy when the person is well.

Permission to access the register must also be narrowly delineated. For example, if a financial institution or company has access to the register for the purposes of discovering whether a person applying for a loan or to enter a mobile phone contract has an enduring power of attorney, the institution should only be able to verify that the power exists if it has been activated for that type of purpose.

Similarly, a hospital needing to know if a patient has appointed a medical agent should not also be automatically able to obtain knowledge of whether the person has a personal guardian.

Some people feel particularly strongly about their privacy, and should be able to have the option when making the appointment to specify who may or may not have access to the register, provided that the potential consequences of such specification are fully understood.
These complexities underline the importance of donors having access to free or affordable legal advice when making appointments.

Question 34 Should it be necessary to notify a public authority and/or various other people when a power of attorney is activated?
and

Question 35 Should a donor be able to specify that certain people should be notified when a power of attorney is activated? Who should be notified and why?
and

Question 37 Should a donor also be able to specify that people/bodies should not be notified when a power of attorney is activated?
Yes, the attorney should be required to notify the Registry of Births, Deaths and Marriages, together with any other party whom the donor has specified.

Question 36 How might notification work in a situation where a person's capacity is fluctuating?
When the donor regains capacity he or she should be able to deactivate the power of attorney and notify the Registry of Births, Deaths and Marriages accordingly.

Chapter 9

Question 38 Do you think that the law concerning instructional medical directives should be set out in legislation?
Yes (Option B), provided that existing common law rights are retained as a safety net.

Question 39 Do you think it should be possible to make statutory instructional directives about things other than medical treatment?
and

Question 40 What types of things should it be possible to include in an Instructional directive?
Yes, it should be possible to make statutory instructional directives about any of the sorts of matters that can be dealt with under guardianship or financial powers. However, directives in relation to non-medical matters should not be too specific or at least should include reasons for specific preferences. This might then allow adherence to the spirit of specific preferences if it were not possible to implement the precise directive.

Again, a broad scope of enforceable advance directives will only have significant utility for those Victorians most likely to need them if there is extensive community legal education and access to legal assistance in drafting.

Question 41 Should the wishes expressed in a document making a personal appointment be binding, or should they merely be matters that the personally appointed decision maker must consider?
They should be binding but displaceable in certain circumstances (Option C). It will therefore be important to include reasons for the wishes in the document (see our response to Q40), and for written reasons to be provided if the wishes are displaced.

Question 44 Should the same rules apply to both enduring guardians and enduring attorneys (financial)? If not, in what circumstances should they differ?
Yes.

Question 45 Should there be sanctions for overriding an Instructional directive in a way that does not comply with the law? What should they sanctions be?
Yes, as for misuse of current powers of attorney.

Question 46 Should there be an electronic registration system for advance directives?
Yes.
Question 47 Should registration extend to medical and lifestyle instructional directives?
Yes.

Question 48 Should registration be voluntary or compulsory?
If a person has a registered decision maker of some sort and that decision maker is aware of the (most recent) advance directive, this should be sufficient.

However, if the person does not have a registered decision maker, registration is probably necessary. If the directive was not registered, it would then simply constitute one factor to be considered among others.

Question 49 Are there issues that arise in relation to the registration of advance directives that differ from those that are relevant when considering the registration of personal appointments?
Advance directives may be more likely to change and therefore require updating. However, both advance directives and personal appointments raise privacy issues, for instance in relation to access via e-health record systems. See our responses to Qs 33-35 and Q37.

Part 5: VCAT Appointments

Chapter 1.0
Question 50 Do you agree with the Commissions proposal that disability should no longer be a separate criterion for the appointment of a substitute decision maker, but that it should be necessary for VCAT to find that a person is incapable of making their own decisions because of a disability before it can appoint a guardian or an administrator?
The Federation agrees that disability should no longer be a separate criterion for the appointment of a substitute decision maker, and that the focus should be on whether the person lacks capacity in the specific context, with the presumption being that they have capacity.

Member centres of the Federation have mixed views about whether disability should retain a status in the assessment of whether a person needs a substitute decision maker (Option B). On the one hand, it can be argued that retaining ‘because of a disability’ still bases an assessment of incapacity on disability, when many people with a disability will never require a substitute decision maker. It therefore tends to reinforce stereotypes and prejudices that disability in itself is inherently more problematic than other attributes.

The counter-argument is that to not require the incapacity to be linked to a disability could cast the net more widely over people deemed to be ‘vulnerable’. This could include individuals whose lifestyle or behaviour is merely socially disapproved of, such as people who are regarded as drinking or gambling too much, or who are labelled as eccentric. Others who have little education and literacy and who therefore might find it difficult to understand their options and make decisions could also be deemed to lack capacity rather than needing appropriate support services.

On balance therefore, we support Option B as a lesser restriction on human rights, and our response to Q4 proposes an additional safeguard.

Question 51 Do you agree with the Commissions suggestions for capacity principles (Option A) and a legislative definition of incapacity (Option B) in order to provide legislative guidance on how to determine when a person is unable to make their own decisions? Are there additional or other ways to provide this guidance?
Yes, we support Options A and B. However, if the legislative definition of capacity is to be similar to section 3(1) of the Mental Capacity Act 2005 (UK), we submit that it is important that there be clarification of how the various criteria are to be assessed.
For example, a person must only be deemed to be unable to understand the information relevant to the decision (s 3(1)(a)) if he or she has been provided with the appropriate information in accessible form. Similarly, some people with complex communication needs find themselves unable to communicate because they are not assisted appropriately.  

