# Part 2
# The Direction of New Laws

This part explores the Commission's ideas for the future direction of guardianship laws. In Chapter 4, we consider those parts of the existing law that have worked well and should be retained, as well as ideas for reform. Chapter 5 considers the overarching principles for inclusion in guardianship legislation. In Chapter 6, we explore ways to make guardianship laws more accessible and to improve community understanding of how those laws operate.

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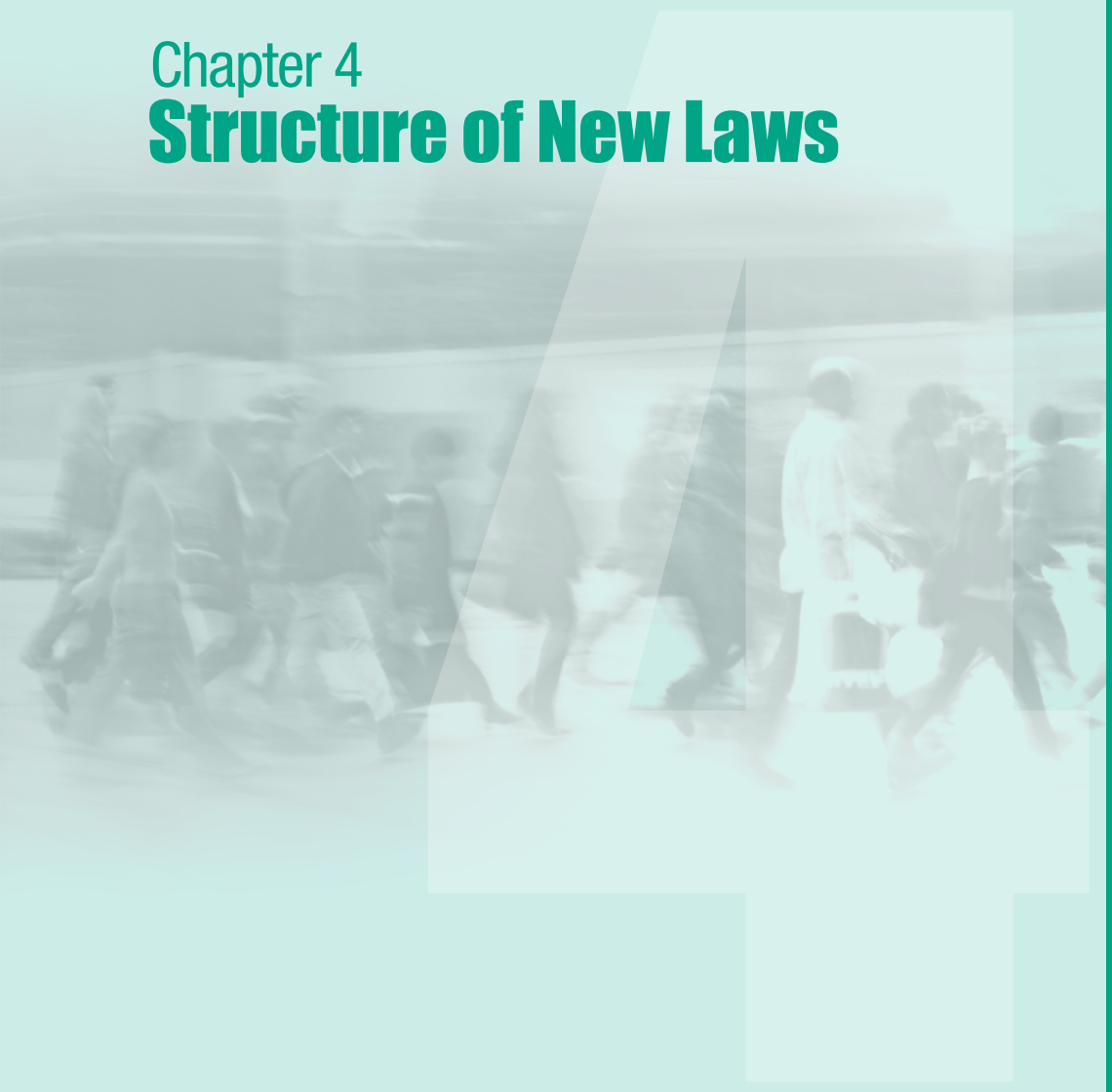
Chapter 4

# Structure of New Laws



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# Chapter 4 Structure of New Laws

## A NEW LEGAL FRAMEWORK

4.1 In approaching this review, the Commission faced a very basic, but extremely important, question: does Victoria need entirely new guardianship laws or can the existing legislation be modified so that it responds effectively to changing needs and social conditions?

### COMMUNITY RESPONSES

4.2 Community responses to our information paper indicated a range of views about this fundamental question. Submissions expressed broad support for the foundations of the current system:

> *The strengths of Victoria's guardianship system include the following: the independent, cheap, relatively informal and expeditious nature of tribunal hearings; the focus on the interests of represented persons in the making of guardianship orders and the carrying out of guardianship activities; the absence of conflicts of interest for guardians (in large a result of guardianship not existing on a fee-for-service basis); and the existence of checks and balances in separating public guardianship from public administration.*[1]

> *The guiding principles of the current legislation (namely that the means that are the least restrictive of a person's freedom of decision and action should be adopted, the best interests of a person with a disability must be promoted and the wishes of a person with a disability should be followed wherever possible) mean that the law generally works well in balancing protection from abuse and neglect and the right to autonomy and self-determination. The emphasis on the least restrictive option and the use of guardianship and administration as 'last resort' measures should be retained in any new legislation.*[2]

4.3 Others saw the system as fundamentally flawed. Sometimes this was because of a view that the system undermines families,[3] and is essentially conflict-ridden;[4] sometimes because of a view that it is too often paternalistic.[5]

4.4 More common, however, was the view that the system is generally a good one, but is nevertheless in need of improvement. Typical of this viewpoint was that of Marillac:

> *Our overall submission is that while the Act works reasonably well in ensuring the financial security and protection of vulnerable people, and also covers medical and health issues adequately, there are some important gaps in guardianship processes which significantly affect people's quality of life.*[6]

4.5 Others noted that the operation of the law in practice is just as important as its actual content.[7] Despite the widely-held view that the legislation is not fundamentally 'broken', many areas for improvement were identified, including:

- development of a Code of Conduct to guide the legislation's implementation[8]
- stronger provisions for dealing with conflicts of interest for private guardians and attorneys[9]
- creating a system that is less crisis-driven and more proactive[10]
- strengthening the legislation's provisions around 'best interests' and 'least restrictive alternative' and providing penalties for abusing these responsibilities[11]
- provisions for the appointment of supported decision makers.[12]

4.6 There is a widely-held view that 'the system remains difficult to understand and navigate for many Victorians'.[13] This is partly due to the complex language and structure of the legislation itself, and partly due to the complex interactions between the various pieces of legislation that deal with substitute decision making. The *Guardianship and Administration Act 1986* (Vic) (G&A Act) has been amended many times since 1986.[14] Numerous amendments inevitably detract from the legislation's readability.

### COMMISSION'S VIEW

4.7 The Commission believes that while many aspects of our current guardianship laws have worked well and should be retained, it is time to develop new laws that are designed to meet the needs of the many groups of people who those laws now affect and that reflect changing attitudes to people with disabilities.

4.8 The Commission believes that it is desirable to rebuild Victoria's guardianship laws, rather than further amend the existing legislation. However, many features of the current system have operated successfully and should form part of new 21st century guardianship legislation.

4.9 Those features include:

- the emphasis on the right of people with a disability to participate in making decisions about their own lives
- the availability of a system of personally appointed substitute decision makers that is relatively inexpensive
- the availability of a system of tribunal appointed substitute decision makers that is relatively quick and inexpensive
- the Office of the Public Advocate with its systemic advocacy, educational and guardianship roles.

4.10 This chapter provides a broad outline of the Commission's preliminary views about the major features of new guardianship laws.

## ELEMENTS OF A NEW SYSTEM

### PARTICIPATION

4.11 In view of rapidly changing social attitudes to people with a disability, clearly exemplified by the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention), the Commission believes it is important to encourage debate about how guardianship laws should be viewed by those people who use them and the broader community.

4.12 As we saw in Chapter 3, while protection must remain an important goal of new guardianship laws, it does not have to be the dominant objective. The Commission believes new guardianship laws that assist people with decision making should be recast in positive terms. These new laws could enable the 'full and effective participation and inclusion in society'[15] of many people with impaired decision-making capacity. They can be seen as enabling laws rather than 'rights denying' ones, especially if the new laws instruct those who assist others to make the decision, whenever possible, that the represented person would have made themselves if they had capacity to do so.

4.13 In the chapters that follow, we describe a range of potential new mechanisms to assist people with decision making. These new mechanisms respond to the fact that, for many people, there is no bright line between capacity and incapacity. The Commission believes that the law can evolve to enable people with some impaired decision-making capacity to participate in decisions that affect them.

1 Submission IP 8 (Office of the Public Advocate) 4.
2 Submission IP 50 (Action for Community Living) 3.
3 See, eg, Submissions IP 3 and 7 (Stephanie Mortimer).
4 See, eg, Submission IP 10 (Gippsland Carers Association) 3–5.
5 Consultation with seniors groups (26 March 2010).
6 Submission IP 27 (Marillac) 1.
7 Consultation with David Green (21 April 2010).
8 Submission IP 1 (Carers Australia (Victoria)) 23.
9 Submission IP 16 (Mark Feigan) 3.
10 Submission IP 23 (Mental Illness Fellowship of Victoria) 2.
11 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 4.
12 See, eg, Submission IP 50 (Action for Community Living) 3.
13 Submission IP 19 (Scope (Vic) Ltd) 7.
14 See Chapter 2 for an overview of the more important of these changes.
15 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 3(c).

# Chapter 4 Structure of New Laws

## INTEGRATION

4.14 Many people who responded to our information paper expressed concern about the complexity of guardianship laws. This response is unsurprising given that the relevant law is spread among three different pieces of legislation—the G&A Act, the *Medical Treatment Act 1988* (Vic) and the *Instruments Act 1958* (Vic). Each of these statutes was introduced at different times, and in response to different calls for change. Together, they provide for seven different types of substitute decision-making mechanisms,[16] which do not always operate harmoniously as they were not designed as parts of an integrated scheme.

4.15 The many ways in which these mechanisms differ, such as the powers and accountability mechanisms of substitute decision makers, are identified throughout this consultation paper.

4.16 The Commission believes that new guardianship laws should provide the community with a fully integrated range of supported and substitute decision-making mechanisms. The particular mechanisms should be designed to form part of one system. In pursuit of this objective, we consider throughout the paper the extent to which:

- the different legislative provisions can be brought under one Act
- the ways in which the roles of different decision makers can be integrated into a coherent framework
- the roles and responsibilities of supported and substitute decision makers can be framed consistently, regardless of how they are appointed, or for what areas of decision making they have responsibility
- supported and substitute decision-making arrangements can be activated in consistent ways, regardless of the nature of the appointment.

## MODERN PRINCIPLES TO GUIDE THE SYSTEM

4.17 The Commission believes that there should be new legislative principles in two important areas: overarching principles to guide all exercises of power, and principles to guide substitute decision makers when making decisions on behalf of another person.

4.18 In Chapter 5 we describe the Commission's proposals for overarching legislative principles. The draft principles, drawn principally from the Convention and the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), emphasise the following:

- respect for dignity of all people
- equality of human rights
- a presumption of capacity
- recognition that incapacity is often decision-specific and time-specific
- the concept of 'substituted judgment'
- an entitlement to assistance in making decisions as independently as possible
- the right to make decisions that other people might disagree with
- the right to communicate in whatever way the person is best able to communicate
- a right to protection from abuse, exploitation and neglect
- support for the right to independent decision making other than to the least extent necessary to ensure personal and social wellbeing.

4.19 In Chapter 17 we discuss decision-making principles. We suggest that substituted judgment should become the paramount principle that guides substitute decision makers.

## FINDING NEW BALANCES

4.20 New guardianship laws will need to strike an appropriate balance between a range of competing needs and considerations. Whenever possible, these balances should be reflected in the overarching legislative principles in order to guide all exercises of discretionary power under the new legislation. Some of the most important balances to be struck are discussed in the following paragraphs.

### Informal and formal arrangements

4.21 The Commission uses 'formal arrangements' to mean decision making by a substitute who is appointed under one of the seven mechanisms now available under Victorian law. A formally appointed substitute decision maker usually has the power to authorise a third person, such as a medical practitioner or a banker, to do things that would be unlawful if performed without consent or other lawful authority. Both a guardian appointed by VCAT and an enduring financial attorney appointed by a person with capacity are examples of formal arrangements. A guardian with appropriate powers may authorise a medical practitioner to perform a surgical procedure on a represented person, while an enduring financial attorney may authorise a bank to pay some of the represented person's money to the medical practitioner who performs that surgical procedure.

4.22 The term 'informal arrangements' refers to making a decision and performing actions in relation to another person without any formal legal authority to do so. Many people act in this way every day. Third parties often 'allow' one person to take actions in relation to another because the actions in question appear to be uncontroversial and in the best interests of the person concerned. Examples include an adult child of an elderly person admitting their parent to a nursing home, or a person's partner doing their banking for them at an automatic teller machine or over the internet.

4.23 The Commission heard many different views about the relative merits of informal and formal arrangements. Some people argued that they prefer to avoid involvement in the formal guardianship system as much as possible, finding it intrusive and restrictive. This is reflected in Scope's comments in relation to supported decision making:

> *At this early stage in its conception, Scope caution against the over formalization of 'supported decision making' through legislation. Scope are 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.*[17]

4.24 Some carers indicated a reluctance to engage with the formal system.[18] Others suggested that formal arrangements are often the only way of ensuring accountability and of safeguarding against abuse. The Australian Bankers' Association raised this issue:

16 See Victorian Law Reform Commission, *Guardianship: Information Paper* (2010) 62–3 for an outline of the different types of appointment.

17 Submission IP 19 (Scope (Vic) Ltd) 17.

18 See, eg, consultations with carers in Hastings (8 April 2010), Gippsland Carers Association (25 May 2010).

> *Bank customers may also put in place informal arrangements with a third party, such as a member of their support network, to assist them with their banking business and financial transactions. While informal arrangements may be preferred by some people, in particular older people that may feel less familiar with using emerging technologies, such arrangements may leave them more vulnerable to exploitation and financial abuse, even by their trusted family member, friend, social worker or other third party.*[19]

4.25 The extent to which the absence of a formally appointed substitute decision maker actually preserves people's freedom to make their own decisions was a matter of considerable debate throughout our consultation process. As we note in Chapter 15, over-reliance on informal arrangements can sometimes mean that service providers become the 'de facto' decision makers. They can exert considerable control over a person's life, with few safeguards to ensure that appropriate decisions are being made. Dr Stephen Judd, the CEO of an aged services provider in New South Wales, referred to this issue in a recent presentation:

> *In your own home you have the right to smoke; the right to have pets; even the right to get fat! You have the right to have sex! And, yet, for far too many older people, they lose their rights as they age and when they start to receive aged care services. They become captive within a controlled environment which dominates them. It is an environment in which they are protectively disciplined—for their own good, for their own health; for the peace of mind of their relative; to pass the scrutinising eye of the regulator, to avoid the complaint from the uptight relative. The result is that they do not belong, they do not feel in control.*[20]

4.26 A formal appointment of a substitute decision maker is not necessarily a restrictive intervention. It can be enabling because it might permit a person to access services and life opportunities they might not otherwise be able to experience because some organisations and professionals insist upon formal consent before providing services.

4.27 The Commission accepts that there is a continuing need for both formal and informal arrangements. As various sectors of the community become more concerned about risk management, however, the need for formal arrangements is likely to increase. Parts 4, 5 and 6 of this paper contain options for both formal and informal arrangements in a way that is intended to ensure an appropriate and workable balance between the two.

### Promoting autonomy and responding to need

4.28 The G&A Act recognises both the importance of individual autonomy as well as the need for people whose decision-making capacity is impaired to receive assistance. For example, the Act contains provisions that require VCAT, when determining whether a person needs a guardian or administrator, to consider whether the person's needs could be met by other means less restrictive of their freedom of decision and action.[21]

4.29 The balancing act required by this legislative direction is challenging. As noted in one submission:

> *As we move forward and plan for the future it is difficult to find the balance between 'protecting the vulnerable and allowing choices & decision making', particularly in the area of 'intellectual' disability.*[22]

4.30 Feedback during our consultation phase indicated broad-ranging views about how well this balance is struck in practice under existing guardianship laws. Views ranged from those who felt the system is paternalistic and over-protective,[23] to those who believed it sometimes fails to recognise need. As one submission noted, 'there is, rightly, a reluctance to take away people's rights and sometimes orders are not made when they need to be'.[24] Another submission argued that failing to see the need for guardianship can arise out of an overzealous adherence to notions of freedom of choice and dignity of risk:

> *While [freedom of choice] is included in the rhetoric of what the writers suggest has become 'disability speak', the reality is that it is a difficult concept to apply to people who are unable to articulate their preferences. As such, it should not be used as a rationale for not granting guardianship.*
>
> *While risks are part of life and this applies equally to persons with a disability, it is important to ensure that the balance does not tilt so far that the person with the disability is put in danger, simply because their choice is seen as being denied if guardianship were to be granted.*[25]

4.31 Others suggested that the balance is reasonably well struck. In its submission, the Southwest Advocacy Association argued:

> *the current emphasis on utilising the least restrictive option and only appointing substitute decision makers as a last resort are principles that must be retained to ensure that peoples' rights and autonomy are protected. SWAA believes that the existing Act strikes an appropriate balance between the protection of people with disabilities who are vulnerable and the importance of upholding their rights, freedoms and dignity. The last thing that SWAA would want to see in terms of reform would be the emergence of more paternalistic guardianship legislation or less emphasis on the pre-eminence of the human rights and the autonomy of people who are already disadvantaged and vulnerable.*[26]

4.32 While our proposals seek to promote decision-making autonomy whenever possible, they also recognise that the decision-making capacity of some people is impaired to such an extent that autonomy, at least in its more conventional sense, is impossible. Nonetheless, by introducing a wider range of decision-making arrangements, the Commission believes that guardianship laws can become a positive means of promoting participation in community life for people whose decision making is impaired, rather than being seen only as a means of restricting people's freedom of decision and action.

