Part 5
VCAT Appointments

In this part, we examine appointments of guardians, administrators and supporters by VCAT. In Chapter 10 we explore the criteria for appointing a substitute decision maker. In Chapter 11, we consider how old a person needs to be before guardianship laws can apply to them. In Chapter 12, we look at whether the existing distinction between guardians and administrators is appropriate, how the division of powers might be better managed and who can be appointed to these positions. We conclude with an examination of the powers of guardians and administrators in Chapter 13.

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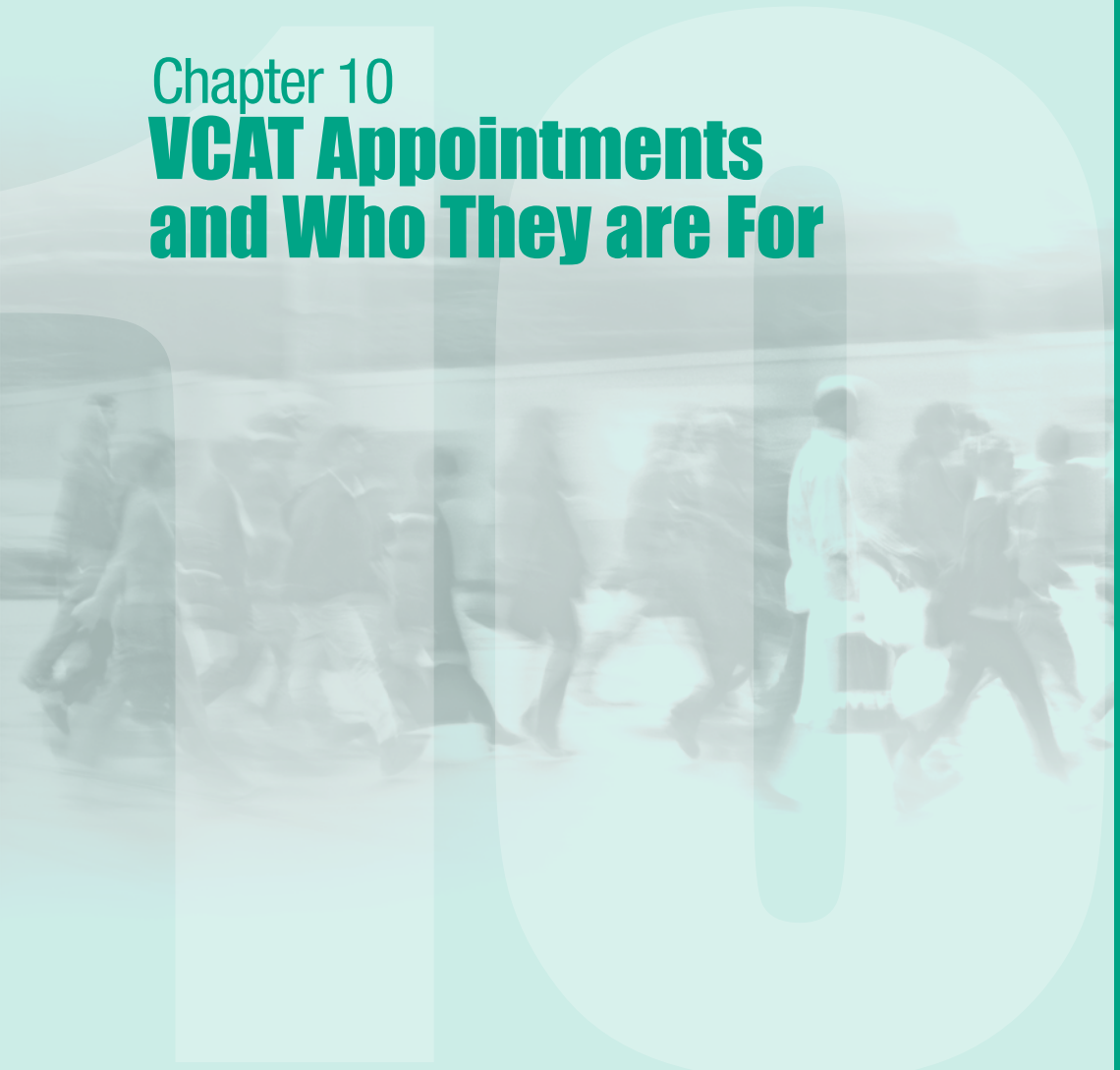