Assessment must also always be carried out according to an express statutory presumption that the person has capacity.

Question 52 Do you agree with the Commission’s proposal (Option B) that new guardianship laws should allow VCAT to appoint a guardian or an administrator for a person when it is satisfied that the person is unable to make their own decisions because of a disability – and is unlikely to regain or achieve that capacity – and might have some future need for a guardian or an administrator?
We do not support this proposal. We believe that the current approach should be retained, because it is more consistent with the overall proposed shift to a continuum of supported decision making, rather than pre-empting questions about a person’s capacity in the future and how their needs might be addressed.

Chapter 11
Question 53 Do you agree with the Commission’s proposal (Option C) to lower the age limit of the Guardianship and Administration Act 1986 (Vic) to 16 and to raise the age limit of the Children, Youth and Families Act 2005 (Vic) to 18?
The Federation supports raising the age limit of the Children, Youth and Families Act 2005 (Vic) to 18, for reasons outlined in the Consultation Paper (at 11.58-11.60). We do not believe that the possibility of DHS reluctance to provide care and protection for an additional group of 17 year olds is a reason not to implement reform, because the provision of such protection is a non-derogable State obligation under the Convention on the Rights of the Child.

We provide no view as to whether the age limit of the G&A Act should also be lowered to 16.

Chapter 12
Question 55 Should the current distinction between guardianship and administration be retained? If so, do you agree with any of the options (A (i) – (vi)) described by the Commission?
The Federation supports Option A(ii) for reasons given in the Consultation Paper (12.67-12.70). While private appointees should be able to take on both a guardian and administrator role if VCAT decides this is appropriate, it is important that the powers continue to be distinguished, because generally a different skill set is required for personal as compared to financial decision making.

The requirement that there be at least two appointments where there is a public guardian and a public administrator, while adding some complexity, strikes the appropriate balance by addressing the need to safeguard the interests and human rights of the donor.

Question 56 Do you agree with any of the suggested ways to manage the overlap between the powers of guardians and administrators? Are there any other ways to manage this overlap?
The Federation supports:
- legislatively clarifying the powers available to guardians and administrators;

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3 ‘At least two’ contemplates situations such as where the person may in addition to a publicly appointed guardian with limited powers and a publicly appointed administrator, have an automatically appointed medical decision maker; or where in addition to VCAT considering the appointment of two public decision makers, there is already a personally appointed guardian with powers for medical decision making only.
• creating a legislative duty for guardians and administrators to consult with each other when they are both appointed;
• introducing formal processes to address disputes between guardians and administrators; and
• increased training for substitute decision makers.

We do not support providing statutory guidance about whose decision prevails in the event of a dispute, because we believe that this is a more appropriate matter for VCAT’s discretion. However, Practice Notes could assist members and legal practitioners.

Question 57 Should new guardianship laws guide VCAT about how to choose between family members and the Public Advocate when appointing a guardian or between family members and State Trustees (or some other professional administrator) when appointing an administrator? If not, how could this issue of recognising existing family relationships be addressed?

The Federation submits that VCAT members should make this assessment in the particular circumstances, rather than attempts being made to enshrine appropriate practice in law.

Chapter 13
Question 58 Do you agree with the Commission’s proposal (Option A) (iii)) that new guardianship laws should contain comprehensive lists of the decision-making powers that can and cannot be given to a guardian and an administrator?

Yes, including the express provision that the lists are non-exhaustive.

Question 59 If yes to Q58, what decisions should be a guardian be able and unable to make?

The list in the Consultation Paper (at 13.109) is appropriately comprehensive.

Question 60 If yes to Q58, what decisions should an administrator be able and unable to make?

See our response to Q61.

Question 61 Do you believe that any of the other options are a better way of dealing with the decision-making powers that guardian or an administrator could or could not be given?

Administration orders should be able to be tailored in the same way as orders for guardians. This would enable VCAT to limit the restriction on the represented person’s independent decision making only to those decisions deemed to absolutely require a substitute decision maker. Such decisions might only apply to the payment of utility bills or rent, with the represented person retaining control of the rest of their finances.

Our clients’ experience is that frequently their administrator, such as State Trustees, controls almost all of their income from the Disability Support Pension (DSP) on the grounds that they are required to accrue savings. This appears discriminatory when compared with the access that people who do not have an administrator and who receive the DSP have to their money, with most people finding it impossible to save on this level of income without considerable denial of daily comforts and even of goods and services regarded by many people as essentials.

The Federation also believes that an appropriate case management program in the Guardianship List, modelled on the Victorian Magistrates’ Court’s Court Integrated Services Program, could improve people’s access to support services and thus might mean that a guardianship or administration order is not required in some circumstances (see our response to Q135).
Question 62 Should it be possible for VCAT to order that a guardian or an administrator have the power to make decisions about any of the following matters:

- Whether a represented person should continue to hold a driver licence
- A will by a represented person
- Organ donation by the represented person?

None of these matters is appropriate for a guardian or an administrator. As with the proposed list of restrictions at 13.109, these are decisions which either have a more appropriate external decision maker (driver’s licence) or raise questions of morality and conflicts of interest, thereby making them inappropriate for substitute decision makers.

Question 63 Should new guardianship legislation extend or clarify the provisions in section 50A of the Guardianship and Administration Act 1986 (Vic) which permit an administrator to make small gifts on behalf of a represented person in limited circumstances?

The provisions need to be clarified in relation to gifts, in order to, among other issues, allow any relevant advance directives to be considered by VCAT in assessing whether an administrator may make a gift outside the current restrictions.