## USER-FRIENDLY LAWS

4.33 Responses to our information paper indicated that many people find the current system confusing. Typical of the responses we received on this issue was that of Carers Victoria, who noted in their submission:

> *The overwhelming theme of all our consultations in preparing this submission was one of confusion. The current Guardianship and Administration Act 1986 is poorly understood by most within its orbit. Individuals and professionals that we consulted including solicitors, employees of, and contractors to the Department of Human Services (DHS), members of caring families who have been appointed to act as Guardians or Administrators, all offered competing interpretations of the Act and its operation.*[27]

19 Submission IP 44 (Australian Bankers' Association) 3.

20 Stephen Judd, 'Citizenship and the Erosion of Rights' (Paper presented at HammondCare's 8th Biennial Conference on Dementia, Sydney, 14 June 2010) 14.

21 *Guardianship and Administration Act 1986* (Vic) ss 22(2)(a), 46(2)(a).

22 Submission IP 12 (Katherine Haggarty) 1.

23 Consultation with seniors groups (26 March 2010).

24 Submission IP 23 (Mental Illness Fellowship Victoria) 2.

25 Submission IP 56 (JacksonRyan Partners) 6.

26 Submission IP 5 (Southwest Advocacy Association) 1.

27 Submission IP 1 (Carers Australia (Victoria)) 4.

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4.34 Responses to our information paper suggested that this lack of community understanding of the guardianship system is extremely widespread, including people with disabilities,[28] the medical and health care profession,[29] the police,[30] disability services staff,[31] legal and financial advisors[32] and, of course, the broader community.[33]

4.35 As noted above, this confusion partly arises because guardianship laws span at least three pieces of legislation and provide for seven different types of substitute decision-making appointments. However, the complexity also arises because of the many ways in which people experience impaired capacity and the differing expectations people have about the ability of guardianship laws to respond to their needs.

4.36 There is a clear tension when designing new laws. On the one hand, guardianship laws should be able to respond to the different needs and circumstances of a diverse population. Issues associated with impaired decision-making capacity might vary markedly, depending, among other things, on the nature of a person's disability, their social supports, the sorts of decisions that need to be made and their living arrangements. On the other hand, guardianship laws should be as simple as possible in order to encourage use by people who might be experiencing stress and confusion, and to provide third parties, such as doctors, service providers, and financial institutions, with a clear understanding of who has authority to make particular decisions.

4.37 In Chapter 6, we examine a range of options to make the law more user-friendly. Some of the key changes we propose include steps to integrate the law and reduce its complexity. We also propose:

- using more consistent terminology to describe the different types of appointment
- developing a range of community education programs to help people understand the laws and to use them more appropriately.

## A BROADER RANGE OF DECISION-MAKING ARRANGEMENTS—SUPPORTED DECISION MAKING

4.38 The Commission recognises that people make decisions in very different ways. Many people—not just those with impaired decision-making capacity—invite others to help them make decisions. Laws designed for people with impaired decision-making capacity should reflect, wherever possible, practices followed widely throughout the community. The Commission believes new guardianship laws should offer a range of decision-making arrangements and, in particular, mechanisms that allow for supported decision making.

4.39 While a number of submissions noted that existing law already supports a number of arrangements for people who have limited capacity to make their own decisions and that 'many important supported decision-making initiatives … can happen with no or minimal legislative change',[34] many also argued that the law provides only two options: substitute decision making or independence.[35]

4.40 The growing interest in supported decision making, both domestically and internationally, was strongly reflected in submissions and in our discussions throughout the community. This was typified in comments made by Carers Victoria, People with Disabilities Australia and the Office of the Public Advocate:

*The new Act should enshrine supported decision making within the role of both guardians and administrators … [it] cannot be conceptualised as the right only of those who engage in verbal communication.*[36]

*It ought to give precedence to supported decision-making arrangements over substitute decision-making arrangements. It ought to mandate and actively promote alternatives to substitute decision-making. This would include measures such as recognition of informal support to exercise capacity, recognition of advance directives, and the provision of professional support to persons with disability to assist them to develop the skills and insight to exercise capacity.*[37]

*OPA takes the view that supported decision-making presents some real possibilities for the greater freedom of people with disabilities and for the greater inclusion of support networks in the lives of people with profound disabilities.*[38]

4.41 Some suggested that the greater range of models afforded by supported decision making should be set out clearly in the legislation so that there are explicit options that can be considered before and at tribunal hearings. As noted by the Royal District Nursing Service:

*We suggest the provision of additional assisted decision making legislative options, such as Supported Decision Making and Co-Decision Making, could provide less restrictive options and could decrease the number of VCAT-Guardianship List applications for appointment of guardians and administrators.*[39]

4.42 The Commission proposes a new range of decision-making arrangements that reflect the fluctuating nature of capacity for many people and the different needs of users of guardianship laws. The new decision-making arrangements should encourage participation by people both in decisions that affect them and in the life of the community. The new arrangements should be as fully integrated as possible in order to promote ease of operation.

4.43 The proposed new range of decision-making arrangements would include supported and substituted decision-making mechanisms that people arrange by making their own appointments. VCAT should also be permitted to make both supported and substituted decision-making appointments. New supported decision-making arrangements could permit:

- legal recognition of supporters, which might include a formal right to access information on behalf of the person being supported
- formal co-decision making, whereby decisions would need to be made by both the person with the disability and their supporter for the decision to be valid.

4.44 The different types of supported and substitute decision-making arrangements are discussed in Parts 4 (personal appointments), 5 (VCAT appointments), and 6 (statutory appointments) of this paper.

## A PREFERENCE FOR PERSONAL APPOINTMENTS

4.45 Current law provides a number of means by which a person can create their own assisted decision-making arrangements that usually come into effect when they are no longer able to make decisions for themselves. This is done through the various enduring power appointments provided for under the G&A Act (enduring guardians), the *Medical Treatment Act 1988* (Vic) (medical treatment agent) and the *Instruments Act 1958* (Vic) (enduring power of attorney).

28 See Submission IP 49a (Council on the Ageing) 2. Also noted in consultations with people with acquired brain injuries (3 May 2010) and Self Advocacy Resource Unit (4 May 2010).

29 Submission IP 36 (Royal College of Nursing Australia) 1.

30 Submission IP 12 (Katherine Haggarty) 2.

31 Submission IP 19 (Scope (Vic) Ltd) 8.

32 Submission IP 43 (Victoria Legal Aid) 6.

33 Submission IP 16 (Mark Feigan) 5.

34 Submission IP 8 (Office of the Public Advocate) 24.

35 See, eg, consultations with mental health consumers (7 April 2010), Self Advocacy Resource Unit (4 May 2010) and Gippsland Carers Association (25 May 2010).

36 Submission IP 1 (Carers Australia (Victoria)) 13, 19.

37 Submission IP 28b (People with Disabilities Australia) 21.

38 Submission IP 8 (Office of the Public Advocate) 24.

39 Submission IP 9 (Royal District Nursing Service) 8.

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4.46 Community responses to our information paper suggest that there is still relatively little use of any of these mechanisms throughout the community.[40]

4.47 The Commission accepts the proposition advanced by the Public Advocate that personal appointments provide greater autonomy for a person whose capacity is impaired, because they more clearly reflect the wishes of the person before they lost capacity.

> *The Public Advocate continues to advocate for the benefit of EPAs [Enduring Powers of Attorney] as an effective means by which individuals can retain some control over their affairs in the event of their incapacity, through the assistance of a trusted person.*[41]

4.48 The Commission believes that new guardianship laws should encourage people to make their own personal appointments of supported and substitute decision makers. To encourage greater use, the personal appointments scheme must be as simple and accessible as possible.

### A NEED TO RETAIN TRIBUNAL APPOINTMENTS

4.49 While stressing the value of personal appointments, and the importance of promoting these wherever possible, responses to our information paper overwhelmingly recognised that there will continue to be a place for appointments made by a tribunal. The tribunal was seen as providing the system with independence and objectivity:

> *VCAT provides access to an independent body that can judge the available evidence, is not connected to any service, can identify any conflict of interest, and provides a mediation role where there is a conflict between a person with a disability, families and or services.*[42]

### THE DISTINCTION BETWEEN LIFESTYLE DECISIONS AND FINANCIAL DECISIONS

4.50 Current guardianship law distinguishes between appointments to make personal (or lifestyle) decisions and financial decisions.[43] The reality of most people's lives, however, is that lifestyle and financial decisions are seldom made separately. Financial decisions invariably affect lifestyle, and lifestyle decisions often affect a person's finances.

4.51 The decisions of an administrator can have an enormous impact on a person's lifestyle and, conversely, the decisions of a guardian can have a significant impact on their finances. As noted in the submission for the Office of the Public Advocate:

> *OPA accepts that some administration duties can encroach on guardianship decisions, and vice versa. This can happen, most routinely, when a decision is being made about the sale of a house, which will involve a decision about both financial management (administration) as well as accommodation (guardianship).*[44]

4.52 It is clearly necessary when designing new guardianship laws to consider whether the two areas of decision making should remain separate. Most responses to our information paper did not support any change, perhaps reflecting the continuing relevance of Attorney-General Kennan's observation in 1986, during the second reading speech for the G&A Act, that the qualities needed for an administrator are different from those of a guardian.[45] This issue is discussed in Chapter 12.

## EXPANDING PROVISIONS FOR STATUTORY AUTOMATIC APPOINTMENTS

4.53 Current guardianship laws provide for the automatic appointment of a substitute decision maker—referred to in the G&A Act as a 'person responsible'—to authorise most medical and dental procedures for people who are unable to consent to those procedures themselves.[46]

4.54 The 'person responsible' is legally entitled to perform those functions that a person's 'next of kin' was often informally asked to undertake in the past when health professionals sought approval to carry out procedures for a person who was unable to consent. The 'person responsible' is the first person who is 'reasonably available and willing' from a list in the G&A Act.[47] The list comprises:

- an agent with medical power of attorney
- a person appointed by VCAT to make the decision
- a VCAT appointed guardian with decision-making powers in relation to medical treatment
- an enduring guardian with decision-making powers in relation to medical treatment
- a person appointed in some other written way by the patient
- the patient's spouse or domestic partner
- their primary carer
- their nearest relative.[48]

4.55 The Commission has considered how this scheme might be improved and whether this system of statutory automatic appointments should be extended to areas beyond medical and dental treatment.

4.56 Many complex issues arise when considering whether it is desirable to extend the range of matters that a person with an automatic statutory appointment can decide and authorise on behalf of a person who is unable to do so themselves. On the one hand, extending the range of matters that an automatic statutory appointee can authorise would promote the rule of law because it would overcome the current reliance on informal arrangements in some important areas. It would also overcome the stress and expense that may be involved for people who seek a formal guardianship or administration appointment from VCAT. On the other hand, however, the automatic nature of statutory appointments means that a person's suitability to be the 'person responsible' for another is not independently evaluated. Nor is there any effective oversight of their decisions.

4.57 In Chapter 15, we discuss the option of extending the automatic statutory appointment scheme to permit the 'person responsible' to authorise the admission of a person without the capacity to make decisions about their living arrangements to a residential facility in some circumstances. Additional safeguards would be required in order to ensure that the power is used responsibly. This proposal and the additional safeguards are discussed in Chapter 13.

40 See, eg, consultations with Mental Health Legal Centre (7 April 2010) and Mildura Principal Aged Care (28 April 2010); Submission IP 22 (Epworth Foundation) 1.

41 Submission IP 8 (Office of the Public Advocate) 38.

42 Submission IP 39 (Aged Care Assessment Services of Victoria) 2.

43 The provisions for tribunal appointed personal and financial decision makers are in parts 4 and 5 of the G&A Act respectively. Provisions for personal appointments are shared between the G&A Act (lifestyle decisions), Instruments Act (financial decisions) and the Medical Treatment Act (medical treatment decisions).

44 Submission IP 8 (Office of the Public Advocate) 20.

45 Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 559 (J H Kennan, Attorney-General).

46 *Guardianship and Administration Act 1986* (Vic) pt 4A.

47 Ibid s 37.

48 Ibid s 37(1).

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## IMPROVED SAFEGUARDS AND ACCOUNTABILITY

4.58 Any system of substitute decision making requires proper accountability of members. As noted by the Victorian Equal Opportunity and Human Rights Commission, 'any regime that permits another person to influence or determine critical life issues for another requires significant safeguards'.[49]

4.59 The checks and balances in current guardianship laws vary considerably, depending upon the nature of the appointment.[50] There appears to be widespread community concern that some substitute decision makers abuse their power. While the actual extent of abuse is unknown and unlikely to ever be detected, it is important that members of the community have faith in the integrity of substitute decision-making processes and feel confident that abuses of power are both detectable and rare.

4.60 In Part 7 we consider the responsibilities of decision makers and propose options for reform. The Commission believes that accountability requirements should be more consistent across different types of appointment, particularly between tribunal and personal appointments. We propose a range of reforms relating to:

- the monitoring of appointments
- the obligations of appointees to make declarations regarding compliance with their legal duties
- reporting requirements
- the consequences of non-compliance.

### A stronger role for the Public Advocate

4.61 The Commission proposes that the Public Advocate should undertake or supervise many of the steps designed to strengthen safeguards. A stronger supervisory, regulatory and investigative role fits well with the Public Advocate's existing responsibilities to protect and promote the rights of people with disabilities.

4.62 Some of the functions and powers that the Public Advocate could be given include:

- extending the Public Advocate's investigatory powers to include matters where there is an allegation of abuse, neglect or exploitation of people with impaired decision-making capacity, regardless of whether this is in the context of a guardianship application
- giving the Public Advocate the power to conduct random audits of substitute and supported decision-making arrangements
- giving the Public Advocate the power to take civil penalty proceedings in some circumstances where obligations under guardianship laws are not met.

4.63 In Chapter 20 we discuss these new functions for the Public Advocate in more detail, but also stress the importance of complementing them with an enhanced community education and training role, including the training of substitute decision makers, supporters, and co-decision makers to promote understanding of their statutory responsibilities.

### A more accessible tribunal

4.64 Despite the widely held view that appointments by an inexpensive and reasonably accessible tribunal have been a positive part of Victoria's guardianship laws, some organisations and people raised concerns about the way in which VCAT deals with guardianship matters.

4.65 In Chapter 21 we consider how VCAT processes and arrangements could be improved to make the guardianship process more accessible and user-friendly. We describe important developments in other parts of the legal system and consider how improvements could be made to pre-hearing processes, confidentiality issues, procedural issues and the way guardianship matters are heard. We also discuss the attendance of the represented person at hearings, their legal representation and training for VCAT members.