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INTRODUCTION

10.1 While it is highly desirable that people make their own appointments of supporters and substitute decision makers, personal appointments will not always be possible or appropriate. There will continue to be a need for appointments by a public body to assist people who have not chosen to make a personal appointment or who cannot do so because of lifelong decision-making incapacity.

10.2 As we noted in Chapters 4 and 7, the Commission proposes that the new guardianship laws contain a range of decision-making arrangements involving both supported and substitute decision making. The grounds for making these appointments are a matter of central importance. As noted during our consultations:

> *It is essential that more clarity is provided as to whom the legislation is for or, in other words, whose needs it is attempting to meet. Not to do so, or at least not to provide some guidance on this, opens the way for a 'catch-all' focus to prevail.*[1]

INTRODUCING NEW SUPPORTED DECISION-MAKING ORDERS

10.3 In Chapter 7, the Commission suggested that new supported decision-making mechanisms could complement existing substitute decision-making mechanisms to create a broader array of decision-making arrangements to better assist people with impaired decision-making capacity.

10.4 The Commission has proposed two supported decision-making appointments by the Victorian Civil and Administrative Tribunal (VCAT):

- new supported decision-making orders
- new co-decision-making orders.

10.5 The Commission proposes that VCAT should be required to consider the option of appointing a supporter before it can appoint a substitute decision maker. We present some options as to how this could occur in Chapter 21. The Commission acknowledges, however, that some people will need a substitute decision maker due to the extent of their decision-making impairment.

RETAINING GUARDIANS AND ADMINISTRATORS

COMMUNITY RESPONSES

10.6 There was strong support both at consultations and in submissions to our information paper to retain substitute decision-making laws.[2] Many people also referred to the need for a more comprehensive and integrated system of decision-making assistance.

Protecting the vulnerable

10.7 A number of submissions identified protection of vulnerable people as a reason for having substitute decision-making laws.[3] This is probably the primary reason why modern guardianship laws were enacted in the 1980s. The Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons emphasised the protective function of guardianship while also identifying the rights-enabling potential of guardianship.[4]

10.8 BENETAS considered that:

> *the current principles regarding protection of vulnerable people are vitally important and seem to be well covered in the present legislation. It is also our position that the current system of guardianship and administration, in principle, is the best way to ensure the needs of vulnerable people are met and their rights protected. However we believe there are better ways that this system can work in practice.*[5]

10.9 The Public Advocate argued that 'there continues to be a place for substitute decision-making laws, where other options do not exist and where the person's well-being would otherwise be placed in jeopardy'.[6]

10.10 The Southwest Advocacy Association also identified 'a continuing need for substitute decision-making laws in order to protect the rights and interests of people who lack capacity and/or are vulnerable to exploitation and abuse'.[7]

10.11 The New South Wales Guardianship Tribunal suggested that the appointment of substitute decision makers and the formal review processes associated with the guardianship system protect people with disabilities:

> *In the Tribunal's view, there is an ongoing need for substitute decision-making laws. One of the benefits of a modern guardianship system is the safety net it provides for people with disabilities. The establishment of decision-making bodies with the power to appoint guardians enables the ongoing review of the substitute decision-maker's appointment and allows the person with a disability to challenge that appointment by seeking a review.*
>
> *If there were no substitute decision-making laws, then substitute decisions would be made in the private sphere with no public accountability. Whilst this may work for many people, there will always be some people whose best interests are not served by their support network and who will require a substitute decision-maker who can make decisions to assure their protection and well-being.*[8]