It is in the interests of justice that provisions concerning gifts, as with other decision making, are consistent for both personal and VCAT appointees, and both private and public decision makers.

Question 64 Should new guardianship legislation alter or clarify the anti-ademption provisions in section 53 of the Guardianship and Administration Act 1986 (Vic)?

The anti-ademption provisions need to be clarified. As in our response to Q63, it is important that the person’s wishes when they wrote their will be honoured as much as practically possible.

Question 65 Should new guardianship legislation enable State Trustees to be given the same powers as those of other administrators?

Yes, provided that the proposed new draft statement of purpose and principles apply to the legislation.

Question 66 Who should conduct litigation on behalf of a represented person?

It is important that a represented person has access to justice for all issues that may arise. However, even assuming that the person conducting the litigation is not personally liable for costs (see our response to Q67 below), the new legislation must also clarify the question of whether a represented person requires a person to conduct litigation on their behalf in a particular circumstance.

For example, with the proposed legislative shift to a continuum of capacity and ongoing processes of assessment, there may be some legal contexts in which the represented person does not need the equivalent of a litigation guardian.

If a litigation guardian is required and the person has a decision maker, that entity (or the more appropriate entity if there is more than one decision maker) should be able to conduct the litigation. However, there may also be contexts where one or both of the guardian and administrator has a conflict of interest and therefore cannot conduct the litigation. In those circumstances, another individual, or perhaps a specialised agency, should be resourced and statutorily empowered to play this role.

Question 67 Should it be possible for a court or tribunal to order that an administrator or guardian who conducts litigation on behalf of a represented person is personally liable for some or all of the costs of that litigation?

Yes, but only if the administrator or guardian, in conducting the litigation, is not acting within the scope of their powers or according to the proposed principles and purpose of the new Act; or if they do not conduct the litigation in an appropriate manner.
It is in the interests of access to justice for the represented person that, subject to the above exceptions, a person conducting litigation on behalf of a represented person should not bear any personal liability.

The new legislation must also clarify the question of whether a represented person requires a person to be appointed to conduct litigation on their behalf in a particular circumstance (see our response to Q66 above). This is particularly important given that the represented person may be liable for costs.

**Question 68** Should new guardianship laws permit VCAT to authorise a guardian, or other person, to use some force to ensure that a represented person complies with the guardian’s decisions? Yes, subject to the restrictions outlined in our response to Q69.

**Question 69** If yes to Q68, do you agree with the additional safeguards proposed by the Commission? We support the Commission’s approach in limiting the capacity of VCAT to make an enforcement order via criteria consistent with the proposed new purpose and principles in the new legislation, and with the Charter.

The Federation also supports the requirement for an independent third party to report to VCAT about the use of the enforcement power. Further consultation may be needed about the nature of the reporting process. The time frame for reports should be less than the present 42-day period for reassessment of the order, and there must be an effective mechanism for urgent VCAT reviews based on reports.

**Part 6: Statutory Appointments**

**Chapter 14**

**Question 70** Do you agree with the Commission’s proposal (Option B) that the hierarchy for automatic appointees, as currently set out in section 37 of the Guardianship and Administration Act 1986 (Vic), should be retained?

and

**Question 71** What alterations (if any) should be made to the list?

Yes, on balance Option B is the more workable option. However, while we acknowledge the practical difficulties, we recommend that consideration be given to issues raised by Indigenous and CALD communities concerning culturally appropriate decision making.

The Federation submits that it is also important to consider some kind of workable ‘checks and balances’ system when the person responsible is a family member. For example, a substantial proportion of our casework involves assistance to women who are victims of family violence, often from their spouse or domestic partner. Under the automatic hierarchy and in the absence of any formal appointments, this person is the first appointee.

It is also unclear whether the Commission proposes to completely remove personal appointments from the Medical Treatment Act; as is proposed in relation to Q26. If so, we believe that given that the present hierarchy gives personal appointment of a medical agent first priority, an enduring guardian with medical decision making powers should take its place (at present, this is fourth on the list).

Lastly, we assume that registered instructional directives would take precedence over any decisions made according to the hierarchy, unless VCAT orders otherwise; but for clarity this should be expressly stated in the new legislation.

**Question 72** Do you think new guardianship legislation should require an automatic appointee to take a substituted judgment approach to decision making?

Yes, for reasons of fairness and consistency with other proposed decision making approaches.
Question 73 Do you think that new guardianship legislation should contain additional measures for scrutinising the decisions made by automatic appointees? If so, what should those measures be? Random audits should be undertaken by an independent agency, in combination with increased community and professional legal education about the advocacy, investigative and training roles of the Public Advocate.

Chapter 15
Question 74 Do you think there should be specific laws about people being admitted to and remaining in remaining in residential care facilities in situations where they do not have capacity to consent to those living arrangements but are not objecting to them?
Yes.

Question 75 If yes, do you agree with the Commission’s Option E that new guardianship legislation should extend the automatic appointment scheme to permit the “person responsible” to authorise living arrangements in a residential care facility in these circumstances if there are additional safeguards?
Yes.

Question 76 If the automatic appointment scheme is expanded to cover these circumstances, do you agree with any or all of the possible safeguards suggested by the Commission?
Yes. We support all of the possible safeguards suggested by the Commission.

Question 77 If the automatic appointment scheme is expanded to cover these circumstances, should the hierarchy of automatic appointees be changed?
See our response to Qs 70-71.

Chapter 16
Question 79 Do you think that the definition of medical treatment should be broadened?
Yes.