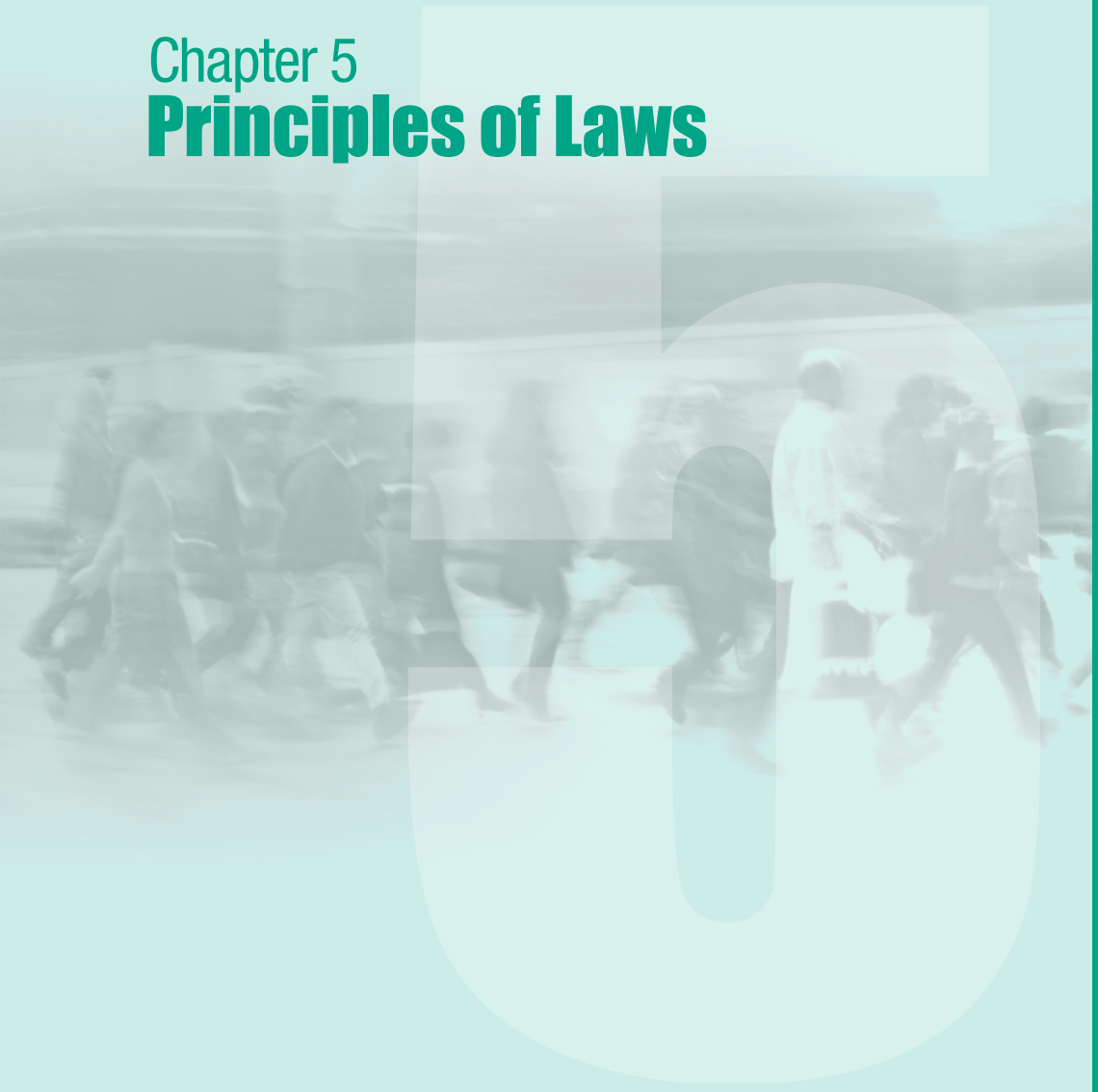
**Question 1** Do you have any general comments about the matters identified by the Commission as influencing the need for change? Are there any other important matters that should affect the content of future guardianship laws?

49 Submission IP 37 (Victorian Equal Opportunity and Human Rights Commission) 6.

50 See Chapter 19 for a general explanation of the current law on these mechanisms.

Chapter 5

# Principles of Laws



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# Chapter 5 Principles of Laws

## INTRODUCTION

5.1 Modern legislation often commences with a statement of principles. These principles serve two broad purposes: they provide parliament with an opportunity to highlight policies the legislation seeks to implement and they provide guidance to those who exercise power under the legislation.

5.2 Because of its fundamental importance in a community that encourages both autonomy and beneficence, guardianship legislation should contain principles that clearly explain the values upon which the laws are based and that guide people—such as tribunal members, the Public Advocate, State Trustees, and private guardians and administrators—when interpreting the law and exercising power over the lives of others.

5.3 In this chapter, we consider the overarching principles that could be included in new guardianship legislation. In Chapter 17 we consider more detailed decision-making principles to guide all substitute decision makers.

## CURRENT LAW

### PRINCIPLES OF THE *GUARDIANSHIP AND ADMINISTRATION ACT 1986* (VIC)

5.4 Section 1 of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) describes the principal objective of the Act as:

> *to enable persons with a disability to have a guardian or administrator appointed when they need a guardian or administrator.*[1]

5.5 In section 4, the 'objects' of the Act are further described as:

- to appoint a Public Advocate
- to enable the making of guardianship and administration orders
- to ensure people with a disability and represented persons are informed of and make use of the Act
- to provide for the appointment of enduring guardians
- to provide for consent to special procedures, medical research procedures and medical and dental treatment on behalf of persons incapable of giving consent
- to provide for the registration of interstate guardianship and administration orders.[2]

5.6 The Act also contains three core principles that provide a framework for use when invoking and exercising the substitute decision-making mechanisms established in the Act. They are that:

- The means that is **least restrictive** of a person's freedom of decision and action as is possible in the circumstances is adopted.
- The **best interests** of a person with a disability are promoted.
- The **wishes** of a person with a disability are, wherever possible, given effect to.[3]

5.7 These principles apply to 'every function, power, authority, discretion, jurisdiction and duty conferred or imposed' by the G&A Act. However, they are not a comprehensive statement of principles that underpin the Act; others emerge from some of the substantive provisions in the Act.

5.8 While the three core principles apply to all decisions made under the G&A Act, the 'least restrictive' principle seems to be most commonly associated with the decision to appoint a substitute decision maker, while the 'wishes of the person' and their 'best interests' are primary considerations when a substitute decision maker exercises their powers. However, it appears that guardians and administrators regularly consider whether they can make decisions that 'least restrict' the person's freedom, and VCAT considers a person's wishes and best interests when making an appointment.[4]

## APPOINTMENT OF SUBSTITUTE DECISION MAKERS

5.9 The three statutory criteria for the appointment of a guardian or an administrator are:

- the person has a disability
- due to that disability, the person is unable to make reasonable judgments in relation to certain personal or financial matters
- the person is in need of a guardian or administrator.[5]

### 'Least restrictive' principle

5.10 In determining whether there is a 'need' to appoint a guardian or an administrator,[6] VCAT must consider 'whether the needs of the person … could be met by other means less restrictive of the person's freedom of decision and action'.[7] If VCAT decides to make a guardianship or administration order, this order must also be 'the least restrictive of that person's freedom of decision and action as is possible in the circumstances'.[8]

5.11 Although not explicitly stated in the G&A Act, it is generally accepted that the principle of 'least restrictive' means that both guardianship and administration should be a last resort, and less formal arrangements should be preserved where they are working.[9]

5.12 Reliance on informal arrangements appears to be declining. This is probably partly due to a more risk-averse culture in the service system, with service providers becoming more reluctant to rely on authorisations given by people who are not guardians or administrators. Further, the assumption that substitute decision making is always a more restrictive response than informal arrangements is being questioned. Informal arrangements sometimes allow service providers to act as de facto guardians with no accountability or transparency. As Barbara Carter suggests, in some circumstances the appointment of a guardian or an administrator

> *may free a person from undue influence or coercion, from the exploitation of others and create a legal space in which the individual can flourish within their family and wider community.*[10]

### Best interests

5.13 In addition to determining whether the three statutory criteria for the appointment of a guardian or administrator are established, VCAT must also be satisfied that an appointment would be in the person's best interests.[11] Similarly, when deciding whether a person is eligible to be a guardian or administrator, VCAT must be satisfied that that person will act in the best interests of the represented person.[12]

1 *Guardianship and Administration Act 1986* (Vic) s 1.
2 Ibid s 4(1).
3 Ibid s 4(2).
4 See ibid ss 22(2)(ab), 22(3), 46(2)(b), 46(3).
5 See ibid ss 22(1), 46(1).
6 See ibid ss 22(1)(c), 46(1)(a)(iii). The G&A Act defines a person with a disability as someone with an intellectual impairment, mental disorder, brain injury, physical disability or dementia:, *Guardianship and Administration Act 1986* (Vic) s 3. We discuss the criteria for VCAT appointments in more detail in Chapter 10.
7 Ibid ss 22(2)(a), 46(2)(a).
8 Ibid ss 22(5), 46(4).
9 This was certainly the intention of the Cocks Committee Report that led to the G&A Act. See Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 19.
10 Barbara Carter, Office of the Public Advocate (Victoria), *Principles and Values in Victorian Guardianship Legislation* (2009) 13.
11 *Guardianship and Administration Act 1986* (Vic) ss 22(3), 46(3).
12 Ibid ss 23(1)(a), 47(1)(c)(i).

# Chapter 5 Principles of Laws

### Wishes of the person

5.14 When deciding whether there is a need for a guardian or administrator, and who the guardian or administrator should be, VCAT must consider, among other things, the wishes of the person 'so far as they can be ascertained'.[13]

### Preserving existing family relationships

5.15 VCAT must consider the 'desirability' of preserving existing family relationships when deciding whether there is a need to appoint a guardian (but not an administrator),[14] and who is suitable for the role.[15] This preference for family members is a principle that Terry Carney and David Tait have argued has historical roots in Roman and French civil law,[16] which sought to assert the primacy of the family group 'both against the state and against the power of the father'.[17]

### Avoiding conflict of interest

5.16 When appointing a guardian or administrator, VCAT must be satisfied that the person appointed is not in a position where their interests conflict with those of the proposed represented person.[18] However, a parent or nearest relative is not considered to have a conflict of interest merely because of their relationship to the proposed represented person.[19]

## EXERCISING POWERS

### Best interests

5.17 Acting in the best interests of a represented person is the predominant guiding consideration for substitute decision makers when exercising their powers under the G&A Act. Guardians and administrators must act in the 'best interests' of the represented person.[20] Similarly, in determining whether to consent to medical or dental treatment, the 'person responsible' must act in the 'best interests' of the patient.[21]

5.18 While 'best interests' is not defined in the G&A Act, the legislation provides some guidance about what it means for a substitute decision maker to act in the best interests of a person. This guidance is different for guardians[22] and administrators,[23] and different again for medical treatment decisions[24] and medical research decisions.[25]

5.19 Both guardians and administrators are required to:

- encourage and assist the represented person to become capable of looking after their own affairs
- consult with the represented person and take into account their wishes as far as possible.[26]

5.20 Guardians (but not administrators) are also explicitly required to:

- act as an advocate for the represented person
- encourage the represented person to participate in the life of the community
- protect the represented person from neglect, abuse or exploitation.[27]

5.21 The person responsible must take into account the following matters when determining whether it would be in the patient's best interests to consent to medical or dental treatment:

- the wishes of the patient
- the wishes of any nearest relative or any other family member
- the consequences to the patient if the treatment is not carried out

- any alternative treatment available
- the nature and degree of any significant risks associated with the treatment or any alternative treatment
- whether the treatment is only to promote and maintain the health and wellbeing of the patient.[28]

5.22 The G&A Act also guides the person responsible on whether a medical research procedure would be contrary to the patient's best interests. The matters to consider are similar to those that are relevant when making medical treatment decisions.[29]

### Wishes of the person

5.23 One of the three core principles in the G&A Act is that 'the wishes of a person with a disability are wherever possible given effect to'.[30] However, fulfilling a person's wishes is just one of a number of matters that a substitute decision maker must consider when deciding whether a proposed decision is in a person's best interests.

5.24 In acting in the best interests of a person, guardians and administrators are required to act 'in consultation with the represented person, taking into account as far as possible, the wishes of the represented person'.[31]

5.25 For medical decisions and medical research decisions, 'the wishes of the patient, so far as they can be ascertained' must be considered in determining their best interests.[32]

## COMMUNITY RESPONSES TO CURRENT PRINCIPLES

5.26 Community responses to the current principles in the G&A Act are discussed below, together with suggestions the Commission received for reform.

5.27 'Best interests' and 'wishes' were considered mostly in relation to the decisions of substitute decision makers, while 'least restrictive' was considered in the context of the decision to appoint a guardian or administrator.

### APPOINTMENT OF SUBSTITUTE DECISION MAKERS

#### 'Least restrictive' principle

5.28 The principle of adopting 'the means which are least restrictive of a person's freedom of decision and action as is possible in the circumstances' was generally supported in the community responses we received. However, there was a strong sense that this principle is not always put into practice. It was argued that guardians and administrators are often appointed in situations where less restrictive alternatives are available.[33]

5.29 It was suggested that this often occurs because there is a lack of alternative support services available, and where alternative supports are available, there is a lack of awareness that they exist.[34] For example, a number of groups suggested that administrators are often appointed when alternatives such as Centrepay or financial counselling would be sufficient.[35] It was also argued that an option that is less restrictive should not be ruled out 'merely because it is less convenient or more costly'.[36]

5.30 The Australian and New Zealand Society for Geriatric Medicine argued that there needs to be further consideration of what is meant by 'least restrictive', and less restrictive alternatives should be explicitly outlined.[37]

13 Ibid ss 22(2)(ab), 46(2)(b).
14 Ibid s 22(2)(c).
15 Ibid s 23(2)(b).
16 Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (The Federation Press, 1997) 29.
17 Ibid 30.
18 *Guardianship and Administration Act 1986* (Vic) ss 23(1)(b), 47(1)(c)(ii).
19 Ibid ss 23(3), 47(3).
20 Ibid ss 28(1), 49(1).
21 Ibid s 42H(2). See also s 38(1).
22 Ibid s 28(2).
23 Ibid s 49(2).
24 Ibid s 38(1).
25 Ibid s 42U(1).
26 Ibid ss 28(2)(c), (e), 49(2).
27 Ibid s 28(2)(a), (b), (d).
28 Ibid s 38(1).
29 Ibid s 42U(1). The major difference between medical research procedures and medical treatment is that for medical research procedures, the availability of alternative treatment, and whether the procedure is only to promote the health and wellbeing of the patient, are not required considerations.
30 *Guardianship and Administration Act 1986* (Vic) s 4(2)(c),
31 Ibid ss 28(2)(e), 49(2)(b).
32 Ibid ss 38(1)(a), 42U(1)(a).
33 See, eg, consultation with seniors groups (26 March 2010).
34 Consultation with Villamanta Disability Rights Legal Service (19 April 2010); Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 16.
35 Consultation with mental health consumers (7 April 2010).
36 Submission IP 28a (People with Disability Australia) 43.
37 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 3.

# Principles of Laws

5.31 The Public Advocate suggested that the 'least restrictive' principle could be replaced by the principle that 'any limitations on the rights and freedoms of the person with a disability are reasonable, proportionate and justified'.[38] The Public Advocate questioned the assumption that guardianship is always 'restrictive', and argued that by giving primacy to 'freedom of decision and action', the G&A Act can devalue other freedoms and rights.[39]

5.32 One submission questioned whether formal guardianship should be considered 'restrictive' in a context where 'de facto guardians' in the form of service providers are already making decisions for the person in their day-to-day life.[40]

## EXERCISE OF POWERS

### Best interests

5.33 Community responses to the principle of 'best interests' were mixed. Responses generally adopted one of the following positions:

- 'Best interests' should be retained as it currently is in the G&A Act.
- 'Best interests' should be retained, but the G&A Act should define more clearly what this means and how the principle should be put into practice.
- 'Best interests' should be replaced with a more modern term.

5.34 The majority of responses fell into the second category; accepting the ongoing usefulness of 'best interests', but arguing that the G&A Act provides little guidance about how best interests should be determined in practice. It was suggested that because the current principle of best interests is inadequately defined, substitute decision makers can be prone to subjective value judgments about what is in another person's best interests.[41] A number of groups argued that clearer guidelines around the application of the 'best interests' principle are needed.[42]

5.35 The current 'best interests' provisions in sections 28(2) and 49(2) of the G&A Act were criticised for merely describing the roles without providing guardians and administrators with sufficient assistance about how to make difficult decisions.[43] A number of submissions and consultations suggested the definition of 'best interests' in section 4 of the United Kingdom's *Mental Capacity Act 2005* (UK) as a possible model to adopt in Victoria.[44] The Law Institute of Victoria was generally supportive of more detailed guidance for substitute decision makers, but cautioned against any guidance that would be 'overly complex or burdensome on guardians and administrators', noting that these appointments are often family members.[45]

5.36 Some groups suggested that the phrase 'best interests' should be removed or changed.[46] The Public Advocate argued that the phrase has taken on negative connotations over time and 'has come to constitute somewhat of a euphemism for overriding free will'.[47] It has also been suggested that best interests is a concept more strongly understood in relation to the rights of children, rather than adults with disabilities.[48] The Public Advocate has suggested that the promotion of 'personal and social wellbeing' might replace 'best interests' in new laws. This approach was supported by Scope.[49] The Law Institute of Victoria, while supporting the retention of 'best interests', argued that any new term should be based around 'benefit to the person' or 'benefit to their wellbeing'.[50]

## Wishes of the person

5.37 When considering the principle of wishes, community responses ranged from making the wishes of the person paramount,[51] to requiring decision makers to follow the person's wishes to a reasonable extent only.[52] The majority of responses emphasised that every effort should be made to discover the person's wishes, and it was generally felt that these wishes should be followed unless there are compelling reasons not to do so. A significant number of people told the Commission that this does not always happen in practice.[53]

5.38 A number of groups pointed out that discovering the wishes of a person can sometimes be very challenging. It was also suggested that knowledge of the person and their history is crucial to understanding their wishes. This was particularly apparent in our consultations with seniors' advocates, and people who had experienced acquired brain injuries.[54]

5.39 Some people commented on the relationship between 'best interests' and 'wishes' in section 4(2) of the G&A Act. Former Public Advocate Julian Gardner was critical of the separation of these two principles in the 'objects' of the Act, arguing that it suggests there is necessarily a difference between a person's wishes and their best interests.[55] Another former Public Advocate, David Green, argued that substitute decision making should always begin with the person's stated wishes, which must be considered alongside an assessment of the person's best interests.[56] The current Public Advocate has proposed that 'wishes' should no longer be a separate object of the Act, but should remain a key subsidiary principle of the 'personal and social wellbeing' of the person.[57]

5.40 A strong theme to emerge from consultations with people with disabilities was that they wanted to be consulted and involved in decision-making processes. If it was necessary for someone else to make decisions on their behalf, they wanted the reasons for these decisions to be explained to them in a way they could understand.[58]

38 Carter, above n 10, 11–14.

39 Ibid 13.

40 Submission IP 3 (Stephanie Mortimer) 1.

41 See, eg, consultations with Disability Advocacy Resource Unit (5 May 2010), Mental Health Legal Centre (7 April 2010); Submissions IP 5 (Southwest Advocacy Association) 5, IP 47 (Law Institute of Victoria) 22, IP 50 (Action for Community Living) 6.