Enabling function

10.12 At consultations and in submissions, some people suggested that characterising substitute decision making as restrictive does not reflect the intention behind guardianship legislation or the practical role substitute decision making plays in people's lives.[9]

10.13 Mark Feigan described the contrasting characterisations of substitute decision making as follows:

> *Guardianship provisions can be viewed in two main ways; either as a repressive restriction of personal autonomy, or as a productive exercise of power that enables a person to be protected and enabled as an (approximately) equal citizen. On balance, I think the latter interpretation better matches with people's experience in Victoria over more than twenty years.*[10]

10.14 The Public Advocate also rejected the idea that guardianship is merely a restriction on an individual's rights, characterising it as 'rights enhancing (in that it serves to protect people) … who are in need of, and entitled to, its protection'.[11]

1 Submission IP 56 (JacksonRyan Partners) 3.

2 See, eg, Submissions IP 5 (Southwest Advocacy Association) 5, IP 8 (Office of the Public Advocate) 19, IP 9 (Royal District Nursing Service) 8, IP 11 (Tony and Heather Tregale) 3, IP 21 (BENETAS) 3, IP 23 (Mental Illness Fellowship Victoria) 4, IP 25 (Eve Kinnear) 1, IP 27 (Marillac) 4, IP 32 (NSW Guardianship Tribunal) 3, IP 33 (Trustee Corporations Association of Australia) 4, IP 37 (Victorian Equal Opportunity and Human Rights Commission) 4–5, IP 40 (Australian & New Zealand Society for Geriatric Medicine) 5, IP 42 (Health Services Commissioner) 5, IP 43 (Victoria Legal Aid) 10, IP 44 (Australian Bankers' Association) 4, IP 47 (Law Institute of Victoria) 23, IP 50 (Action for Community Living) 7 and IP 55 (The Australian Psychological Society Ltd) 10.

3 Submissions IP 5 (Southwest Advocacy Association) 5, IP 8 (Office of the Public Advocate) 19, IP 21 (BENETAS) 2, IP 25 (Eve Kinnear) 1, IP 50 (Action for Community Living) 7 and IP 55 (The Australian Psychological Society Ltd) 10.

4 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) 13. See also the discussion in Chapter 2 of this consultation paper.

5 Submission IP 21 (BENETAS) 2.

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

7 Submission IP 5 (Southwest Advocacy Association) 5.

8 Submission IP 32 (NSW Guardianship Tribunal) 3.

9 Consultation with Fiona Smith (18 March 2010); Submissions IP 16 (Mark Feigan) 2 and IP 56 (JacksonRyan Partners) 4.

10 Submission IP 16 (Mark Feigan) 2.

11 Submission IP 8 (Office of the Public Advocate) 16.

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Compatibility with human rights instruments

10.15 A small number of people considered whether substitute decision making is compatible with the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention)[12] and the Victorian Charter of Human Rights (the Charter).[13]

10.16 The Victorian Equal Opportunities and Human Rights Commission (VEOHRC) submitted that substitute decision making is compatible with the equal recognition before the law for persons with disabilities that is guaranteed by article 12 of the Convention.[14] It observed that the Australian Government's interpretive declaration accepted that article 12 requires a shift towards primary reliance on supported decision making but contemplates an ongoing role for substitute decision makers.[15] VEOHRC considered that:

> *in accordance with Australia's interpretive declaration, the appropriate approach will be to preserve the highest level of autonomy possible, while acknowledging that autonomy may sometimes need to be restricted in certain circumstances—a continuum between supported and substitute decision-making.*[16]

10.17 VEOHRC emphasised that the starting point in assisting a person with impaired decision-making ability to make decisions should be supported decision making:

> *departures from supported decision making—to partial or full substitute decision-making—must satisfy a test of being a reasonable limitation on the human rights of the individual subject of the decision, who would otherwise be the decision maker (the elements of such a test would be based on section 7(2) of the Charter).*[17]