Question 80 Should a broader definition include the prescription and administration of pharmaceutical drugs?
Yes.

Question 81 Should it include paramedical procedures, such as physiotherapy? Should it include complementary health procedures, such as naturopathy and Chinese medicines?
Yes, the definition should include paramedical and complementary health procedures.

Question 82 Do you think a distinction should be made between minor and other medical procedures when a person is unable to consent? If yes, how should the distinction be made between minor and other procedures?
and
Question 83 Do you agree that minor medical procedures should not require substituted consent if certain safeguards are met? Do you agree with the safeguards suggested?
The Federation submits that a medical practitioner must obtain substituted consent to a medical procedure, regardless of how minor or uncontroversial it may appear.

Question 84 Do you believe the law should retain the requirement that a medical or dental practitioner must notify the Public Advocate where a person responsible does not consent or cannot be identified or contacted and the practitioner still wishes to carry out the procedure?
Yes.
Question 85 Do you believe the process for obtaining substituted consent to participation in medical research procedures should be the same as the process for obtaining substituted consent for medical treatment?
Yes, essentially, with extra safeguards – see our response to Q86.

Question 86 If the process is the same, what factors should the person responsible be required to consider before giving substituted consent to participation in medical research procedure?
The factors the person responsible should be required to consider will need to be developed from appropriate existing medical research ethics frameworks, so that the decision is treated in the same way as it would be if the represented person had capacity to make the decision.

In relation to major medical research procedures, arguments concerning benefits to the represented person should additionally be required to be assessed by VCAT, with the represented person being legally represented by an independent advocate.

Part 7: Responsibilities and Accountability Under the Law

Chapter 17

Question 87 Does the law need to provide more guidance about the relationship between the wishes a person expresses at the time a decision is made, and any past wishes, views, beliefs and values the person has expressed?
Yes. While we support a substituted judgment approach rather than the principle of best interests, the guidance concerning the best interests approach in the Mental Capacity Act 2005 (UK) (outlined in the Consultation Paper at 17.94) is useful in considering the relationship between present and past wishes.

In that Act, the phrase ‘factors that the person would have been likely to consider if they were able to’ gives effect to the principle underpinning substituted judgment. It suggests that if the person had capacity when past wishes were known, then these wishes should be given more weight than wishes expressed in the present when the person is now assessed as not having capacity with respect to those particular decisions.

Past wishes should be binding when they have been expressed via an instructional directive, but displaceable in certain circumstances (see our response to Q41).

Question 88 Does the law currently strike the right balance between following the wishes of the person, including those that involve risk or danger, and other important considerations such as the right of a person to be protected from harm?
No. Our clients’ experience is that often administrators and guardians interpret their legal responsibilities to mean that in practice almost no degree of risk is permitted in decision making. An example of this is the practice of State Trustees in prioritising savings when a represented person’s sole income is the Disability Support pension (see our response to Q61). In some cases the person has enough savings to enjoy amenities that most Victorians would take for granted, such as taking a holiday or purchasing a car or other significant item which would substantially improve their quality of life, but is not permitted to do so.

It is unjust that many administrators’ approaches to represented persons in daily practice appear to be shaped by an increasingly risk averse society. We believe that the law must expressly incorporate the principle of ‘dignity of risk’, on the basis that all people may make bad decisions and ignore advice, provided that this does not directly result in serious harm.

Substituted decision making, supported decision making, the concept of capacity as a continuum rather than an all-or-nothing or once-and-for-all proposition, advance directives, enhanced accountabil-
ity of personal and appointed decision makers and limited orders will also assist in ‘tipping the scales’ more towards the appropriate balance.

**Question 89 Do you think there should be a general set of decision – making principles that should apply to all types of substituted and supported decisions?**
Yes. See also our response to Q88 which suggests that all the arrangements comprise a decision making continuum, and therefore implicitly should be underpinned by the same general principles.

**Question 90 Do you agree with the Commission’s proposal (Option C) that substituted judgment should be the paramount consideration for decision makers? Or, do you think that substituted judgment should be just one guiding principle to consider?**
Yes, substituted judgment should be the paramount consideration for decision makers. See also our response to Q88.

**Question 91 Is substituted judgment relevant to supported decision making?**
Yes. The Federation views substituted judgment as it is outlined in the Consultation Paper (at 17.132-17.136) as on a continuum with supported decision making, in the sense that the substitute decision maker is required as far as possible to assist the represented person in contributing to the decision, and to reflect their wishes and needs.

Substituted judgment appears to be also on a continuum with supported decision making in another sense, as there will be a substantial number of represented people for whom capacity will fluctuate or who will retain capacity to make some decisions without assistance or at least without a substitute decision maker for those areas of decision making.

**Question 92 Do you agree that new guardianship laws should specifically require substitute decision makers to act honestly and respond appropriately to conflicts of interest?**
Yes.

**Question 93 Do you agree that new guardianship laws should specifically require guardians and administrators to treat the represented person and important people in their life with courtesy and respect at all times?**
Yes.

**Question 94 Should new guardianship laws contain the same decision-making principles for financial decisions and person decisions?**

**Question 95 If no, how could financial decision makers be guided to balance the need for sound financial management with the principle of substituted judgement where these considerations might conflict?**

Although financial and personal decision makers should be guided by the same decision making principles, there may be instances where two kinds of decision makers conflict over a decision where both are required to be involved, such as when deciding whether the represented person should be able to go on holiday or purchase an item of significant value.

In this situation, the general principles guiding the financial administrator may translate (appropriately) into considerations that are not part of the guardian’s decision making, such as greater fiscal caution over how the money is to be spent. The Consultation Paper acknowledges this tension (at 17.145-17.148).