42 See, eg, consultation with Disability Advocacy Resource Unit (5 May 2010); Submissions IP 8 (Public Advocate) 18, IP 20 (Dying with Dignity) 1, IP 32 (NSW Guardianship Tribunal) 2, IP 47 (Law Institute of Victoria) 22.

43 Consultation with Julian Gardner (26 March 2010).

44 Consultation with people with disabilities and advocates in Morwell (29 March 2010); Submission IP 47 (Law Institute of Victoria) 22. Section 4 of the *Mental Capacity Act* (UK) provides more detailed guidance around what it means to act in a person's best interests, including not making assumptions based on the person's age, appearance, condition or behaviour, considering the likelihood the person will regain capacity, encouraging the person to participate in decision making, and considering the person's past and presently expressed wishes, beliefs and values, and factors that the person would have been likely to consider if they were able to: see *Mental Capacity Act 2005* (UK) c 9, s 4.

45 Submission IP 47 (Law Institute of Victoria) 22.

46 Submissions IP 7 (Stephanie Mortimer) 2, IP 8 (Office of the Public Advocate) 17–18, IP 19 (Scope (Vic) Ltd) 12–14. Scope argued that the notion of best interests remains a useful and appropriate guide, but the actual term 'best interests' has overly paternalistic connotations.

47 Submission IP 8 (Office of the Public Advocate) 17. See also Carter, above n 10, 14.

48 Consultation with Julian Gardner (26 March 2010).

49 Submissions IP 8 (Office of the Public Advocate) 17–18, IP 19 (Scope (Vic) Ltd) 14.

50 Submission IP 47 (Law Institute of Victoria) 22.

51 Consultation with Julian Gardner (26 March 2010).

52 Submission IP 11 (Tony and Heather Tregale) 3.

53 See, eg, consultations with Respecting Patient Choices (6 April 2010), people with disabilities and service providers in Morwell (29 March 2010), Disability Advocacy Resource Unit (5 May 2010); Submission IP 18 (BMC Ministries) 3.

54 Consultations with seniors groups (26 March 2010), people with acquired brain injuries (3 May 2010).

55 Consultation with Julian Gardner (26 March 2010).

56 Consultation with David Green (21 April 2010).

57 Carter, above n 10, 15.

58 Consultations with people with acquired brain injuries (3 May 2010), mental health consumers (7 April 2010), VALID Western Region Client Network (2 March 2010), VALID Northern Region Client Network (3 March 2010), Self Advocacy Resource Unit (4 May 2010).

# Chapter 5 Principles of Laws

## TOWARDS NEW GENERAL PRINCIPLES

5.41 While the core principles of the G&A Act have served Victoria well over the past 24 years, the Commission believes that the principles should be modernised.

5.42 Several sources have informed the Commission's thinking about the principles to underpin new guardianship laws. Those sources include: the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention), the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter), developments in other jurisdictions and community responses to our information paper. The values expressed in the Convention, which emphasises the dignity and autonomy of people with disabilities, and promotes their participation and inclusion in society, should be at the forefront of new principles.

### *CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES*

5.43 The Convention provides an important framework within which to build new guardianship laws.

5.44 The Convention's overriding stated purpose is to

> *promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*[59]

5.45 The Convention also outlines its general principles, which include:

- respect for inherent dignity, individual autonomy, the freedom to make one's own choices, and independence of persons
- non-discrimination
- full and effective participation and inclusion in society
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- equality of opportunity
- accessibility
- equality between men and women
- respect for the evolving capacities of children with disabilities and respect for the right of children to preserve their identities.[60]

5.46 The Convention strongly emphasises the inherent dignity of people with disabilities, and their right to participate in society on an equal basis with others.[61]

5.47 Article 12 of the Convention has direct relevance to guardianship laws. It recognises the right of people with disabilities to be recognised as people before the law, their right to enjoy legal capacity on an equal basis with others, and their right to the support and assistance necessary for them to exercise their legal capacity.[62] Importantly, the Convention requires that this support:

- respects the rights, will and preferences of the person
- is free of conflict of interest and undue influence
- is proportional and tailored to the person's circumstances
- applies for the shortest time possible
- is subject to regular review by a competent, independent and impartial authority.[63]

5.48 Article 12 has been interpreted as marking a change in approach towards people with disabilities in decisions that affect their lives, and in placing an increased obligation on states to provide decision-making support. Some have gone further, arguing for an interpretation of Article 12 that prohibits substitute decision making, and focuses solely on the promotion of supported decision making.[64] We discuss supported decision-making mechanisms in more detail in Chapter 7.

5.49 The concept of 'participation', which is a practical way of fulfilling the overarching goals of dignity and equality, is emphasised throughout the Convention.[65] The Convention recognises that 'persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world' and obliges states parties to take action to ensure the full and effective participation of people with disabilities in society.[66]

5.50 Article 9 also stresses the notion of participation and accessibility, requiring states to

> *take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.*[67]

5.51 Participation is articulated as both a principle and a right under the Convention,[68] and the Commission sees an increased focus on the participation of people with disabilities in decisions affecting their lives as a key component of reforms to guardianship laws.

## YOKOHAMA DECLARATION OF WORLD CONGRESS ON ADULT GUARDIANSHIP LAW

5.52 The 2010 World Congress on Adult Guardianship Law in Japan drew together some of the leading international experts in adult guardianship law. The declaration made by participants strongly affirmed the guiding principles and provisions of the Convention, and emphasised some of the core principles that participants believed should underpin adult guardianship laws.

5.53 The declaration supported:

- a legal presumption of capacity
- an acknowledgment that capacity is decision and time specific
- the principle that a person should only be found as unable to make a decision if all practical measures to help the person to make the decision have been tried without success.[69]

5.54 In relation to the conduct of guardians, some of the key principles and responsibilities supported by the Yokohama declaration are to:

- act with due care, honesty and in the best interests of the person, and to respect and follow the adult's wishes, values and beliefs to the greatest possible extent
- protect the adult from ill treatment, abuse, neglect and exploitation
- respect and promote the adult's human rights and legal entitlements
- limit interference in the adult's life to the greatest possible extent by choosing the least intrusive, least restrictive, and most normalising course of action
- involve the adult in all decision-making processes to the greatest extent possible
- encourage participation and help the adult to act independently in those areas where they are able to.[70]

59 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1 ('*Convention on the Rights of Persons with Disabilities*').

60 Ibid art 3.

61 See, eg, ibid arts 1, 3, 9, 12, 19.

62 Ibid arts 12(1)–(3).

63 Ibid art 12(4).

64 See, eg, Tina Minkowitz, 'Abolishing Mental Health Laws to Comply with CRPD' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* 151, 156–9.

65 *Convention on the Rights of Persons with Disabilities* arts 1, 3(c), 5(3), 9(1), 12(3), 29, 30,

66 Ibid preamble (k), 3(c), 4.

67 Ibid art 9.

68 United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) 16.

69 'Yokohama Declaration', World Congress on Adult Guardianship Law 2010, Yokohama, 4 October 2010, available at <http://www.international-guardianship.com/yokohama-declaration.htm>.

70 Ibid.

# Chapter 5 Principles of Laws

## CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

5.55 Victoria is one of two Australian jurisdictions with a charter of rights.[71] The Charter came into full operation on 1 January 2008.[72] The Charter gives statutory recognition to 20 civil and political rights and freedoms primarily derived from the *International Covenant on Civil and Political Rights* (ICCPR).[73] The purpose of the Charter, discussed in detail in Chapter 3, is to protect and promote the human rights of all people in Victoria.[74] The Charter provides that legislation is to be developed and interpreted compatibly with human rights.[75]

## DEVELOPMENTS IN OTHER VICTORIAN LAWS

5.56 In the 25 years since the G&A Act was enacted, there have been developments in other Victorian laws that affect people with a disability. Most notable among these have been the *Disability Act 2006* (Vic), and the more recent reviews into powers of attorney, conducted by the Victorian Parliament Law Reform Committee. The Victorian Department of Health has also recently reviewed the *Mental Health Act 1986* (Vic).

### Disability Act

5.57 The *Disability Act 2006* (Vic) (Disability Act) provides a comprehensive set of principles that apply to the provision of services to people with disabilities in Victoria, other than disabilities related solely to mental disorders and age-related disabilities. The Disability Act contains an extensive statement of principles. The core principles emphasise that people with disabilities have the same rights and responsibilities as other members of society. These include rights to:

- be respected for their human worth and dignity as individuals
- live free from abuse, neglect or exploitation
- realise their individual capacity for physical, social, emotional and intellectual development
- exercise control over their own lives
- participate actively in the decisions that affect their lives, and have information and support where necessary, to enable this to occur
- access information and communicate in a manner appropriate to their communication and cultural needs
- access services that support their quality of life.[76]

5.58 The Disability Act also includes important principles about developing service plans for people with disabilities.[77]

5.59 Disability service principles are an important complement to guardianship and administration laws[78] and could inform principles around supported decision making in new guardianship laws.

### Victorian Parliament Law Reform Committee *Inquiry into Powers of Attorney*

5.60 The Victorian Parliament Law Reform Committee's review of the enduring powers of attorney (financial) and enduring powers of guardianship considered the 'founding principles' that should govern all aspects of a new 'Powers of Attorney Act', as well as more specific principles in relation to capacity and decision.

5.61 The Committee argued that the Convention should be at the core of powers of attorney legislation, and recommended two foundational principles. These are that people must exercise their powers and functions in relation to a person with impaired capacity:

- in a way that is as least restrictive of the person's freedom of decision and action as is possible in the circumstances
- so that the person is provided with appropriate support to allow them to exercise their legal capacity to the maximum extent possible.[79]

5.62 The Committee recommended a legislative presumption of capacity, as well as the inclusion of definitions of capacity and incapacity.[80]

5.63 In relation to decision making by people appointed under powers of attorney, the Committee recommended that:

- The starting point for any decision making should be the person's stated wishes.
- People should be encouraged to participate in decision making, even when they have impaired decision-making capacity.
- Representatives must act in a way that promotes the personal and social wellbeing of the person.[81]

5.64 In defining the 'personal and social wellbeing of the person', the Committee recommended the following factors should be included:

- recognising the person's role as a valued member of society
- taking into account the person's existing supportive relationships, values and cultural and linguistic environment
- recognising the person's right to confidentiality of information.[82]

### Exposure Draft Mental Health Bill 2010

5.65 The former government released an Exposure Draft Mental Health Bill in October 2010.

5.66 Some of the Bill's key principles include:

- a statement that people with a mental illness have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights and responsibilities[83]
- a presumption that a person has capacity to make decisions relating to their mental illness if they appear to be capable of understanding the nature and effect of the decision, can make the decision freely and voluntarily and can communicate the decision in a way which is understandable to another person[84]
- a requirement that a person with a mental illness must be consulted in the making of decisions about their mental illness, be supported to make their own decisions, be provided with the support and information necessary to exercise their rights under the Act, and have their preferences and wishes considered in the making of decisions that affect them[85]
- a principle that decisions made and treatment provided under the Act be appropriate to the specific needs of the person[86]
- a requirement that any advice, notice, order or other information provided under the Act be explained to the person with the mental illness to the maximum extent possible, in the language, mode of communication and terms that the person is most likely to understand.[87]

71 The other is the Australian Capital Territory. See the *Human Rights Act 2004* (ACT).

72 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2.

73 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1.

74 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(1). 'Person' is defined in s 3(1) to mean a human being, and 'child' means a person under the age of 18 years.

75 *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 3.

76 *Disability Act 2006* (Vic) s 5.

77 Ibid s 52(2).

78 Robin Creyke, Department of Human Services and Health, Aged and Community Care Division, *Who Can Decide? Legal Decision Making For Others* (Canberra: Australian Government Publishing Service, 1996) 44–5.

79 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 41–2.

80 Ibid 109–113.

81 Ibid 172–4.

82 Ibid 174.

83 Department of Health (Victoria), Exposure Draft Mental Health Bill 2010 (Vic) cl 7(1).

84 Ibid cl 3(2), 7(2).

85 Ibid cl 7(4).

86 Ibid cl 8.

87 Ibid cl 9(1).

# Chapter 5 Principles of Laws

## LAWS IN OTHER AUSTRALIAN STATES

5.67 Victoria's G&A Act was one of the earliest modern guardianship laws. Every Australian state and territory now has guardianship laws that are broadly similar to the Victorian G&A Act.[88] These Acts have been introduced over the past quarter century, with the Queensland *Guardianship and Administration Act 2000* (Qld) the most recent. None of these laws has been comprehensively amended since Australia ratified the Convention in 2008, though guardianship laws in Queensland and New South Wales have recently been the subject of extensive reviews.[89]

5.68 The three core principles of the G&A Act—'best interests', 'least restrictive' and 'wishes'—are included within the guardianship laws in all Australian states and territories, although the wording and emphasis sometimes differs.[90]

5.69 Laws in other Australian jurisdictions also contain additional principles to those in the G&A Act, particularly Queensland's *Guardianship and Administration Act 2000* (Qld).

### Capacity

5.70 Although the common law presumes that adults have the capacity to make decisions that affect their own lives unless there is evidence to the contrary, this important presumption has not been included in the G&A Act.[91] Queensland and Western Australian guardianship laws have explicitly included a presumption of capacity in their guardianship laws.[92] The New South Wales Parliament Legislative Council, Standing Committee on Social Issues recently recommended that a presumption of capacity should be included in New South Wales guardianship laws.[93] The Committee argued that an explicit presumption would facilitate 'domain specific' substitute decision-making arrangements, and would be consistent with the 'least restrictive' principle, assisted decision making, and the requirements of the Convention.[94]

5.71 ACT guardianship laws require that a person should not be found to lack capacity merely because they are eccentric, have particular political or religious affiliation or sexual preferences, engage in illegal or immoral conduct, or take drugs or consume alcohol.[95]

### Substituted judgment—putting yourself in the shoes of the represented person

5.72 'Substituted judgment' is an approach to substituted decision making that requires the decision maker to try, as far as possible, to make the decision the represented person would have made if they were able to do so themselves. This is the paramount consideration for decisions made under South Australia's guardianship laws.[96] It is also an important consideration in Queensland guardianship laws,[97] and for decisions by attorneys in the ACT.[98] Although it is not explicitly required in the Victorian G&A Act, the Victorian Public Advocate sees 'substituted judgment' as a key guiding principle for decision making.[99]

### History of the person

5.73 The idea of using the history of the person to guide decision making is related to the notion of substituted judgment. The G&A Act requires substitute decision makers to consider the 'wishes of the person'[100] but does not indicate whether this only means the wishes the person currently expresses, or also includes the person's history, and their known views, beliefs and values.

5.74 As discussed above, South Australia, Queensland and the ACT (for attorneys) require the history and values of the person to be considered for decisions made by using 'substituted judgment'. Western Australia requires wishes to be considered 'as expressed, in whatever manner, or as gathered from the person's previous actions'.[101]

5.75 We discuss decision-making principles for substitute decision makers in Chapter 17. In that chapter, we propose new laws that have substituted judgment as the paramount principle for substitute decision making. We also consider what principles should apply to supported decision makers.

## Consultation with carers

5.76 The ACT explicitly requires decision makers to consult with a person's carers before making a decision.[102] This is not a requirement in Victoria, although 'the wishes of any nearest relative or any other family members of the patient' must be taken into account for medical decisions[103] and in deciding whether a guardian (but not an administrator) is needed.[104]

## Maintaining existing relationships

5.77 In Victoria, the importance of preserving existing family relationships must be considered when deciding whether a guardian is needed and who the guardian should be.[105] New South Wales law refers to the importance of preserving existing family relationships as a general principle,[106] while Queensland and Western Australian laws emphasise the need to maintain existing supportive relationships.[107]

## Informal decision making

5.78 The legislation in some Australian jurisdictions explicitly refers to informal decision-making arrangements. While the Victorian legislation does not expressly refer to informal arrangements, there appears to have been a longstanding understanding that they should be allowed to continue when they are working satisfactorily.[108]

5.79 In South Australia, the adequacy of existing 'informal arrangements', and the desirability of preserving those relationships, must be considered in tribunal decisions about guardianship and administration.[109] This includes arrangements that might be considered 'informal' substitute decision-making arrangements.