10.18 VEOHRC also emphasised that the need for a substitute decision maker should not be assumed to exist indefinitely merely because a substitute decision maker has been appointed for a particular decision:

> *one departure from supported decision-making with a particular person does not mean substitute decision-making must take place from then on. When the need for another decision arises, an approach based on substitution must be scrutinised and justified afresh.*[18]

10.19 In their submission, Action for Community Living observed that article 16 of the Convention[19] requires states parties to take appropriate steps to protect people with disabilities from exploitation, violence and abuse.[20] It considered that in some instances, this may require substitute decision making.[21]

10.20 Like VEOHRC, the Action for Community Living emphasised that substitute decision making should only be used if supported decision-making mechanisms are not viable.[22]

Need for a more nuanced and integrated system

10.21 At consultations and in submissions there was widespread support for a more comprehensive and integrated approach to providing for the needs of people with an impaired decision-making ability.[23]

10.22 Many people considered that the system should function as a continuum that encompasses informal arrangements, formal supported decision making and formal substitute decision making.[24]

10.23 Several submissions suggested that the increased promotion and use of advance planning mechanisms, such as advance directives and enduring powers of attorney, would help provide a more integrated system. For example, the Law Institute of Victoria argued that guardianship and administration are required but that:

> *reform is necessary to ensure a comprehensive and integrated system that promotes advance planning (including enduring powers of attorney and advance directives) and provides for tribunal made orders (such as guardianship and administration) only where necessary.*[25]

10.24 We discussed possibilities for improving the use and effectiveness of enduring powers of attorney in Chapter 8. The role of advance planning documents is discussed in more detail in Chapter 9.

THE COMMISSION'S VIEW

10.25 The Commission proposes that the law should continue to provide for state appointed substitute decision makers when other options are not viable.

10.26 In accordance with the approach adopted by the Convention,[26] the Commission believes that the primary aim of substitute decision making should be to promote the ability of an individual with impaired decision-making capacity to participate in all aspects of life to the maximum degree possible. When viewed this way, substitute decision making is primarily an enabling device rather than one that restricts a person's freedom to care for themselves.

10.27 The Commission proposes that substitute decision making should occur only when other supportive options are inappropriate. It should be possible to choose from a range of mechanisms, which might include informal assistance, formal supported decision making and substitute decision making.

CRITERIA FOR THE APPOINTMENT OF A GUARDIAN OR ADMINISTRATOR

THE GUARDIANSHIP AND ADMINISTRATION ACT 1986 (VIC)

10.28 Section 22 of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) sets out the current criteria for the appointment of a guardian. Section 46 describes the grounds for appointing an administrator. In both instances, there is a three-part test. Before making an appointment, VCAT must be satisfied that the person:

- has a disability[27]
- is unable, by reason of the disability, to make reasonable judgments (either about matters relating to their personal circumstances in the case of appointing a guardian,[28] or about the matters relating to their estate in the case of appointing an administrator[29])
- is in need of either a guardian[30] or an administrator.[31]

10.29 In both instances, the appointment of a substitute decision maker is discretionary. Both section 22 and section 46 stipulate that VCAT *may* make an appointment if it finds the three criteria satisfied. While the G&A Act does not describe VCAT's required level of satisfaction before making an appointment, it appears that the normal civil standard—the balance of probabilities—is used in practice.

10.30 Case law has stressed that the three requirements are both separate and cumulative.[32]

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

13 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

14 *Convention on the Rights of Persons with Disabilities*, art 12.

15 Submission IP 37 (Victorian Equal Opportunity and Human Rights Commission) 4.

16 Ibid 4–5.

17 Ibid 5.

18 Ibid.

19 *Convention on the Rights of Persons with Disabilities*, art 16(1) provides that: 'States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects'.