This situation could activate the formal process to address disputes between guardians and administrators. Where there is only a financial decision maker, there must be an accessible avenue for the represented person to seek further input into the decision making, via reassessment or review by
VCAT, so that the principles that might be applied by a personal decision maker, such as enhancing quality of life by taking a holiday, are still able to be taken into account.

**Question 96** Should there be separate and distinct principles for medical decision making? If so, what should these principles be?
No, the same core principles should apply to all types of decision making.

**Chapter 18**

**Question 97** Do you agree with the Commission’s proposal that new guardianship legislation should authorise all substitute decision makers, including automatic appointees, to have access to confidential and private information about the represented person on a “need to know” basis?
Yes (Option B).

**Question 98** Do you believe that new guardianship legislation should contain a provision similar to section 101 of the Guardianship Act 1988 (NSW) for dealing with misuse of confidential or private information?
Yes.

**Chapter 19**

**Question 99** Do you think that private guardians and attorneys should be required to lodge periodic reports about their activities with a public official?
Ideally, yes. This would be consistent with other proposals to increase accountability of the substitute decision making system. A simple form would probably not be too onerous.

However, we appreciate the need to balance the requirement of accountability with the reality that many private guardians and attorneys presently operate according to informal and generally fair arrangements, and might not undertake the role if it becomes perceived as overly subject to bureaucracy and unnecessarily punitive measures.

Our less preferred option would therefore be for random audits to be undertaken by an independent agency, with the emphasis being on highlighting the role of the Public Advocate in providing increased training and support for private decision makers where needed.

**Question 100** Should people exercising substitute decision-making powers be required to provide periodic declarations of compliance with their responsibilities?
Yes. This would be consistent with other proposals to increase accountability of the substitute decision making system. The option for decision makers to identify any areas where they could benefit from assistance should also be included.

**Question 101** Who should receive and monitor the declarations?
Clearly the Public Advocate and State Trustees should not monitor their own declarations, but it is also not necessarily appropriate that they monitor the declarations of private decision makers.

Ideally, both functions should be performed by an independent agency distinct from the Office of the Public Advocate and State Trustees. As we note in our response to Q19, the functions of guardian/administrator, investigator and regulator should be undertaken by separate entities.

**Question 102** Do you think that substitute decision makers should declare an oath or sign a statement agreeing to comply with their responsibilities before they undertake their roles?
Yes. This should be supported by compulsory training of publicly appointed substitute decision makers and easily accessible community legal education for personal appointees.
Question 103 Should there be random audits on the way substitute decision makers perform their responsibilities?
Yes.

Question 104 Who should carry out these random audits?
Ideally, audits should be performed by an independent agency distinct from the Office of the Public Advocate and State Trustees (see our response to Q101).

Question 105 Should VCAT be able to order administrators and financial attorneys to repay funds that have been misused?
Yes.

Question 106 Is there a need for more specific penalties for substitute decision makers who misuse or abuse their powers?
and
Question 107 If yes, what types of conduct should warrant a specific penalty?
and
Question 108 Should penalties for substitute decision makers who misuse or abuse their powers be increased?
and
Question 109 Should penalties be the same, regardless of whether the substitute decision makers have been personally appointed or appointed by VCAT?
and
Question 110 Should civil penalties be introduced for substitute decision makers who misuse or abuse their powers?
There should be consistent and more specific offence provisions across all different substitute decision making appointments. The offences should cover situations where:
• substitute decision makers abuse their powers to gain an advantage for themselves or someone else;
• fail to exercise their powers and discharge their duties in good faith in the person’s best interest and for a proper purpose; and
• fail to keep proper records.

The current penalties in the G&A Act are low when compared to the potential conduct that falls within the offences.

On balance, civil penalties are preferable as they are easier to enforce and more serious criminal conduct is likely to be covered by the existing criminal offences of theft and fraud. However, if civil penalties are introduced, issues around conflict in the multiple roles of the Office of the Public Advocate need to be resolved, either through the divestment of some of its powers or the creation of a new agency.

Question 111 Do you agree with the Commission’s proposal (Option B) that new guardianship laws should permit merits review of decisions made by the Public Advocate as a guardian and by State Trustees as an administrator?
No. We support merits review being available for decisions of both public and private appointments, on the basis that, as the Consultation Paper notes, this is the most equitable approach to the issue and also because it reduces the confusion that would flow from having unnecessary distinctions between public and private appointments.
Question 112 Who should be entitled to apply for merits review of a guardian’s or administrator’s decision?
The represented person, and any person deemed by VCAT to have a special interest in the affairs of the represented person.

Question 113 What should constitute a “reviewable decision”? ‘Decision’ should continue to be defined by the present section 4 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) (the VCAT Act). Those decisions that are ‘reviewable’ should be delineated as those made by guardians and administrators (or appropriate new terms) in connection with the exercise of their powers under the G&A Act (or its replacement).

Question 114 Are there any additional steps that need to be taken to limit trivial, vexatious or repeated applications for merits review of a guardian’s or administrator’s decision?
The Federation submits that existing VCAT procedures are sufficient, with the addition that a statement of reasons should be provided if applications are denied or struck out. This is important because many people do not understand VCAT or guardianship and administration processes.

Question 115 Should merits review of decisions by administrators be treated differently to merits review of decisions by guardians?
No.

Question 116 Who should conduct merits review decisions of public guardians and administrators?
VCAT.