88 In New South Wales it is the *Guardianship Act 1987* (NSW), in Queensland it is the *Guardianship and Administration Act 2000* (Qld), in Western Australia it is the *Guardianship and Administration Act 1990* (WA), in South Australia it is the *Guardianship and Administration Act 1993* (SA), in Tasmania it is the *Guardianship and Administration Act 1995* (Tas), in the Australian Capital Territory it is the *Guardianship and Management of Property Act 1991* (ACT), in the Northern Territory it is the *Adult Guardianship Act 1988* (NT).

89 The Queensland Law Reform Commission has recently completed a two-stage review of guardianship laws. The first stage, completed in 2007, focused on the legislation's confidentiality provisions, with most of the recommendations being implemented in the *Guardianship and Administration and Other Acts Amendment Act 2008 (*Qld). The second stage focused on the principles contained in the legislation and Queensland's guardianship laws more generally. The final report has been completed and was tabled in Parliament in November 2010. See Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).The New South Wales Parliament Standing Committee on Social issues has released its final report in relation to substitute decision-making laws. See Standing Committee on Social Issues, New South Wales Parliament Legislative Council, *Substitute Decision Making for People Lacking Capacity* (2010).

90 The term 'best interests' does not appear as a core principle in South Australian and Queensland guardianship laws, other than in the context of medical decision making. However, these laws do require decisions and actions to be consistent with the 'proper care and protection of the person'. See *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(5); *Guardianship and Administration Act 1993* (SA) s 5(d). The ACT refers to the 'interests' of the person, which are defined in s 5A of the *Guardianship and Management of Property Act 1991* (ACT).

91 See *Borthwick v Carruthers* (1787) 1 TR 648, 99 ER 1300; *Re Cumming* (1852) 1 De GM & G 537 at 557, 42 ER 660 at 668.

92 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1; *Guardianship and Administration Act 1990* (WA) s 4(3).

93 Standing Committee on Social Issues, New South Wales Parliament Legislative Council, *Substitute Decision Making for People Lacking Capacity* (2010) 62.

94 Ibid 44.

95 *Guardianship and Management of Property Act 1991* (ACT) s 6A.

96 *Guardianship and Administration Act 1993* (SA) s 5(a).

97 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(4).

98 *Powers of Attorney Act 2006* (ACT) sch 1 s 1.6(4).

99 See Office of the Public Advocate (Victoria), *Adult Guardianship in Victoria* (2006) 2–3, available at <http://www.publicadvocate.vic.gov.au/about-us/200/>.

100 *Guardianship and Administration Act 1986* (Vic) ss 28(2)(e), 49(2)(b), 38(1)(a), 42U(1)(a).

101 *Guardianship and Administration Act 1990* (WA) ss 4(7), 51(2)(e), 70(2)(e).

102 *Guardianship and Management of Property Act 1991* (ACT) s 4(3). This must be done unless the decision maker believes this would adversely affect the person's interests—s 4(4).

103 *Guardianship and Administration Act 1986* (Vic) ss 38(1)(b), 42U(1)(b).

104 Ibid s 22(2)(b).

105 Ibid ss 22(2)(c), 23(2)(b).

106 *Guardianship Act 1987* (NSW) s 4(e).

107 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 8; *Guardianship and Administration Act 1990* (WA) ss 51(2)(g), 70(2)(g).

108 The Cocks Committee Report, which led to the G&A Act, considered that supportive families would be unlikely to need a guardianship order to assist adults with a disability in the great majority of cases: Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 19, 48.

109 *Guardianship and Administration Act 1993* (SA) s 5(c).

# Chapter 5 Principles of Laws

5.80 In Queensland, the law contemplates a range of substitute decision-making arrangements, including decisions made 'on an informal basis by members of the adult's existing support network',[110] as well as decisions made by formally appointed attorneys, guardians and administrators.[111] The Queensland Civil and Administrative Tribunal can ratify decisions made by 'informal decision makers'.[112]

5.81 The Commission believes that there is a place for both informal and formal decision-making arrangements. The challenge is to ensure that informal arrangements continue when appropriate, but that more formal decision-making mechanisms are activated when necessary.

### Culture and religion

5.82 The importance of maintaining cultural and linguistic environments and values is recognised in New South Wales,[113] Western Australian,[114] and Queensland legislation.[115] Queensland and Western Australian laws also recognise the importance of the person's religious environment and beliefs.[116] Queensland also includes more guidance about what this means where a person is a member of an Aboriginal community or a Torres Strait Islander.[117]

### Queensland

5.83 Queensland has the most comprehensive set of rights and principles in its guardianship laws. They include principles and human rights statements that are not found (at least explicitly) in other guardianship laws. These principles have been described as 'perhaps as close to a bill of rights as the law in Queensland comes'.[118]

5.84 Some of these rights are expressed as 'acknowledgements':

- An adult's right to make decisions is fundamental to the adult's inherent dignity.
- The right to make decisions includes the right to make decisions with which others may disagree.
- The capacity of an adult with impaired capacity to make decisions may differ according to the nature and extent of the impairment, the type of decision to be made—including the complexity of the decision to be made—and the support available from members of the adult's existing support network.
- The right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent.
- An adult with impaired capacity has a right to adequate and appropriate support for decision making.[119]

5.85 The 'purpose' of the Queensland laws is described as seeking a balance between:

- the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision making
- the adult's right to adequate and appropriate support for decision making.[120]

5.86 The 'general principles' of the Queensland guardianship legislation also include the following principles, which 'should be recognised and taken into account':

- the right of adults to the same basic human rights, regardless of capacity, and the importance of being empowered to exercise these rights[121]
- an adult's right to respect for their human worth and dignity as an individual[122]
- an adult's right to be valued as a member of society, and encouraging the adult to perform valued social roles[123]

- that power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs[124]
- an adult's right to confidentiality.[125]

5.87 Queensland also emphasises the importance of the following matters in relation to decision making:

- an adult's right to participate in decisions that affect the adult's life[126]
- preserving the adult's right to make decisions to the greatest possible extent, including providing the adult any necessary support and access to information, to enable the adult to participate in decisions affecting the adult's life[127]
- the use of substituted judgment where appropriate[128]
- consistency with the proper care and protection of the adult.[129]

## COMPARABLE APPROACHES OVERSEAS

5.88 In seeking to devise principles to include in new Victorian legislation, the Commission has also considered guardianship laws in other parts of the world—in particular, the United Kingdom, New Zealand and Canada.

### England and Wales

5.89 As in the Queensland and Western Australian legislation, the *Mental Capacity Act 2005* (Mental Capacity Act), which operates in England and Wales, has explicitly included a presumption of capacity.[130] This presumption is effectively a restatement of the common law presumption of capacity. The Mental Capacity Act principles also provide further guidance around the circumstances in which a finding of incapacity may be made, as well as other principles relating to the assessment of capacity.[131] These are all outlined in Chapter 10, where we discuss the assessment of incapacity in more detail.

5.90 Like the G&A Act, the Mental Capacity Act also contains the core principles of acting in the 'best interests' of a person lacking capacity, and seeking to act in a manner that is 'less restrictive' of the person's rights and freedoms. However, the Mental Capacity Act provides extensive guidance about how to determine what is in a person's best interests.[132] This includes:

- not making superficial assumptions based on the person's age, appearance, a condition they may have or an aspect of their behaviour
- consideration of the likelihood the person will regain capacity
- acting to encourage the person to participate in decision making
- considering the person's past and presently-expressed wishes, beliefs and values, and factors that the person would have been likely to consider if they were able to
- consulting with relevant people in the person's life, including those nominated by the person.[133]

### New Zealand

5.91 Like the Mental Capacity Act, guardianship laws in New Zealand contain a presumption that a person has capacity[134] and require that a person cannot be found to lack capacity to make a decision merely because their decisions do not meet the standard of 'ordinary prudence'.[135]

110 *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).
111 Ibid s 9(2)(b).
112 Ibid s 154.
113 *Guardianship Act 1987* (NSW) s 4(e).
114 *Guardianship and Administration Act 1990* (WA) ss 51(2)(h), 70(2)(h).
115 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9.
116 *Guardianship and Administration Act 1990* (WA) ss 51(2)(h), 70(2)(h); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9.
117 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9(2).
118 Office of the Public Advocate (Queensland) and Queensland Law Society, *Elder Abuse: How well does the law in Queensland cope?* (2010) 12. Available at <http://www.qls.com.au/content/lwp/wcm/resources/file/eb89e1043274b31/elder-abuse_issues-paper%20v6.pdf>.
119 *Guardianship and Administration Act 2000* (Qld) s 5.
120 Ibid s 6.
121 Ibid sch 1 pt 1 cl 2.
122 Ibid sch 1 pt 1 cl 3.
123 Ibid sch 1 pt 1 cl 4.
124 Ibid sch 1 pt 1 cl 10.
125 Ibid sch 1 pt 1 cl 11.
126 Ibid sch 1 pt 1 cl 7(1).
127 Ibid sch 1 pt 1 cls 2, 3(a).
128 Ibid sch 1 pt 1 cl 7(4).
129 Ibid sch 1 pt 1 cl 7(5).
130 *Mental Capacity Act 2005* (UK) c 9, s 1(2).
131 Ibid c 9, ss 1(3)–(4), 2–3.
132 Ibid c 9, s 4.
133 Ibid c 9, ss 4(1)(3)(4)(6)–(7).
134 *Protection of Personal and Property Rights Act 1988* (NZ) ss 5, 24.
135 Ibid ss 6(3), 25(3).

# Chapter 5 Principles of Laws

### Canada

5.92 The guardianship laws of several Canadian provinces contain an explicit presumption of capacity.[136] Laws in Alberta and British Columbia also recognise that the means by which an adult communicates is not grounds for finding that person incapable of making a decision,[137] while Saskatchewan and Alberta ensure the right of a person to communicate by any means that enables them to be understood.[138] Principles in Saskatchewan also include the right for adults to be informed about decisions that affect them, and participate in them to the best of their ability.[139]

5.93 Several Canadian provinces also have principles and mechanisms that promote the idea of 'supported decision making'.[140] In Manitoba, substitute decision-making laws for people with intellectual disabilities include an acknowledgement of the role of supported decision making:

> *Supported decision making by a vulnerable person with members of his or her support network should be respected and recognized as an important means of enhancing the self-determination, independence and dignity of a vulnerable person.*[141]

5.94 We discuss supported decision making in more detail in Part 3.

## POSSIBLE OPTIONS FOR REFORM

5.95 The Commission believes that the principles in Victoria's guardianship law should be modernised. They should be a blend of existing principles that remain relevant and new principles that reflect contemporary values concerning people with impaired decision-making capacity, perhaps most clearly articulated in the Convention.

5.96 The proposed new general principles seek to be a statement of the community values and policies implemented by new guardianship legislation. They are also designed to guide the interpretation and practice of new laws. The proposed new principles reflect a belief that guardianship laws should aim to promote human dignity by enabling people to participate in decisions that affect them to the greatest extent possible.

5.97 The Commission has developed a draft set of new legislative principles for discussion. They have three parts:

- a statement of purpose
- general principles, including principles concerning the assessment of capacity
- specific decision-making principles, which apply to substitute decision makers, such as guardians and administrators.

5.98 This structure is similar to the current G&A Act, and is broadly consistent with the structure of laws generally in Victoria.

### STATEMENT OF PURPOSE

5.99 The statement of purpose in the current Act is quite narrowly legal and does not contain a broad vision or goal. The Commission proposes the following statement of purpose for new guardianship laws:

> *The purpose of this Act is to protect and promote the dignity and human rights of people with impaired decision-making capacity. To this end, the Act establishes mechanisms to support and assist people to participate in decisions that affect their lives, realise their rights and protect their inherent dignity.*

5.100 This statement of purpose is influenced by the Convention[142] and reform proposals from the Public Advocate.[143]

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

## NEW GENERAL PRINCIPLES

5.101 The Commission proposes the following general principles to guide new adult guardianship laws:

- All adults have an inherent human dignity which must at all times be respected and upheld.
- All adults are entitled to the same basic human rights, and should be empowered to exercise those rights wherever possible.
- All adults are presumed to have the ability to make decisions that affect their lives unless this is shown not to be the case.
- The assessment of an adult's decision-making capacity must take into account the following:
  - Capacity is specific to each decision to be made.
  - Impaired decision-making capacity may be temporary or permanent and can fluctuate over time.
- Where a person is found to be unable to make a decision, any decision made on their behalf should, as far as possible, be the decision that the decision maker believes the person would have made if they were able to.
- All adults, regardless of their ability to make decisions, have wishes and preferences that can and should inform decisions made in their lives.
- All adults are entitled to the support necessary for them to make or participate in decisions affecting their lives.
- All adults are entitled to take reasonable risks and make choices that other people might disagree with.
- All adults have the right to communicate in any way that allows them to understand and be understood.
- All adults are entitled to live in safety and security and to be protected from abuse, neglect and exploitation.
- Any limitations on the ability of adults to make decisions that affect their lives must be justified, reasonable and proportionate.

5.102 In the following paragraphs we briefly explain some reasons for including particular principles in new guardianship legislation.

### Dignity

5.103 The right to dignity is very important to people with disabilities, particularly because they have not always had their worth as individuals affirmed by society. Because dignity is often described as the source from which all other human rights derive, the Public Advocate has argued that fostering human dignity should be at the core of guardianship legislation.[144]

136 See, eg, in Alberta the *Adult Guardianship and Trusteeship Act* SA 2008, c A 4.2, s 2(a); in Saskatchewan *The Adult Guardianship and Co-Decision Making Act* SS 2000, c A 5.3, s 3(b); in British Columbia the *Representation Agreements Act* RSBC 1995, c 405, s 3(1); in Ontario the *Substitute Decisions Act* SO 1992, c 30, s (2).

137 *Adult Guardianship and Trusteeship Act* SA 2008, c A 4.2, s 2(b), *Representation Agreements Act* RSBC 1995, c 405, s 3(2).

138 *The Adult Guardianship and Co-Decision Making Act* SS 2000, c A 5.3, s 3(e); *The Adult Guardianship and Trusteeship Act* SA 2008, c A 4.2, s 2(b).

139 *The Adult Guardianship and Co-Decision Making Act* SS 2000, c A 5.3, s 3(f).

140 See, eg, *Adult Guardianship and Trusteeship Act* SA 2008, c A 4.2; *The Adult Guardianship and Co-Decision Making Act* SS 2000, c A 5.3; *Representation Agreements Act* RSBC 1995, c 405; *The Vulnerable Persons Living with a Mental Disability Act* SM 1993, c 29.

141 *The Vulnerable Persons Living with a Mental Disability Act* SM 1993, c 29, s 6(2).

142 *Convention on the Rights of Persons with Disabilities* art 1.

143 Carter, above n 10, 3, 6–7.

144 Ibid 9.

# Chapter 5 Principles of Laws

### Same human rights

5.104 The Victorian Charter provides that people with a disability have the same human rights as others.[145] This draft principle is similar to an 'acknowledgment' in the Queensland guardianship legislation, which states that adults have the same basic human rights, regardless of capacity, and should be empowered to exercise these rights.[146]

### Capacity and incapacity

5.105 Capacity principles are discussed in detail in Chapter 10. We propose some options for reform, which include legislative guidance around the presumption of capacity, the assessment of incapacity and a legislative definition of capacity.

### Substituted judgment

5.106 In Chapter 17, we discuss the principle of substituted judgment in detail when we explore the responsibilities of all substitute decision makers. We suggest that this approach to decision making should replace the current approach of best interests.

5.107 The principle of substituted judgment reflects views that guardianship laws should have an underlying purpose of enhancing rights through enabling people to participate in decisions in ways that they would not otherwise have been able to.

### Wishes

5.108 The Commission believes that the principles in guardianship laws should continue to recognise the importance of respecting and fulfilling a person's wishes and preferences.

5.109 In our consultations, most consultees agreed that where a person is unable to make a decision because of impaired decision-making capacity, they will still have current or former wishes and preferences that should inform any decision made on their behalf.[147] These wishes include both those that are expressed at the time a decision is to be made, and those that can be ascertained by considering the history of the person, including their known views, beliefs, values, likes and dislikes. Respecting a person's wishes and preferences is clearly a central aspect of substituted judgment.

5.110 We consider the issue of wishes further in Chapter 17, where we discuss decision-making principles and the relationship between a person's expressed wishes at the time a decision is made and other considerations, such as the person's history and known views, beliefs and values.

### Supported decision making

5.111 The Commission proposes that the principles in new guardianship laws should explicitly recognise supported decision making—an important advance identified in the Convention.[148] The language in our draft principles is similar to the wording used in Queensland guardianship laws.[149] In our consultations, there was very strong support for new laws to recognise the right of people with disabilities to access the support they need to make decisions and to exercise autonomy.[150]

5.112 The New South Wales Legislative Council Standing Committee on Social Issues recently recommended that New South Wales guardianship laws include a statement supporting the principle of 'assisted decision making'.[151]

### Risky and bad decisions

5.113 Many participants in our consultations talked about the principle of 'dignity of risk', and felt that guardianship laws should balance the goal of protecting people from harm with allowing them to take risks and realise their goals in life.[152] A number of participants also argued that more should be done to manage and minimise risk, rather than simply avoid it.[153]

5.114 Some consultation participants also felt it is important that people with impaired decision-making ability are able to make some unwise decisions, and have the opportunity to learn from their mistakes.[154] The Commission acknowledges that some people have little or no understanding of the dangers and consequences of risky decisions they wish to make. Some people may also have limited ability to remember or learn from past mistakes.