20 Submission IP 50 (Action for Community Living) 7.

21 Ibid.

22 Ibid.

23 See, eg, Submissions IP 17 (Psychiatric Disability Services of Victoria) 2–3, IP 19 (Scope (Vic) Ltd) 16, IP 21 (BENETAS) 2, IP 37 (Victorian Equal Opportunity and Human Rights Commission) 4–5, IP 43 (Victoria Legal Aid) 5 and IP 47 (Law Institute of Victoria) 23.

24 Consultations with service providers in Mildura (27 April 2010) and Disability Advocacy Resource Unit (5 May 2010); Submissions IP 8 (Office of the Public Advocate) 25 and IP 58 (Mental Health Legal Centre) 6.

25 IP 47 (Law Institute of Victoria) 23.

26 *Convention on the Rights of Persons with Disabilities*, arts 1, 3.

27 *Guardianship and Administration Act 1986* (Vic) ss 22(1)(a), 46(1)(a)(i).

28 Ibid s 22(1)(b).

29 Ibid s 46(1)(a)(ii).

30 Ibid s 22(1)(c).

31 Ibid s 46(1)(a)(iii).

32 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [44] ('*XYZ*').

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The Act's overarching principles

10.31 Section 4(2) of the G&A Act underpins the criteria set out in sections 22 and 46:

> *It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that—*
>
> *(a) the means which is least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and*
>
> *(b) the best interests of a person with a disability are promoted; and*
>
> *(c) the wishes of a person with a disability are wherever possible given effect to.*

10.32 The importance of these principles in guiding the tribunal's consideration of whether to appoint a guardian or an administrator has been stressed in case law. In *XYZ v State Trustees Ltd*, a VCAT order appointing an administrator was set aside and remitted to VCAT because, among other things, the tribunal had failed to give due weight to the G&A Act's section 4(2) principles.[33]

10.33 In particular, Justice Cavanough emphasised that consideration of the person's wishes relates not just to who is appointed as an administrator, but also to whether an administrator should be appointed at all.[34]

10.34 Although section 4(2)(c) does not give primacy to the wishes of the person with the disability over their best interests or the least restrictive alternative, it places an obligation on VCAT to fulfil the wishes of a person with a disability wherever possible. When deciding whether or not to make an appointment, VCAT must consider the wishes of the proposed represented person, as far as they can be ascertained,[35] and give effect to them wherever possible.[36]

10.35 In *Moore v Guardianship and Administration Board*, Justice Gobbo said that 'it must be a very rare case that will see an order made against the wishes of a represented person'.[37] In *XYZ*, on remittal to VCAT, Deputy President Billings described this statement as:

> *an expression of caution rather than a rule. Obviously, whether or not an administrator will be appointed against a person's wishes will depend on the circumstances of the individual case.*[38]

10.36 Deputy President Billings noted that the words 'wherever possible' contemplate that in some cases it will be impossible to follow the person's wishes. He observed that:

> *in McDonald v Guardianship Board*[39] *the Court accepted that there 'may be cases in which the jurisdiction of the [tribunal] may be justifiably invoked', adding that the legislation 'prescribes, very important safeguards against the making of inappropriate guardianship and administration orders'.*[40]

Disability

10.37 The Act defines disability very broadly: '**Disability**, in relation to a person, means intellectual impairment, mental disorder, brain injury, physical disability or dementia'.[41]

10.38 Notwithstanding the breadth of this definition, there are times when determining disability can be difficult. In cases such as those involving personality disorders, or addictive and obsessive behaviours, a finding of disability can be challenging.[42]

Reasonable judgments

10.39 The Act does not define 'reasonable judgments'. This term could be interpreted as inviting VCAT to evaluate the worth or quality of the decisions a person makes. In practice, however, the term seems to have been given the same meaning as 'capacity' or 'competence', which are concepts used throughout the law to describe a level of cognitive ability that is a necessary component of a valid decision. VCAT appears to obtain information about a person's capacity from a variety of sources, including expert assessments (such as from a neuropsychologist), lay evidence (such as from family members or others who can describe the person's abilities or inabilities to make decisions) and the tribunal's own impressions.[43]