Question 117 Should VCAT have the discretionary power to appoint a guardian or administrator on the condition that they complete any training requirements specified in the order?
Yes.

Part 8: Implementing and Regulating New Laws

Chapter 20

Question 118 Do you believe the Public Advocate’s investigation function should extend beyond cases concerning guardianship and administration?
Yes, for reasons outlined in the Consultation Paper (at 20.37-20.40).

Question 119 Do you think the Public Advocate’s investigatory powers should be clarified so that she can require people and organisations to provide her with documents and attend her offices to answer questions?
Yes, for reasons outlined in the Consultation Paper (at 20.41-20.42).

Question 120 Do you think the Public Advocate should have the power to enter private premises with a warrant issued by a judicial officer when there are reasonable grounds for suspecting that a person with a disability who has been neglected, exploited or abused is on those premises?
Yes, for reasons outlined in the Consultation Paper (at 20.43).

Question 121 Do you think it is necessary to protect the anonymity of people who provide the Public Advocate with information about the possible abuse, neglect or exploitation of people with a disability?
Yes.

Question 122 Should the Public Advocate be able to take civil penalty proceedings against people who have allegedly breached guardianship legislation?
No. See our response to Q110.
Question 123 Do you support clarifying the Public Advocate’s individual and systemic advocacy functions in guardianship legislation?
Yes.

Question 124 Do you think that the legislation should include principles to guide the Public Advocate when undertaking her advocacy functions?
Yes, however, the Public Advocate should retain the discretion to act.

Question 125 Do you think that the Public Advocate’s functions in relation to community advocacy are necessary?
Yes.

Question 126 Do you agree that the Public Advocate should continue to be both the guardian of last resort and an advocate?
The Federation submits that it would be preferable to separate these roles, to avoid any public perception of conflict of interest and to enable the Public Advocate to investigate all guardianship arrangements.

Question 127 Should the Public Advocate be responsible for training and supporting private guardians?
Yes. However, considerably expanded resourcing of the Public Advocate will be necessary for this strategy to be effective.

Question 128 Should the Public Advocate be responsible for monitoring the activities of all or some private guardians?
No. Given the proposed expanded investigative and advocacy roles for the Public Advocate, the Federation submits that monitoring and other forms of regulation should be undertaken by a separate entity.

Question 130 Do you think the Public Advocate should play a role in designing a register of personal appointments?
Yes, in the sense that the Public Advocate should draw on its experience to provide input. However, the Public Advocate should not be responsible for holding or maintaining the register.

Question 131 Do you think the Public Advocate should be given responsibility for monitoring the activities of personally appointed substitute decision makers?
No. Given the proposed expanded investigative and advocacy roles for the Public Advocate, the Federation submits that monitoring and other forms of regulation should be undertaken by a separate entity.

Question 133 Do you think the Public Advocate should be given any responsibilities to deal with possible misuses of power by a person who is automatically appointed by legislation to make decisions for another person?
Yes, if those responsibilities involve the Public Advocate in investigative and advocacy roles rather than in monitoring or regulatory capacities.

Question 134 Do you think the Public Advocate should be required to report annually to Parliament?
Yes, for reasons outlined in the Consultation Paper. However, other functions will need to be reported to Parliament by a separate entity independent of the Public Advocate (see our responses to Qs 126, 128 and 131).
Chapter 21

Question 135 Should the Guardianship List be supported by a body such as the New South Wales Guardianship Tribunal’s Coordination and Investigation Unit so that it can take a more active role in preparing cases for hearing?

Yes. The Federation also endorses PILCH Homeless Persons’ Legal Clinic’s submission in response to the Commission’s Guardianship Information Paper (28 May 2010) that a case management program, modelled on the Victorian Magistrates’ Court’s Court Integrated Services Program, should be implemented in the Guardianship List to improve people’s access to support services. These services might provide a viable less restrictive means of support than a guardianship or administration order, and this option would therefore be consistent with the principles of the proposed new legislation.

Question 136 Should the Public Advocate be funded to undertake this role?

No. The Federation believes that this role is more appropriate for VCAT staff as it involves engaging with all parties. In contrast, the Public Advocate’s roles centre on advocacy for the represented person (or person the subject of an application), especially if the proposed changes to legislative purpose and principles proceed.

Question 137 Do you agree with any of the options proposed by the Commission to improve legal assistance and advocacy for people in Guardianship List matters at VCAT?

Legal assistance is an important safeguard in ensuring that the rights of proposed represented persons are upheld in guardianship and administration cases. By their nature, these cases involve very significant decisions about vulnerable people’s lives. In addition, in improving efforts to ensure the proposed represented person is able to attend hearings or at least have their views known, it is critical that they have access to legal advice and representation.

Accordingly, the Federation supports:

- ensuring that all people who are the subject of Guardianship List applications are provided with a clear statement of rights and information about how to contact CLCs, Victoria Legal Aid and other organisations for legal assistance including representation (Option A); and
- amending the VCAT Act so that a represented person or a person subject to a Guardianship List application has an automatic right to legal representation (Option B).

We also support the creation of a statutory power for VCAT to order that a person be provided with legal representation when VCAT believes this step is necessary (Option C). One option to implement this is discussed in the PILCH Homeless Persons’ Legal Clinic’s submission in response to the Commission’s Guardianship Information Paper (28 May 2010). PILCH submitted that VCAT’s use of this power could be assisted by the incorporation into the VCAT Act of a definition of ‘special circumstances’. This definition should be framed broadly and include age, disability, mental health, addiction, homelessness, cultural, linguistic and socioeconomic factors.