5.115 At present, substitute decision makers are required to consider risk by balancing the three core principles of 'best interests', 'wishes' and the 'least restrictive alternative'. The Public Advocate cautioned against the idea that a person should be placed in a situation of harm simply because this is what the person would have done themselves.[155] Some submissions thought that 'reasonable'[156] or 'appropriate'[157] risk might be a helpful way of thinking about this difficult question.

### Safety and security

5.116 The Public Advocate has suggested that a core 'object' for new guardianship laws be that the 'person with a disability is able to live in safety and security'.[158]

5.117 The Public Advocate argues that 'a civil society protects its members from harm', and that the disproportionate level of abuse, neglect and exploitation suffered by people with disabilities justifies the inclusion of this principle in guardianship laws.[159]

5.118 The idea of 'safety and security' and protection from 'harm' could at times be a principle in tension with the 'dignity of risk' and the autonomy of the person. In current guardianship laws, the idea of safety and security is partly encompassed by the principle of 'best interests' and by the requirement that guardians protect the represented person from 'neglect, abuse or exploitation'.[160]

### Communication

5.119 The Convention emphasises the importance of accessible information and communication assistance for people with disabilities.[161] In some Canadian provinces, principles for guardianship laws contain an entitlement for adults to communicate by any means that enables them to be understood.[162]

5.120 The right for a person with a disability to be communicated with in a way that they can understand,[163] together with a right for people to access appropriate communication aids, was proposed.[164]

### Limitations on freedoms

5.121 Community responses suggested that the principle of adopting the means that are 'least restrictive of a person's freedom of decision and action as is possible in the circumstances' should be maintained, and even strengthened, in new laws. The Commission accepts that in some cases, however, this principle has been interpreted to imply that guardianship and administration are necessarily restrictive of people's rights, when this is not always the case. There is also legitimate concern that the principle may be used to justify inaction, when support and intervention may be necessary to protect and promote a person's rights.

5.122 The Commission is interested in responses to an alternative principle, proposed by the Public Advocate, that any limitations on the rights and freedom of a person are reasonable, justified and proportionate.[165]

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

145 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6.

146 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 2.

147 See, eg, submissions IP 1 (Carers Australia (Victoria)) 19, IP 7 (Stephanie Mortimor) 3, IP 19 (Scope (Vic) Ltd) 14–17, IP 27 (Marillac) 1, IP 43 (Victoria Legal Aid) 10, IP 58 (Mental Health Legal Centre) 24–5.

148 *Convention on the Rights of Persons with Disabilities* art 12(3) states that 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.

149 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(3)(a) says that the adult 'must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life' and section 5(e) says that 'an adult with impaired capacity has a right to adequate appropriate support for decision-making'.

150 See, eg, Submissions IP 1 (Carers Australia (Victoria)) 19, IP 19 (Scope (Vic) Ltd) 17–18, IP 28b (People with Disability Australia) 21.

151 *Substitute Decision Making for People Lacking Capacity*, above n 93, 63.

152 See, eg, consultation with Jeffrey Chan, Senior Practitioner (16 March 2010); Submission IP 43 (Victoria Legal Aid) 8.

153 Consultations with Julian Gardner (26 March 2010), David Green (21 April 2010).

154 Consultation with VALID Western Region Client Network (2 March 2010).

155 Submission IP 8 (Office of the Public Advocate) 19.

156 Submission IP 7 (Stephanie Mortimer) 3.

157 Submission IP 27 (Marillac) 1.

158 Carter, above n 10, 10–11.

159 Carter, above n 10, 10.

160 *Guardianship and Administration Act 1986* (Vic) s 28(2)(d).

161 See *Convention on the Rights of Persons with Disabilities* arts 4(1)(g)(h), 9, 12(3), 21.

162 *Adult Guardianship and Trusteeship Act* SA 2008, c A 4.2, s 2(b), *The Adult Guardianship and Co-Decision Making Act* SS 2000, c A 5.3, s 3(e)

163 Consultation with Advocacy Disability Ethnicity Community (21 April 2010).

164 Submission IP 1 (Carers Australia (Victoria)) 19.

165 Carter, above n 10, 11–12.

# Principles of Laws

## Other possible principles

5.123 Other matters could be included in the principles in new guardianship legislation. The importance of a person's culture and the role of their family and carers are two matters that merit consideration. Recognition of these principles forms part of the Commission's options for reform of decision-making principles, which we consider in Chapter 17. However, they might also be included in the general principles of guardianship laws.

### Culture and religion

5.124 The importance of recognising and respecting the culture of a person when providing decision-making support, or making a decision on their behalf, was an issue raised in a number of our consultations.[166] A person's cultural and linguistic environment is not an explicit consideration in Victorian guardianship laws, as it is in Queensland, New South Wales and Western Australia.[167] The principles of the Disability Act include a right of people with disabilities to 'access information and communicate in a manner appropriate to their communication and cultural needs'.[168]

### Recognition of families, friends and caring relationships

5.125 Community responses to our information paper demonstrated that some carers of adults with (predominantly intellectual) disabilities felt that their relationship to the person they cared for was inconsistently or inadequately recognised by important bodies such as service providers, government agencies, VCAT and medical professionals.[169]

5.126 Victorian guardianship laws recognise 'the desirability of preserving existing family relationships' in relation to guardianship appointments,[170] and the 'wishes of any nearest relative or other family members' in relation to guardianship appointments and medical decisions,[171] but contain no overarching statement about the role of carers, families and other supportive relationships in the life of a person with a disability.

5.127 The *Carer Recognition Act 2010* (Cth) came into force on 18 November 2010.[172] The Act 'does not create rights or duties that are legally enforceable',[173] but it does set out the 'Statement for Australia's Carers', which includes the statement, 'the relationship between carers and the persons for whom they care should be recognised and respected'.[174]

5.128 The principles in new guardianship laws could include a statement about the role of family and other support networks in a person's life. We consider a number of ways to provide legal recognition of families and support networks in Chapters 7, 10 and 14.

**Question 4** Are there principles you think should be added or removed from these general principles?

166 Consultations with Action Disability Ethnicity Community (21 April 2010), people with disabilities and advocates in Morwell (29 March 2010). See also the Public Advocate's proposal that guardians be guided to act 'with respect for the person's cultural and/or ethnic values and circumstances: Carter, above n 10, 5.

167 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9; *Guardianship Act 1987* (NSW) s 4(e); *Guardianship and Administration Act 1990* (WA) ss 51(2)(h), 70(2)(h).

168 *Disability Act 2006* (Vic) s 5(2)(f).

169 See, eg, submissions IP 1 (Carers Australia (Victoria)) 10–11, IP 10 (Gippsland Carers Association) 7–10.

170 *Guardianship and Administration Act 1986* (Vic) s 22(2)(c).

171 Ibid ss 22(2)(b), 38(1)(b), 42U(1)(b).

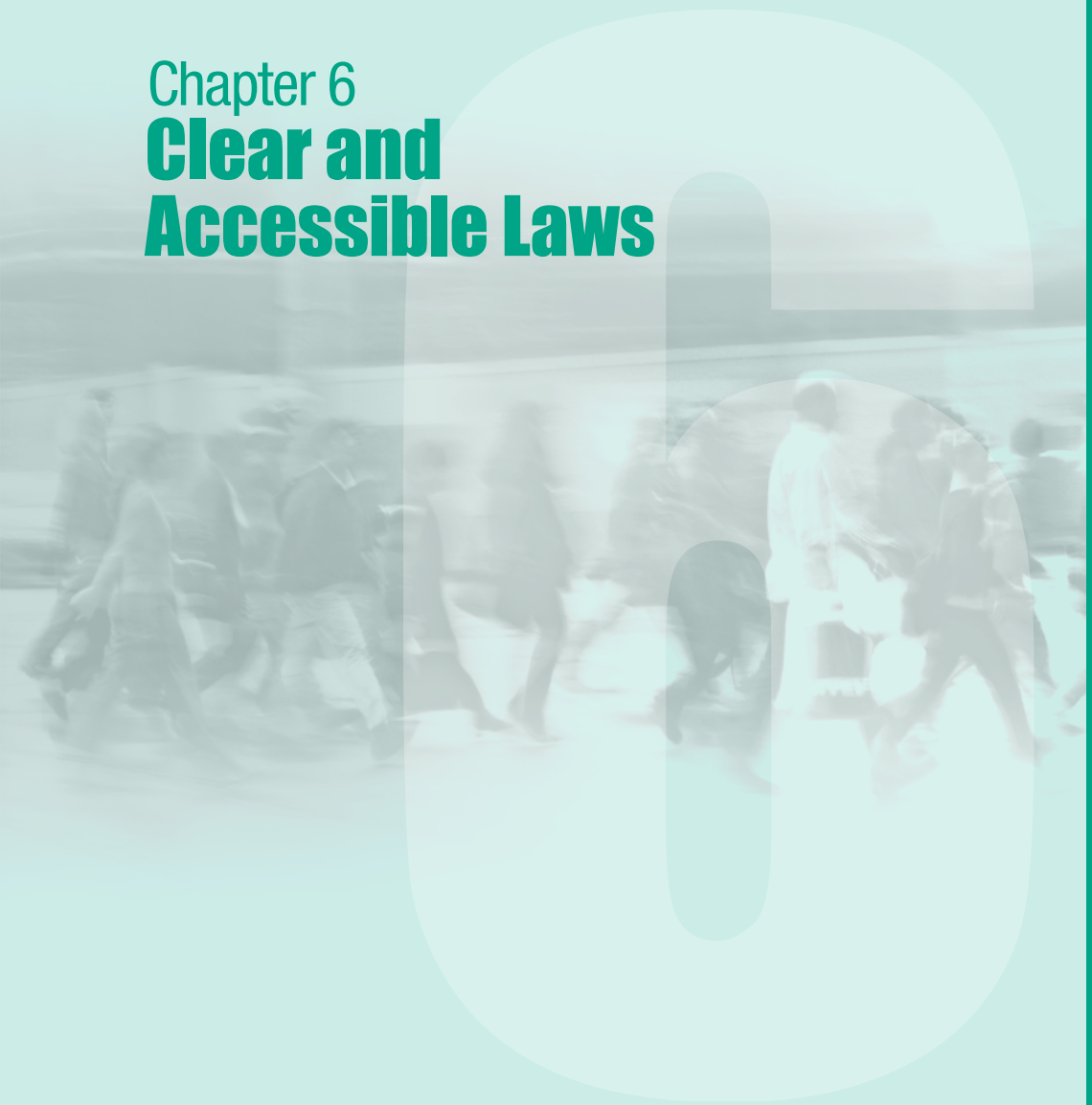
172 *Carer Recognition Act 2010* (Cth) s 2.

173 Ibid s 10.

174 Ibid sch 1 cl 6.

Chapter 6

# Clear and Accessible Laws



## CONTENTS

# Chapter 6 Clear and Accessible Laws

## INTRODUCTION

6.1 Guardianship laws are poorly understood by many of the people who need to use them. This is probably due, at least in part, to their complexity. There is a need for extensive community education about these laws, particularly for people who are likely to be major users, such as older Victorians.

6.2 The Commission believes that new Victorian guardianship laws should be as clear and accessible as possible. In this chapter, we consider some of the reasons for the current complexity and examine ways that new guardianship laws might become more accessible to those people who need to use them.

## CURRENT LAW

### STRUCTURE AND LANGUAGE OF CURRENT LAWS

6.3 Victoria's substitute decision-making laws are currently located in three different statutes:

- *Guardianship and Administration Act 1986* (Vic) (G&A Act)
- *Medical Treatment Act 1988* (Vic) (Medical Treatment Act)
- *Instruments Act 1958* (Vic) (Instruments Act).

6.4 Victorian law creates six major substitute decision-maker appointments for people with impaired capacity. Four of these appointments—'guardian', 'enduring guardian', 'person responsible' and 'administrator'—are made under the G&A Act, while enduring financial 'attorneys' are appointed under the Instruments Act, and medical 'agents' are appointed under the Medical Treatment Act.

6.5 The *Disability Act 2006* (Vic) and the *Mental Health Act 1986* (Vic) also authorise a form of substitute decision making—involuntary treatment and confinement—for people covered by those laws. We discuss this legislation separately in Chapters 22 and 23.

6.6 The G&A Act, the Medical Treatment Act and the relevant parts of the Instruments Act were developed at different times in response to different needs. All three Acts have been amended on many occasions since they commenced. They use different language to describe the manner in which substitute decision-making appointments are made and operate. For example, a person who has a substitute decision maker has four different names:

- a 'represented person', if they have a guardian, administrator or both
- a 'patient', if decisions are made on their behalf by a person responsible
- an 'appointor', if they have appointed an enduring guardian
- a 'donor', if they have appointed a general or enduring attorney or a medical agent.

6.7 The G&A Act consists of four main operational parts:

- part 3, which establishes the Public Advocate
- part 4, which deals with guardianship orders
- part 4A, which deals with medical and other treatment for patients who are unable to consent
- part 5, which deals with administration orders.

6.8 While some parts of the G&A Act—such as the provisions concerning the appointment of guardians in part 4—are relatively clear, other parts of the Act, such as part 4A, which deals with substitute consent for medical treatment and participation in research trials, are unnecessarily complex. Part 5, which deals with administration orders, is quite inaccessible to people other than experts in the field.

## COMMUNITY EDUCATION AND RESOURCES

6.9 The Public Advocate has primary responsibility for community education about guardianship, administration, and powers of attorney in Victoria.[1] The Public Advocate publishes fact sheets and guides about guardianship, administration, enduring powers, and medical treatment decisions for people who cannot consent. These sheets are also available in 11 community languages.[2] The Public Advocate also produces 'Take Control: A kit for making powers of attorney and guardianship' in partnership with Victoria Legal Aid, which was distributed to nearly 47 000 people in 2008–09.[3] 'Take Control' is currently only available in English.

6.10 The Public Advocate also delivers community education presentations and runs a telephone advice service that is accessed by thousands of Victorians every year.[4] Furthermore, the Victorian Civil and Administrative Tribunal (VCAT) and the Public Advocate work in partnership to provide information and training to people appointed as guardians and administrators.

6.11 A number of other groups provide information, advice and advocacy about guardianship laws. These groups include specialist legal centres such as:

- Victoria Legal Aid Human Rights and Civil Law Service
- Seniors Rights Victoria
- Mental Health Legal Centre
- Villamanta Disability Rights Legal Service
- PILCH Homeless Persons' Legal Clinic.

6.12 There are a number of community-based organisations and regionally-based community legal centres with knowledge and expertise in guardianship laws. The *Law Handbook*, published by the Fitzroy Legal Service, contains a summary of areas of the law that most often affect people in everyday life and includes chapters on guardianship and administration and powers of attorney.[5]

6.13 Action on Disability within Ethnic Communities (recently renamed Advocacy Disability Ethnicity Community) and Spectrum Migrant Resource Centre provide information and support for people from culturally and linguistic diverse communities. The Commission is unaware of an equivalent provider of information and support about guardianship laws for Indigenous Victorians.

6.14 The Respecting Patient Choices program, originally based at Melbourne's Austin Hospital, has become a leading source of education and support for the community and the medical profession in relation to advance planning around medical treatment. Respecting Patient Choices has developed its own set of information guides and advance care planning documents.[6] Although the program promotes advance planning across the community, its resources are at this stage primarily targeted towards people who are approaching their later stages of life.

1 *Guardianship and Administration Act 1986* (Vic) s 15(c).

2 These guides are available at the Office of the Public Advocate's website: Office of the Public Advocate (Victoria), *Index of Publications* (30 November 2010) <http://www.publicadvocate.vic.gov.au/publications/124/>.

3 This number includes copies downloaded from the websites of the Public Advocate and Victoria Legal Aid and hard copies provided by the Public Advocate and Victoria Legal Aid: see Office of the Public Advocate (Victoria), *Annual Report 2008–09* (2009) 41.

4 Office of the Public Advocate (Victoria), *Annual Report 2008–09* (2009) 40–1.

5 Carmen Harbour (ed), *The Law Handbook 2010* (Fitzroy Legal Service Inc, 2009).

6 For further details, see Respecting Patient Choices, *Advance Care Planning* (27 August 2010) <http://www.respectingpatientchoices.org.au/>.

Chapter 6

# Clear and Accessible Laws

## COMMUNITY RESPONSES

6.15 Some of the major barriers to accessibility identified in our consultations include:

- complexity of the law, and the use of inaccessible language and terminology
- inadequate community education about guardianship laws
- inadequate support and advocacy for people affected by guardianship laws.