10.40 In *XYZ,* Justice Cavanough emphasised that someone's inability to make reasonable judgments[44] must be assessed separately to the issues of whether the person has a disability[45] and whether the person is in need of an administrator.[46] He found in that case that VCAT had failed to distinguish properly between the reasonable judgment and need requirements.[47]

10.41 In determining whether someone is unable to make reasonable judgments, VCAT is required to consider all of the relevant lay and expert evidence.[48]

10.42 The test is subjective in the sense that VCAT must measure the person's capacity in relation to his or her actual property and affairs, rather than against an objective standard such as 'the ordinary routine affairs of man'.[49]

Need

10.43 The G&A Act describes a range of matters that must be considered when deciding whether a person is 'in need' of a guardian or administrator. VCAT must consider all of the following matters when deciding if a person needs a guardian:

- whether the needs of the person about whom the application is made could be met by other means less restrictive of the person's freedom of decision and action
- the wishes of the proposed represented person, as far as they can be ascertained
- the wishes of any nearest relatives or other family members of the proposed represented person
- the desirability of preserving existing family relationships.[50]

10.44 In determining the need for an administrator, the G&A Act requires VCAT to consider only the first two of these four points.[51]

10.45 In *XYZ*, Justice Cavanough suggested that:

> *Generally speaking, the question of 'need' will be answered primarily by reference to the availability or otherwise of alternative arrangements outside administration (such as family support) to compensate for or deal with the person's identified 'inability'.*[52]

Overarching objects

10.46 When exercising its discretionary power to appoint a guardian or administrator, VCAT is also required to consider the overarching objects in section 4(2) of the Act. Those objects are that:

- the means that are the 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.[53]

33 Ibid [20]–[37].
34 Ibid [33].
35 *Guardianship and Administration Act 1986* (Vic) ss 22(2)(ab), 46(2)(b).
36 Ibid s 4(2)(c). See *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [79].
37 *Moore v Guardianship and Administration Board* [1990] VR 902, 917.
38 *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [79].
39 *McDonald v Guardianship Board* [1993] 1 VR 521, 530.
40 *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [79].
41 *Guardianship and Administration Act 1986* (Vic) s 3.
42 Consultations with John Billings (17 March 2010) and members of VCAT Guardianship List (2 June 2010).
43 Consultation with John Billings (17 March 2010).
44 *Guardianship and Administration Act 1986* (Vic) s 46(1)(a)(ii).
45 Ibid s 46(1)(a)(i).
46 Ibid s 46(1)(a)(iii).
47 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [43].
48 Ibid [55].
49 XYZ (Guardianship) [2007] VCAT 1196 (29 June 2007) [53]–[55]. *Guardianship and Administration Act 1986* (Vic) s 46(1)(a)(ii).
50 *Guardianship and Administration Act 1986* (Vic) s 22(2).
51 Ibid s 46(2).
52 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [44].
53 *Guardianship and Administration Act 1986* (Vic) s 4(2).

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COMMUNITY RESPONSES

10.47 Responses to our information paper highlighted that the law is used to assist a broad range of people with different disabilities and different needs. Some of the key issues arising during our consultations were:

- the degree to which 'disability' is relevant in determining the need for a guardian or administrator
- what 'capacity' means and how we assess it
- the degree to which 'vulnerability' is relevant, regardless of capacity, in deciding whether or not a guardian or administrator is needed.