Enhanced access to legal assistance is an essential requirement of the supported and substitute decision-making system. It requires adequate funding of CLCs and Victoria Legal Aid. Repeated government enquiries have confirmed the poor funding levels of CLCs relative to demand for assistance. While we do not oppose the increased use of pro bono in these matters (referred to in Option D), this is no substitute for properly funded legal assistance services for vulnerable persons.

Question 138 Should VCAT be required to consider making supported and co-decision-making orders before appointing a substitute decision maker?

VCAT should be required to consider making supported decision-making orders before appointing a substitute decision maker.
Question 139 Do you think that new guardianship legislation should specify a maximum period for all guardianship and administration order?
Yes.

Question 140 If so, what should that maximum period be?
12 months.

Question 141 Following the expiry of an order, should it be possible for VCAT to reassess or make a new guardianship or administration order in the absence of the parties, with their consent?
No. Given the disadvantage and marginalisation experienced by many people subject to guardianship and administration orders, their access to justice is compromised. It cannot be assumed that their consent to a decision being made on the papers would be fully informed. If processes were enhanced to the point that represented persons could be guaranteed genuine access to justice, it is likely that they would be more likely to attend hearings.

Question 142 Should VCAT advise a person who provides them with confidential information that the information may be made available to the proposed represented person and other parties?
Yes. We believe that Option A strikes the appropriate balance between the represented person’s right to privacy and the need for VCAT to receive pertinent information.

Question 143 Should a person who provides VCAT with confidential information be responsible for requesting and justifying the need to keep the information confidential?
Yes. Option B promotes the general principle of full disclosure, which is both important to facilitating the best decision making about the represented person’s circumstances and adheres to the person’s right to know what is being said about them by third parties. At the same time, Option B provides a safeguard if it can be proven that releasing the information might cause the person harm including damaging their relationships, and this outweighs the represented person’s or other parties’ right to know.

Question 144 Should VCAT Guardianship List files remain open to the public, with some restrictions about who can gain access, or should the files be closed to the public, with only the parties having a right of access?
Guardianship List files should remain closed to the public. Only the applicant, the affected person and legal representatives should have automatic right of access. VCAT should be able to determine any other request for access.

Question 145 Should the period in which an application for a rehearing can be made be extended beyond the current 28-day limit?
Yes. In our experience, 28 days is too short a short period for many represented persons, who may not even be aware that they have the right to a rehearing.

Question 146 Should VCAT be required to inform the parties of the right to seek a rehearing?
Yes (see our response to Q145 above). Parties should also be informed of their right to a statement of reasons.

Question 147 Should a represented person be requested to opt out of, rather than opt in to, a reassessment hearing?

and

Question 148 Should a represented person be entitled to at least one unscheduled reassessment of the order during the period of the order?
Consistent with our responses to Qs 145 & 146, the Federation submits that represented persons should be requested to opt out of hearings, and that they should be entitled to at least one unscheduled reassessment of the order.
The whole process of notification and associated documentation needs to be more accessible to all members of the community, particularly those persons who have a cognitive disability or who find it physically difficult to open the current notices of hearing (see our responses to Qs 151-153).

**Question 149 Should the legislation allow guardians and administrators to seek a VCAT order to enforce decisions they make which a third party refuses to accept?**

The Federation supports legislation allowing guardians and administrators to seek a VCAT order to enforce decisions they make which a third party refuses to accept. However, we believe that it is in the interests of the represented person that mediation between the disputing parties be required before any order is sought, unless exceptional circumstances exist. The represented person may have an ongoing relationship with the third party and it would be preferable not to unnecessarily risk jeopardising this if another approach could achieve the desired result.

**Question 150 Should multi-member panels, with members drawn from a range of backgrounds, be the standard practice for Initial guardianship and administration applications?**

There is a benefit to having multi-member panels as standard practice for initial or particularly complex guardianship and administration applications. However, if the resource implications mean that more members sit across multiple lists, we would only support this approach if all members assessing guardianship and administration matters have appropriately specialised skills, experience and understanding of the issues faced by persons subject to the Act.

**Question 151 Do you have any views about how VCAT Guardianship List hearings should be conducted?**

The Federation strongly endorses the views of many stakeholders that Guardianship List matters should be conducted with as little formality and technically as possible. Ideally, hearings should be conducted in rooms where there is not a court bench. We would welcome a proposal to formally enshrine therapeutic jurisprudence in the VCAT Act.

We note that Qs 152-155, although concerned with accessibility and participation, do not specifically address the needs of people with disabilities. As represented persons are by definition a sub-group of these communities, we believe that it is essential that VCAT members on the Guardianship List undergo regular disability awareness training, including particularly training about the needs and experiences of people with cognitive and communication disabilities. VCAT materials and processes must also be accessible to all people with communication disabilities, including those with complex communication needs.

See also our response to Q135.

**Question 152 Do you have any ideas about how to achieve better attendance of the represented person at VCAT hearings?**

Better attendance of the represented person at VCAT hearings could be achieved via enhancing community understanding of the purpose and processes of such hearings. This could be achieved through community legal education, and through the production of clearly and simply written materials in large font, including notices of hearings which explain what the recipient needs to do.

Represented persons or those subject to an application should be encouraged to attend hearings and to actively participate. This would be further facilitated by promoting the right to legal representation. Promotion should include VCAT taking a more proactive role in identifying when a person who is unrepresented needs representation, and adjourning the hearing or appointing a legal representative to address this need.
More broadly, better attendance will be facilitated by holding VCAT hearings in accessible suburban and regional and non-traditional locations (such as nursing homes and hospitals). We support the strategic direction of VCAT in this regard. More flexibility around hearing times and the use of technology may also assist.