6.16 The problems these barriers create in practice include:

- low community use of enduring appointments, particularly for non-financial matters, despite the clear benefits of doing so
- represented persons often not being aware of their rights, or not provided the support they need to understand and exercise them
- families of people with disabilities being given little guidance about decision making and often being confronted with guardianship laws in times of crisis
- some people appointed as substitute decision makers being unaware of their responsibilities and duties
- lack of knowledge among medical professionals about the medical treatment provisions in the G&A Act, meaning that these laws are not always followed in practice.[7]

### UNDERSTANDING OF GUARDIANSHIP LAWS

6.17 In response to our information paper, Carers Australia (Victoria) summarised the concerns of many people by noting that the G&A Act 'is poorly understood by most within its orbit'.[8] They also argued that

> *as long as people do not understand the Act, its principles and rationale, the decisions made by VCAT will feel arbitrary to individuals with capacity disabilities and to their families.*[9]

6.18 Marillac, a disability service provider, noted that confusion arises for parents who do not realise that once their child with a disability turns 18, they are no longer the child's legal guardian.[10]

6.19 The Mental Health Legal Centre also noted that people who are placed under an administration order often have little idea of what the order means, and of their rights.[11]

6.20 Many suggested that the level of awareness and understanding of guardianship, administration and powers of attorney was generally low.[12] There was a suggestion that understanding of guardianship laws seems to be even lower among culturally and linguistically diverse (CALD) communities,[13] while the level of knowledge of guardianship laws among Victoria's Indigenous communities appears to be very limited.[14]

6.21 Respecting Patient Choices and others identified a need for improved training and cultural change within the medical profession, because many medical professionals have an inadequate understanding of substitute decision-making laws.[15]

### Suggestions to improve understanding and accessibility of guardianship laws

#### Simplify language and update terminology of guardianship laws

6.22 One of the major concerns around the accessibility of guardianship laws is the laws' technicality and inconsistency in the language used.

6.23 Scope argued that serious consideration should be given to redrafting the G&A Act in an Easy English format.[16]

6.24 The terms used for the different appointments—in particular, the terms 'guardian' and 'administrator'—were also considered in various consultations.

6.25 Many people argued against any substantial changes to the current terminology.[17] Victoria Legal Aid noted that any changes to the current terminology would need to be accompanied by appropriate community education.[18]

6.26 Criticism of the term 'guardian' centred on concerns about paternalism and its associations with adult–child relationships.[19] Possible alternatives, such as 'agent' and 'personal decision maker', did not receive strong support in consultations.

6.27 The term 'administrator' was more strongly criticised than the term 'guardian', because it was suggested that it fails to adequately describe the nature of the role. The Public Advocate also noted that 'administrator' could be confused with other terms such as 'letters of administration', and suggested the term be replaced with the New South Wales term 'financial manager'.[20] Other alternatives discussed in consultations included 'financial decision maker' and 'financial guardian'.

6.28 The term 'person responsible' was also criticised. It was suggested that it is poorly understood in the community.[21] Respecting Patient Choices proposed the alternative of 'health decision maker'.[22]

6.29 Other specific criticisms of the language used in the G&A Act included references to parent–child relationships in the powers of 'plenary guardians' (which we consider further in Chapter 13) and the term 'best interests' (which we consider in more detail in Chapters 5 and 17).

### National consistency

6.30 The issue of national consistency around substitute decision-making laws arose many times during our consultations, particularly in relation to powers of attorney. Submissions and evidence provided to the Victorian Parliament Law Reform Committee for their *Inquiry into Powers of Attorney* also proposed a nationally consistent framework, and the Committee has recommended that the Victorian Government actively promote and support a national harmonisation of power of attorney laws.[23] This follows the House of Representatives Standing Committee on Legal and Constitutional Affairs 2007 report, *Older people and the law*, which recommended Australian governments improve mutual recognition of powers of attorney, and work towards uniform legislation.[24]

6.31 The Commission heard in consultations in Shepparton and Mildura that confusion can arise where people who live in New South Wales access services in Victoria.[25] The Australian Bankers' Association argued there is a need for greater standardisation of guardianship laws across jurisdictions, in addition to more uniform laws in relation to powers of attorney.[26]

### Education campaign

6.32 There is a widely held view that the information resources produced by the Public Advocate are of a good standard, and that the Public Advocate provides adequate information to people who seek assistance, particularly through its telephone advices service.

6.33 Community feedback suggested, however, that a targeted statewide, or even national, education strategy would be an important complement to any changes to guardianship laws.[27]

6.34 A 'targeted' approach—focusing on specific groups such as medical professionals, social workers, lawyers, CALD and Indigenous communities and carers—was suggested.[28]

7 See Chapter 16 for a fuller discussion of the law's current provisions around consent to, and refusal of, medical treatment.

8 Submission IP 1 (Carers Australia (Victoria)) 4.

9 Ibid 18.

10 Submission IP 27 (Marillac) 2. The confusion and distress caused by this was apparent in a number of consultations the Commission undertook with parent or grandparent carers of adults with developmental disabilities.

11 Submission IP 58 (Mental Health Legal Centre) 11.

12 See, eg, Submissions IP 27 (Marillac) 2, IP 47 (Law Institute of Victoria) 3 and IP 58 (Mental Health Legal Centre) 11.

13 Consultation with Advocacy Disability Ethnicity Community (21 April 2010); Submission IP 52 (Spectrum Migrant Resource Centre) 2.

14 See Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 272; consultation with Mallee Family Care (28 April 2010); Submission IP 30 (Victorian Aboriginal Legal Service) 6.

15 Consultation with Austin Hospital—Respecting Patient Choices Team (6 April 2010).

16 Submission IP 19 (Scope (Vic) Ltd) 7.

17 See, eg, consultation with service providers and advocates in Shepparton (22 April 2010); Submissions IP 11 (Tony and Heather Tregale) 3, IP 16 (Mark Feigan) 16 and IP 39 (Aged Care Assessment Service of Victoria) 7.

18 Submission IP 43 (Victoria Legal Aid) 14.

19 Consultation with people with acquired brain injuries (3 May 2010); Submission IP 27 (Marillac) 5.

20 Submission IP 8 (Office of the Public Advocate) 31.

21 Consultation with Austin Hospital—Respecting Patient Choices Team (6 April 2010); Submission IP 7 (Stephanie Mortimer) 4.

22 Consultation with Austin Hospital—Respecting Patient Choices Team (6 April 2010).

23 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 35–8.

24 House Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into older people and the law* (2007) 79–81.

25 Consultations with service providers in Mildura (27 April 2010) and service providers in Shepparton (22 April 2010).

26 Submission IP 44 (Australian Bankers' Association) 2.

27 Consultation with Fiona Smith (18 March 2010); Submissions IP 5 (Southwest Advocacy Association) 2–3, IP 36 (Royal College of Nursing Australia) 1–2, IP 21 (Benetas) 4 and IP 50 (Action for Community Living) 3.

28 See generally Submissions IP 9 (Royal District Nursing Service); IP 27 (Marillac) 2–3.

# Clear and Accessible Laws

6.35 Victoria Legal Aid and Scope also emphasised the importance of educating people with disabilities about their rights, and educating supporters and substitute decision makers about their roles and responsibilities.[29] Mental Health Legal Centre suggested that there could be a requirement that information and a statement of rights be provided to people who are the subject of applications for guardianship or administration, as is required for involuntary patients under the *Mental Health Act 1986* (Vic).[30]

6.36 The Public Advocate supported increased resources for community education, and argued that this could form part of a broader strategy to increase options for and awareness of the various avenues by which people with impaired capacity can live without the need for guardianship and administration.[31]

6.37 Council on the Ageing proposed the use of 'peer education' as an effective means of engaging older people and empowering them to take steps to maintain as much control over their lives as possible.[32]

6.38 Advocacy Disability Ethnicity Community emphasised that simply translating material into community languages was insufficient to assist CALD communities. To genuinely educate CALD communities, it is crucial that information is explained to people in their own language, and that case studies and audio-visual aids are used to put the information in context.[33]

6.39 Advocacy Disability Ethnicity Community also suggested that medical professionals should have an enhanced role in informing the community about substitute decision-making laws.[34] Similarly, the Law Institute of Victoria noted the important role lawyers play in educating clients about guardianship laws.[35]

## PROPOSALS OF THE VICTORIAN PARLIAMENT LAW REFORM COMMITTEE INQUIRY INTO POWERS OF ATTORNEY

6.40 The Parliament Law Reform Committee made a number of recommendations to improve the accessibility of powers of attorney. These include:

- a 'Powers of Attorney Act' to bring the laws for the different powers into one Act
- consistent names for documents and powers
- consistent names of parties to a power of attorney—'principal' and 'representative'
- the development of new, easier to understand power of attorney forms
- consolidating the enduring powers into one document and making forms more readily available
- producing powers of attorney forms and information in community languages.[36]

6.41 To improve community understanding and awareness of powers of attorney, the Committee has also recommended:

- a coordinated, whole-of-government approach to providing information and education around powers of attorney
- a statewide education campaign involving plain English information in a variety of community languages, the use of a variety of different media formats, community engagement through existing community forums and ongoing support through the availability of advice and support

- targeted education towards seniors, young people and CALD communities
- further research into the use of powers of attorney by Indigenous Victorians
- targeted education of lawyers, health and community sector workers and other professionals who have contact with powers of attorney.[37]

6.42 The Commission believes that a similar approach may be effective in improving knowledge of guardianship laws.

## OTHER JURISDICTIONS

### OTHER AUSTRALIAN JURISDICTIONS

6.43 All other Australian jurisdictions have guardianship laws which are broadly similar to those in Victoria. All states and territories have 'guardians' and 'administrators' (known as 'financial managers' in New South Wales and 'managers' in the Northern Territory and the ACT), and all states and territories have laws in relation to powers of attorney.

6.44 Victoria's G&A Act is the oldest guardianship statute currently in force in Australia, though it has been amended many times in the past 25 years. It has been the model for guardianship laws in other Australian states and territories, although there have been different approaches in many areas.

6.45 In this part of the chapter, we consider developments in other jurisdictions that should be assessed when considering how to make guardianship laws less complex and more accessible for those people who need to use them.

#### Queensland—structure of laws

6.46 The most recent Australian guardianship legislation—Queensland's *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld)—is probably clearer than legislation in most other jurisdictions, but these Acts are also significantly longer than their Victorian equivalents.

6.47 The structure of Queensland guardianship legislation is also different to that in Victoria. The *Powers of Attorney Act 1998* (Qld) deals with personal, medical and financial enduring powers, as well as the Queensland equivalent of the 'person responsible' scheme (known as the 'statutory health attorney'), in the one Act. The *Guardianship and Administration Act 2000* (Qld) deals with tribunal appointments of guardians and administrators, some health care consents and the office of the Adult Guardian.

### ALBERTA, CANADA—EDUCATION

6.48 The Canadian province of Alberta has been quite successful in promoting the use of non-financial advance planning mechanisms, known as 'personal directives'.[38] The Public Guardian estimates that there are approximately 400 000 personal directives in Alberta, which has a population of 3.6 million people.[39] The focus of the education and awareness campaign has been on seniors in Alberta, and in particular seniors living in aged care. The Albertan government has also spent a considerable amount of time working with and educating the medical profession, which in turn has a major role in educating patients. As well as empowering Albertans to take greater control over their future, the government sees long-term cost benefits of its education campaign through a reduced need for guardianship appointments.[40]

29 Submissions IP 19 (Scope (Vic) Ltd) 8, IP 43 (Victoria Legal Aid) 6–7.

30 *Mental Health Act 1986* (Vic) ss 18, 19. See Submission IP 58 (Mental Health Legal Centre) 11.

31 Submission IP 8 (Office of the Public Advocate) 12.

32 Consultation with Council on the Ageing (9 March 2010).

33 Consultation with Advocacy Disability Ethnicity Community (21 April 2010).

34 Ibid.

35 Submission IP 47 (Law Institute of Victoria) 12.

36 *Inquiry into Powers of Attorney*, above n 23, 33–65.

37 Ibid 257–87.

38 For further details see *Personal Directives Act*, RSA 2008, c P-6.

39 Consultation with Office of the Public Guardian, Alberta (16 March 2010).

40 Ibid.

Chapter 6

# Clear and Accessible Laws

## ENGLAND AND WALES—*MENTAL CAPACITY ACT 2005* (UK)

6.49 The *Mental Capacity Act 2005* (UK) (Mental Capacity Act),[41] which came into effect in England and Wales in 2007, establishes a comprehensive decision-making framework for adults who lack the capacity to make their own decisions. The Act, which contains principles in relation to 'capacity'[42] and 'best interests',[43] deals with the following matters:

- 'lasting powers of attorney' (similar to enduring powers)[44]
- the Court of Protection (which has a similar role to VCAT's Guardianship List)[45]
- the role and powers of 'deputies' (who take on roles similar to guardians and administrators)[46]
- the United Kingdom Public Guardian[47]
- medical treatment for people with impaired capacity, and advance decisions to refuse treatment[48]
- participation by people who lack capacity in medical research trials[49]
- 'Independent Mental Capacity Advocates', who assist people with impaired capacity with major decisions when they do not have anyone else to help them[50]
- deprivation of liberty safeguards that apply when a person may be effectively deprived of their liberty without their own consent or that of any other person authorised to make that decision.[51]

6.50 A 'Code of Practice'[52] has been developed to assist with the interpretation and implementation of the Mental Capacity Act. The Code is targeted towards substitute decision makers and other people who have involvement with people with impaired mental capacity.[53] It is nearly 300 pages long.

## WESTERN AUSTRALIA—CULTURAL ACCESSIBILITY FOR INDIGENOUS AUSTRALIANS

6.51 Western Australia has examined the issue of the cultural relevance of their guardianship system for Indigenous Australians.

6.52 An early review of their guardianship system found that:

> *There are certain features and characteristics inherent to the guardianship and administration system that limit its capacity to be responsive particularly to Aboriginal people. These include the foreignness of the concepts of guardianship and administration orders to many Aboriginal people, the significant cultural values, norms and obligations that may not be able to be accommodated by orders, the difficulty of incorporating Aboriginal cultural and kinship obligations into the system, and the complexity of the system, process and language for some Aboriginal people.*[54]

6.53 Some of the strategies identified in Western Australia in response to these findings might be relevant to Victoria. They include:

- measures to support informal arrangements, especially through involving key Indigenous advisers to provide specialist cultural advice and guidance to the Public Advocate and the tribunal
- the Public Advocate and the tribunal to involve Indigenous agencies in identifying and developing less restrictive alternatives for Indigenous people
- a more partnership-based relationship between the Public Advocate and Indigenous agencies, and between the tribunal and Indigenous agencies, in the development of formal protocols and guidelines for tribunal members.[55]

## POSSIBLE OPTIONS FOR REFORM

6.54 The Commission has developed several options for reform designed to make guardianship laws clearer and more accessible to members of the community.

### STRUCTURE OF LAWS

6.55 Because Victoria's substitute decision-making laws are spread among three different Acts, it can be difficult for people to find those laws and understand how they interact. While this legislation has served the Victorian community relatively well, it is highly desirable that they be logically drawn together and fully integrated.

**Option A: A 'Powers of Attorney Act', a 'Medical Treatment Act' and a 'Guardianship and Administration Act'**

6.56 This option would adopt the Parliament Law Reform Committee recommendation that enduring attorneys and enduring guardians be dealt with under a 'Powers of Attorney Act'.

6.57 Further, part 4A of the G&A Act could be moved into the Medical Treatment Act, so that the laws relating to consent and refusal of medical treatment are located in one place.

6.58 This option creates a clearer distinction than currently exists between laws around personal appointments, medical decision making, and guardianship and administration orders. However, it would cause substitute decision-making laws to remain spread across three different Acts.

**Option B: A 'Powers of Attorney Act' and a 'Guardianship and Administration Act' (incorporating medical treatment laws across these two Acts)**

6.59 This option would mirror the Queensland approach, where personal appointments for personal, medical and financial decisions are harmonised into one 'Powers of Attorney Act', while laws around guardianship, administration, the Public Advocate and the role of the tribunal would remain in the G&A Act.

6.60 This option would involve moving all provisions for the personal appointment of medical agents from the Medical Treatment Act, into a new 'Powers of Attorney Act', but would keep provisions for automatic appointments of medical decision makers in the G&A Act.

6.61 The Medical Treatment Act's provisions for patients to refuse their own treatment would remain in that Act, and provisions for the appointment of general powers of attorney would remain in the Instruments Act.

6.62 While this option would reduce the number of statutes concerned with substitute decision-making regimes, it would have separate legislation dealing with personal appointments and tribunal appointments of guardians and administrators.

**Option C: One single Act consolidating all the various substitute decision-making laws (preferred)**

6.63 This option would consolidate all generic substitute decision-making laws into one piece of legislation, which occurred in the United Kingdom in 2005 with the enactment of the Mental Capacity Act.