The relevance of 'disability'

10.48 Views on the relevance of 'disability' in determining the need for a guardian or administrator varied considerably throughout our consultations. Many argued that capacity, rather than disability, is the most important issue.[54] Some people approached the issue from a broad human rights perspective, as reflected in Mark Feigan's submission:

> *Disconnecting guardianship law from disability has some advantages in framing the law as a more universal component of Victoria's human rights protection and promotion framework. This may help to make our system of law itself more inclusive.*[55]

10.49 Some people argued, however, that it is necessary to require a person's impaired capacity to be linked to a disability in order to give the assessment process some objectivity. Otherwise, it was argued, capacity assessments would be based on value-laden judgments about the wisdom of a person's decisions:

> *Neuropsychologists believe that establishing whether a person has a 'disability', as broadly outlined in Victoria's G&A Act, remains a valid criterion for determining the need for a substitute decision-maker. In particular, neuropsychologists are concerned that opinion regarding a person's underlying capacity to make decisions should not be based solely on the apparent wisdom or outcome of the decisions that the person makes (a situation known as the 'outcome approach' to capacity). In the absence of establishing whether a disability is present, the G&A Act could be applied to individuals who make poorly considered decisions, but who do not possess a cognitive impairment that impacts on their ability to make decisions. Neuropsychologists therefore support the retention of establishing whether a person has a disability underlying poor decision-making, as defined in the current G&A Act (e.g., dementia, brain injury, mental disorder), as a necessary 'threshold requirement'.*[56]

10.50 The Mental Health Legal Centre noted that the G&A Act's current inclusion of disability as a criterion in its own right is concerning because it creates the perception that there is a correlation between having a disability and lacking capacity:

> *Despite the historical context of the [G&A Act] in being designed to promote the rights of people with disabilities, the MHLC is concerned that the effect of the law in practice is to reinforce a perception in the community, including among clinicians, that people who have or are labelled as having a disability, including a mental illness, do or are more likely to, lack capacity to make their own decisions.*[57]

Understanding and assessing 'capacity'

10.51 The complexities of the issues that arise when assessing decision-making capacity were often raised in responses to our information paper. There is a clear tension between the law's pragmatic search for a bright line between capacity and incapacity and the realities of everyday life, which demonstrate that a person's capacity can fluctuate over time and from one area of decision making to another.

10.52 Some people suggested that capacity issues arise very differently for people who have disabilities other than an intellectual disability, and that the system is poorly equipped to acknowledge and respond to these differences.

10.53 A person with mental illness who experiences loss of capacity, for example, may only do so episodically:

> *There are not really any universally accepted objective tests for capacity relevant to mental illness, nor do they properly take into account the episodic nature of mental illness, and fluctuating capacity … Capacity in mental illness can be difficult to understand—it is often manifested more in behaviour than in cognition; so assessing capacity should really be more about looking at the impact of people's decisions on their quality of life—but this then raises challenges about how you assess this without bringing in value judgments.*[58]

10.54 A person with an acquired brain injury, however, might experience severe loss of capacity at the time of their injury, but might then regain much, or even all, of their capacity later on.[59] A person who has dementia, on the other hand, might have diminishing capacity, but also many years of competent decision making and independent living.[60]

10.55 Some people expressed concerns about the ways in which capacity assessments are actually undertaken. These concerns include views that:

- Capacity assessments may sometimes involve little more than a line or two in a medical practitioner's report.[61]
- Some medical practitioners err on the side of presuming incapacity, to avoid legal action if the person makes a bad decision later on.[62]
- Capacity assessments might be made by medical practitioners who may assume that anyone with an intellectual disability lacks the capacity to make their own decisions.[63]
- A capacity assessment might be undertaken in a way that does not give a real indication of the person's situation, such as when a person who generally lacks capacity is able to present well before VCAT and thereby suggest that an order does not need to be made, when it does[64] or, conversely, when a person presents poorly when they are assessed, despite being able to function well in their own day-to-day living.[65]
- VCAT might make determinations about capacity without actually meeting the proposed represented person.[66]

10.56 The importance of a more sophisticated and modern approach to understanding and assessing capacity was stressed in the submission from the Australian and New Zealand Society of Geriatric Medicine. The Society said that the lack of legislative guidance on the issue of capacity leads to concerns about consistency in practice.[67] The Australian Psychological Society referred to the complexity of accurate capacity assessment and of identifying links between reduced capacity and disability.[68]