See also our response to Q135.

Question 153 Do you have any ideas about how to make the Guardianship List more accessible to Indigenous people?
The Federation supports VCAT continuing to consult with Indigenous communities about the most appropriate strategies for making the Guardianship List more accessible to Indigenous people.

See also our response to Q135.

Question 154 What can be done to make the Guardianship List more accessible to users who come from culturally and linguistically diverse backgrounds?
We support translation into community languages of all documentation for matters in the Guardianship List, together with making interpreters readily accessible at hearings. We agree with representatives of CALD communities that translation alone is not sufficient, and that community legal education must be widespread and appropriately targeted to different communities.

See also our response to Q135.

Question 155 What can be done to make the Guardianship List more accessible to users in regional areas?
The Federation supports the establishment of metropolitan hubs and increased regional VCAT staffing. We agree that the setting for hearings should be more user-friendly; for example, community meeting rooms. It is also important that community education about the role and function of VCAT be tailored to regional and rural environments.

See also our response to Q135.

Part 9: Interaction with Other Laws

Chapter 22
Question 156 Do you agree with the Commission’s previous recommendation that the compulsory treatment provisions in the Disability Act 2006 (Vic) be extended to people with a cognitive impairment other than intellectual disability?
The Federation submits that it is not appropriate for guardianship to be used as a means of providing compulsory treatment of persons deemed at serious risk to themselves or others. At the same time, we believe that it is also not appropriate to extend the existing compulsory treatment provisions in the Disability Act to people with a cognitive impairment other than intellectual disability.

As the Consultation Paper notes, citing the Minister for Community Services in 2006, there is insufficient evidence to support the extension of the Disability Act provisions to people with acquired brain injury.
Chapter 23

Question 157 Do you agree with the Commission’s proposal (Option C) that it should be possible, in some circumstances, for guardianship to be used as a mechanism for authorising psychiatric treatment and place of residence decisions for a person who is unable to make their own decisions due to mental illness?

The Consultation Paper presents Option C as a compromise position between the options of making no change and adopting the fusion model of mental health laws with the guardianship system. The Federation does not have a clear unified position and discusses the issues below.

We appreciate that the current approach under the Mental Health Act 1986 (Vic) (the MHA), authorising involuntary detention and treatment of persons deemed to be mentally ill via a stand-alone statute, runs counter to progressive understandings of mental illness as not requiring different legal treatment from physical illness. We also agree with various other commentators that it is discriminatory for capacity and consent to form the basis for the treatment of physical illness, but not for mental illness.

As the Consultation Paper notes (at 23.45), there is disagreement about whether the Disabilities Convention permits involuntary detention and treatment of persons with mental illness. However, it is much clearer that in the interests of justice, the functions of involuntary detention and involuntary treatment, at present both the role of the authorised psychiatrist under the MHA, should be separated. The Federation therefore does not support Option A (no change).

A genuinely just fusion model would be entirely founded on human rights principles, including those in the Disabilities Convention. In our view this necessitates specific and stringent procedures in the empowering legislation to enable assessment of capacity and to allow for reviews and appeals in relation to psychiatric detention and treatment. As the Consultation Paper acknowledges (at 23.35-23.38), these do not exist in the current guardianship legislation, and they are not proposed for the new approach.

In addition, ongoing proposed reforms to the MHA, following the Mental Health Act Review, will still be based on a stand-alone model of mental health legislation. While at this stage it is unclear what specific form various provisions will take in the new mental health legislation, it seems likely that proposed definitions of capacity and foundational principles will differ between the two Acts.

For these reasons we have doubts about the efficacy of a fusion model at this time (Option B).

In relation to Option C, we appreciate that under the MHA, an involuntary treatment order is a form of clinical guardianship and that it is problematic that at present the ‘guardian’ (authorised psychiatrist) both consents to and provides treatment. We believe that in some situations, for example, where a person has appointed an enduring guardian for psychiatric treatment decisions or made a hybrid or instructional directive, it could be more likely that the person’s wishes concerning psychiatric treatment are followed.

However, there are many other situations where a guardian, appointed by VCAT, could take the same kind of stance against the wishes of the person as is presently often taken by the family members of people who are involuntarily detained and treated. We also note that the Consultation Paper (Option C p437) refers to the proposed guardian ‘authorising psychiatric treatment and place of residence’, and to the authorised psychiatrist contacting the enduring guardian ‘with the recommendation that their powers be exercised for the represented person’s benefit’ (at 23.74).

The Federation's concern is that this sounds like the same type of decision making that is currently exercised under the MHA, rather than the model of substituted judgment outlined in the Consultation Paper (at 17.132-17.136). In our response to Q51 we support substituted judgment as on a continuum with supported decision making, in the sense that the substitute decision maker is required as far as possible to assist the represented person in contributing to the decision, and to reflect their wishes and needs.

At most then, we would give cautious support to an enduring guardian, preferably supplemented by an instructional directive, making decisions about residence and/or psychiatric treatment for a person assessed as lacking capacity to make such decisions and independently assessed as mentally ill. Even this limited option would only be compatible with Victorian human rights obligations if the proposed new provision in the reformed guardianship legislation was linked to strengthened safeguards and increased external accountability in the proposed new mental health legislation, including providing for advance directives to be legally enforceable.⁶

⁶ Federation of Community Legal Centres, Mental Health Bill Exposure Draft 2010 (December 2010)