6.64 The Law Institute of Victoria strongly supported a single, comprehensive law in relation to substitute decision making, and identified simplicity, a uniform test of capacity, and a principled framework around substitute decision making as some of the key advantages of such an approach.[56]

41 *Mental Capacity Act 2005* (UK) c 9.
42 Ibid c 9, ss 2, 3.
43 Ibid c 9, s 4.
44 Ibid c 9, ss 9–14.
45 Ibid c 9, ss 15–23, 45–53.
46 Ibid c 9, ss 16–21.
47 Ibid c 9, ss 57–60.
48 Ibid c 9, ss 5–6, 24–26, 28.
49 Ibid c 9, ss 30–34.
50 Ibid c 9, ss 35–41.
51 Ibid c 9, ss 4A, 4B, sch A1, 1A.
52 *Mental Capacity Act 2005 Code of Practice* (UK).
53 See *Mental Capacity Act 2005* (UK) c 9, s 42.
54 Colin Penter and Margaret Stockton Metcalf, *Review of the Operations and Effectiveness of the Western Australian Guardianship and Administration Act*, Report of the Section 122 Review (1998).
55 Bindi Other-Gee, Colin Penter, L Ryder and Jodie Thompson, Department of Justice, Office of the Public Advocate (Western Australia), *Needs of Indigenous people in the Guardianship and Administration system in Western Australia* (2001) 67–74.
56 Submission IP 47 (Law Institute of Victoria) 9–10.

# Clear and Accessible Laws

6.65 Consolidation of the various legislative provisions is likely to be an important means of integrating Victoria's substitute decision-making laws. It should promote a more consistent approach to the way in which the various substitute decision-making mechanisms operate.[57]

**Question 5** Do you agree with the Commission's proposal that Victoria's various substitute decision-making laws be consolidated into one single Act?

## TERMS USED FOR SUBSTITUTE DECISION MAKERS

6.66 It is difficult to identify appropriate terminology to use in guardianship legislation. Consultations revealed that there is a great deal of uncertainty about the meaning of key terms such as 'guardian', 'administrator' and 'power of attorney'.

6.67 The Commission has developed options for reforming the current terminology and seeks responses about the desirability of change.

### 'Person responsible'

6.68 The term 'person responsible' is used in part 4A of the G&A Act to refer to the person who is entitled by virtue of an automatic statutory appointment to authorise medical treatment for an adult person who is incapable of consenting to their own medical treatment. The term is open to criticism because it sounds legalistic and fails to indicate the matters for which the person is responsible. It is, broadly speaking, a statutory term to describe a person's 'next of kin'.

6.69 The options are:

**Option A: No change—retain term 'person responsible'**

**Option B: 'Medical decision maker' or 'health decision maker' (preferred)**

6.70 Although the role of the 'person responsible' received support in our consultations, it is clear that the term is not widely known and understood. Respecting Patient Choices and others told the Commission that the term 'next of kin' remains dominant within the medical profession and in the community.[58] This might lead to problems in practice, because community understanding of who is a person's 'next of kin' is sometimes different from the 'person responsible' under the G&A Act.

6.71 The term 'person responsible' is also used in New South Wales, Western Australia and Tasmania, while 'health attorney' and 'statutory health attorney' are used in the ACT and Queensland respectively.

6.72 The Commission believes that both the medical profession and the community might more easily understand a descriptive term, such as 'medical decision maker' or 'health decision maker'.

**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?

## 'Guardians' and 'administrators'

6.73 The term 'guardian' is used in the G&A Act to describe a person appointed to make personal or lifestyle decisions for someone who is unable to make their own decisions. An 'enduring guardian' is appointed by the person themselves when they have decision-making capacity, while a 'guardian' is appointed by VCAT. The term 'administrator' is used in the G&A Act to describe a person appointed by VCAT to make financial decisions for someone who is unable to make their own decisions.

6.74 The options are:

**Option A: No change—retain the terms 'guardian' and 'administrator'**

**Option B: The term 'guardian' should be replaced with 'adult guardian', and the term 'administrator' should be replaced with 'financial guardian' (preferred)**

**Option C: The term 'guardian' should be replaced with 'personal guardian', and the term 'administrator' should be replaced with 'financial manager'**

**Option D: The term 'guardian' should be replaced with 'personal decision maker', and the term 'administrator' should be replaced with 'financial decision maker'**

6.75 The term 'guardian' is open to criticism because it is commonly used to describe the relationship between a child and an adult person with parental responsibilities for the child.

6.76 Despite this difficulty, the Commission is wary of suggesting that the term be abandoned because the concept of 'guardianship' appears to be reasonably well understood within the community. The term 'guardian' is used in every other Australian jurisdiction and many other countries to describe a person who has authority to make personal or lifestyle decisions for an adult with impaired decision-making capacity. Use of the term 'adult guardian' might be an acceptable compromise because it retains the useful term 'guardian' yet indicates that the relationship is not one involving a parental figure and a child.

6.77 The meaning of the term 'administrator' in guardianship law appears to be little understood, even though it is used in a number of other Australian jurisdictions.[59] 'Financial manager', which is used in New South Wales, may be a clearer alternative.[60]

6.78 The Commission observed in a number of consultations that people often use the term 'guardian' when they mean 'administrator'. Consequently, the term 'financial guardian' has been proposed as another alternative. A similar term—'property guardian'—is used in the Canadian province of Saskatchewan.

6.79 Option D—'personal decision maker' and 'financial decision maker'—are terms that clearly describe the role of a substitute decision maker. Although there was some support for these terms in our consultations, others considered them too long. These terms are not used in any Australian jurisdiction.

**Question 7** Do you agree with the Commission's proposal that the term 'guardian' should be replaced with 'adult guardian'?

**Question 8** Do you agree with the Commission's proposal that the term 'administrator' should be replaced with 'financial guardian'?

57 Perhaps it would be more logical for the law regulating a general power of attorney to remain in the *Instruments Act 1958* (Vic) because a general power of attorney may be used only by people with capacity.

58 Consultation with Austin Hospital—Respecting Patient Choices Team (6 April 2010).

59 The term 'administrator' is also used in South Australia, Western Australia, Tasmania and Queensland. The term 'financial manager' is used in New South Wales, and the term 'manager' is used in the Northern Territory and the ACT.

60 Submission IP 8 (Office of the Public Advocate) 31.

# Clear and Accessible Laws

## 'Enduring powers'

6.80 The Victorian Parliament Law Reform Committee recommended in its *Inquiry into Powers of Attorney* that simple and consistent terminology be used for people who are appointed under an enduring power of attorney (financial) and an enduring power of guardianship.[61] It suggested the term 'representative'.[62] Similarly, the Committee suggested that people who make these appointments should be called a 'principal'.[63]

6.81 The Committee also recommended that these instruments be given consistent names:

- enduring power of attorney (financial)
- enduring power of attorney (guardianship).[64]

6.82 The Commission believes there are benefits in using the same language throughout guardianship law so that the same or similar terms are used in relation to powers of attorney, guardianship and administration. For example, the terms 'enduring adult guardian' or 'enduring financial guardian' could be used.

**Q** **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?

## COMMUNITY EDUCATION

6.83 Community education was identified in our consultations as an important means of:

- increasing community awareness and use of planning instruments such as powers of attorney[65]
- promoting the use of supported decision making as an alternative to substitute decision making[66]
- improving the understanding of people with disabilities about their rights in relation to substitute decision-making laws[67]
- improving the levels of understanding among substitute decision makers about the duties and responsibilities of their role[68]
- increasing awareness of substitute decision-making arrangements among professionals who come into come into contact with these arrangements (such as government agencies, the health and community sectors and financial agencies).[69]

6.84 As mentioned earlier, the Victorian Parliament Law Reform Committee has recommended a coordinated and targeted approach to community education.[70]

6.85 The Committee suggested that lawyers and health and community sector workers are well-placed to promote the use of powers of attorney.[71] The Committee also identified seniors, young people and people from CALD communities as groups with low levels of awareness and use of powers of attorney, with Aboriginal Victorians also likely to have low awareness levels (though more research is needed).[72]

6.86 The Committee found that although people aged over 60 have the highest level of uptake of powers of attorney, many lack a thorough understanding of how they work, and there is a need for a targeted, multi-faceted education campaign, making particular use of face-to-face interactions.[73]

6.87 The low awareness and uptake of powers of attorney in CALD communities was explained by reference to language barriers, and other cultural issues such as unfamiliarity with the concept of needing to formally appoint a decision maker. It is compounded by a lack of information that is specifically targeted to these groups.[74] To remedy this, the Committee recommended developing targeted information and resources developed in consultation with CALD communities, and conducting information sessions using existing community forums.[75]

6.88 The Committee also found that few young people used powers of attorney. While acknowledging the difficulty in engaging younger people in discussions around death and disability, the Committee endorsed the Public Advocate's call for the development of further information and resources targeted towards younger people.[76]

6.89 The Commission seeks suggestions about how community awareness and understanding of guardianship laws might be improved.

**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?

## Community education materials

6.90 The Public Advocate produces information and guides about guardianship, administration, medical treatment and powers of attorney.

6.91 Carers Victoria proposed a 'code of conduct' for guardianship laws.[77] A model for this may be the 'Code of Practice', which complements the United Kingdom Mental Capacity Act. This code operates as a guide to the legislation for those people who work with or have the care of adults who may lack capacity to make particular decisions.[78]

6.92 Codes of practice are rarely used in Australia to explain the operation of statutory schemes. One concern expressed by a leading commentator about codes of practice in United Kingdom mental capacity and mental health laws is that they can blur the distinction between 'guidance' and strict legal requirements, and lead to confusion.[79] The introduction of a code of practice to explain the operation of Victorian guardianship law would be a radical step that the Commission is not proposing at this stage. The Commission believes that it is better to concentrate on making legislation clear and accessible rather than to produce a code or guide to explain unnecessarily complex laws.

6.93 The community may be better served by the Public Advocate expanding production of high quality publications in a range of accessible formats and community languages. These publications outline legal requirements and best practice in the exercise of decision-making responsibilities, but unlike codes of practice do not themselves take on a form of quasi-legal authority.

61 'Agents' appointed under the *Medical Treatment Act* (Vic) were not included in the inquiry.

62 *Inquiry into Powers of Attorney*, above n 23, 44–7.

63 Ibid.

64 Ibid 42–4.

65 Submissions IP 8 (Public Advocate) 12, IP 44 (Australian Bankers' Association) 2 and IP 50 (Action for Community Living) 4.

66 Submissions IP 8 (Public Advocate) 12 and IP 19 (Scope) 18.

67 Consultations with Disability Advocacy Resource Unit (5 May 2010), people with acquired brain injuries (3 May 2010) and mental health consumers (7 April 2010); Submissions IP 43 (Victoria Legal Aid) 6–7 and IP 58 (Mental Health Legal Centre) 11.

68 Consultations with Gippsland Carers Association Inc (25 May 2010) and service providers in Mildura (27 April 2010); Submission 49a (Council on the Ageing) 2.

69 Submissions IP 1 (Carers Australia (Victoria)) 4, 23, IP 9 (Royal District Nursing Service) 4, IP 19 (Scope) 7 and IP 27 (Marillac) 2–3.

70 *Inquiry into Powers of Attorney*, above n 23, 35–8.

71 Ibid 273, 280.

72 Ibid 265–72.

73 Ibid 265–7.

74 Ibid 267–9.

75 Ibid 267–70.

76 Ibid 270–1.

77 Submission IP 1 (Carers Australia (Victoria)) 22–3.

78 *Mental Capacity Act 2005* (UK) *Code of Practice*, 1.

79 Peter Bartlett, 'The Code of Practice and the ambiguities of "guidance"' (2009) 19 *Criminal Behaviour and Mental Health* 157, 159.

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6.94 However, the Public Advocate has also acknowledged its limited capacity to undertake broad-based community education in relation to powers of attorney, suggesting that the Department of Justice and Victoria Legal Aid may be better placed to do this.[80] Another solution may be for the Public Advocate to receive additional funding to produce community education materials and conduct broader community education around substitute decision making.

**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?

### Peer education

6.95 Peer education means involving people from similar social, age or cultural groups to educate each other about important issues. The Commission heard in our consultations that there is a significant role for peer education programs in relation to substitute decision-making laws.[81] Council on the Ageing already runs general peer education programs for seniors in Victoria and other states, and powers of attorney commonly feature as an important topic of discussion. The Commission sees significant potential for an expanded role for peer education around substitute decision making, not just among older Victorians, but also among many other community groups such as disability groups, CALD communities, Indigenous communities, and Victoria's gay, lesbian, bisexual, transgender and intersex community.

### Advertising and raising awareness

6.96 An advertising and awareness campaign may assist the community to better understand and make use of guardianship laws.

6.97 The Commission notes the success of other awareness and education campaigns in similar fields. For example, following a segment about the power of attorney registry on BBC's *The One* television show in January 2010, there was a very significant increase in the registration of powers of attorney.[82] Alberta, Canada, is notable for its significant investment in promoting 'personal directive' planning mechanisms, which included a mail out of 200 000 personal directive kits in 2009.[83]

6.98 The Australian Government has invested significantly in measures to improve Australia's relatively low organ donor registration and donation rates. It has established the Organ and Tissue Authority, whose role includes the coordination of community education and awareness campaigns. Recent measures include the 2010 Donate Life OK campaign, which involved a combination of television, radio, cinema, print and billboard advertisements, use of media and social networking websites and outdoor activities.[84] The focus of this campaign was to encourage discussion around organ donation, and improve donor registration levels.[85] The Commission believes that a similar campaign, encouraging community awareness and discussion around supported and substitute decision making, may encourage people to plan for their future, and retain as much control over their lives as possible.

**Question 12** Would an education and awareness campaign assist the community to better understand and make use of guardianship laws?

## Collection of data

6.99 Lack of data about the operation of guardianship laws makes it very difficult to undertake evidence-based law reform.

6.100 As the Victorian Parliament Law Reform Committee noted, there is very limited data available relating to the use of powers of attorney in Victoria.[86] This is because they are essentially private agreements between individuals, and in most cases operate completely outside of the oversight of VCAT and the Public Advocate. The introduction of a registry of powers of attorney, which has been both recommended by the Committee[87] and proposed by the Commission in Chapter 8 of this paper, could be a valuable tool for gathering information about powers of attorney, and formulating community information and education.

6.101 Though VCAT provides some statistics about the number and types of orders made by the Guardianship List, there is very limited data available about Guardianship List users, and other important information such as:

- the average length of orders
- the number of 'plenary' and 'limited' orders
- the percentage of people who are the subject of applications who are legally represented
- the percentage of people who are the subject of applications who attend hearings.

6.102 By contrast, the Mental Health Review Board publishes more extensive data, including:

- the percentage of cases in which the affected person attends the hearing
- the percentage of hearings in which the person is legally represented, or has family and friends in attendance
- the percentage of matters in which statements of reasons are requested by parties
- a more detailed breakdown of the types of matters heard
- more detailed caseflow data
- data relating to the composition of the Board
- the volume and language groups of interpreters used at hearings.[88]

6.103 The Public Advocate publishes data about its guardianship clients, including details about the age and gender of clients, as well as the nature of the disability that led to the order, and the reason for the appointment.[89] They have also published a more extensive analysis of trends in public guardianship between 1988 and 2008, noting the 'exponential growth' in the number of cases it has managed over this period.[90] The Public Advocate also provides basic data about its investigations, advocacy, and community education and information roles.[91]

6.104 State Trustees does not publish similar data about its clients. The Commission notes that State Trustees does not have the same level of public funding as the Public Advocate, nor does it have a legislative function to undertake systemic advocacy for people with disabilities.

**Question 13** What type of data do you think needs to be collected and made available and from what bodies?

80 Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 22 October 2009, 9 (John Chesterman, Manager, Policy and Education, Office of the Public Advocate (Victoria)).

81 Consultation with Council on the Ageing (9 March 2010).

82 Consultation with the UK Office of the Public Guardian (11 October 2010). Monthly registrations more than doubled compared with 2009 volumes in March, April and May 2010. See Office of the Public Guardian, *Mental Capacity Update edition 2/2010*, <http://www.publicguardian.gov.uk/docs/Mental_Capacity_Act_Update_-_Issue_02-2010_new_link.pdf> 3.

83 Consultation with Office of the Public Guardian, Alberta (16 March 2010).

84 See Organ and Tissue Authority, *Donate Life* (2010) <http://www.donatelife.gov.au/index.html>.

85 Following the first year of implementation of the reform package, figures released by the Australian and New Zealand Organ Donation Registry and the Organ and Tissue Authority show an increase in the number of donors from an average of 11.3 donors per million Australians in 2009 to 13.8 per million in 2010. This is the highest number of donors in Australia's recorded donation and transplant history: Catherine King MP, Parliamentary Secretary for Health and Ageing, 'Tribute to Australian Organ Donors' (Media Release, 18 January 2011) <http://www.donatelife.gov.au/News-and-Events/News/Media-Releases/Tribute-to-Australian-Organ-Donors.html>. Victoria had an average of 17.7 organ donors per million in 2010 compared to 11.8 in 2009: Organ and Tissue Authority, *Facts and Statistics* (2010) Donate Life, <http://www.donatelife.gov.au/Discover/Facts-and-Statistics.html>.

86 *Inquiry into Powers of Attorney* above n 23, 20.

87 Ibid 225–33.

88 Mental Health Review Board, *2009 Annual Report* (2009).

89 Office of the Public Advocate (Victoria), *Annual Report 2009–10* (2009) 5–7.

90 Liz Dearn, Office of the Public Advocate (Victoria), *Guardianship Trends in Victoria: 1998–2008* (December 2009) Office of the Public Advocate (Victoria) <http://www.publicadvocate.vic.gov.au/research/132/>12.

91 OPA, *Annual Report 2009–10*, above n 89, 9–10, 14–17.