54 See, eg, Submissions IP 5 (Southwest Advocacy Association) 4, IP 9 (Royal District Nursing Service) 6, IP 11 (Tony and Heather Tregale) 3, IP 19 (Scope (Vic) Ltd) 9, IP 20 (Dying with Dignity Victoria) 3, IP 22 (Epworth Foundation) 2, IP 29 (Australian Association of Social Workers), IP 37 (Victorian Equal Opportunity and Human Rights Commission) 2, IP 42 (Health Services Commissioner) 4, IP 46 (Troy Huggins), IP 47 (Law Institute of Victoria) 5, IP 50 (Action for Community Living), 5 and IP 52 (Spectrum Migrant Resource Centre) 2.

55 Submission IP 16 (Mark Feigan) 8.

56 Submission IP 55 (The Australian Psychological Society Ltd) 4.

57 Submission IP 58 (Mental Health Legal Centre) 14

58 Submission IP 23 (Mental Illness Fellowship Victoria) 3–4.

59 Consultation with people with acquired brain injuries (3 May 2010).

60 Consultation with seniors groups (26 March 2010).

61 Consultation with Julian Gardner (26 March 2010).

62 Consultation with State Trustees client (7th May 2010).

63 Consultation with Self Advocacy Resource Unit (4 May 2010).

64 Submission IP 23 (Mental Illness Fellowship Victoria) 3.

65 Consultation with Disability Advocacy Resource Unit (5 May 2010).

66 See, eg, consultation with service providers in Morwell (29 March 2010).

67 Submission IP 40 (Australian & New Zealand Society of Geriatric Medicine) 2–3.

68 Submission IP 55 (The Australian Psychological Society Ltd) 4–7.

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10.57 Issues such as these were addressed in the Mental Health Legal Centre's call for principles to guide reform in this area. The Centre argued that those principles should reinforce a presumption of capacity, allow that presumption to be displaced only where there is sufficient evidence to prove otherwise, and recognise that capacity is both decision-specific and time-specific.[69]

10.58 The Mental Health Legal Centre suggested that the capacity test must really be a test for incapacity—a test that looks for evidence of incapacity rather than evidence of capacity.[70] This view is supported by expert commentary quoted in the Mental Health Legal Centre submission:

> *A critical matter overlooked by many mental health care practitioners is that when dealing with questions of capacity, because of the presumption of capacity, they should primarily seek evidence of incapacity and when they fail to find such evidence then let the presumption of capacity prevail.*[71]

The relevance of 'vulnerability'

10.59 The question of whether 'vulnerability' is a significant factor when determining if a person might require a guardian or an administrator elicited a range of community responses. Generally, people felt that vulnerability is insufficient in itself to become a criterion for the appointment of a substitute decision maker. The Law Institute of Victoria wrote:

> *Guardianship and administration should protect people who are vulnerable because they lack capacity and should not be used to protect vulnerability where no issue of capacity is evident. Undue influence and elder abuse, which diminish the autonomy of older persons, are serious issues which must be addressed by government and our society. However, we consider that the guardianship regime is not an appropriate vehicle to address issues such as physical and emotional abuse and prevention of access to services where a person has decision-making capacity.*[72]

10.60 Some community responses to our information paper did, however, identify the problems that can arise in relation to vulnerable people who have capacity. This was discussed most typically in relation to elder abuse. Elder abuse might involve, for example, an older person being financially abused by a member of their family but, despite having capacity and insight into what is happening, feeling powerless to act because of an emotional (or other) dependence they have on their family member.[73]

10.61 However, despite the seriousness of this type of scenario, and a recognition that the current guardianship regime cannot intervene unless the person has a disability that impairs their decision-making capacity, people tended to argue that this indicates the need for advocacy rather than guardianship.[74]

10.62 The relevance of considering 'vulnerability' alongside a lack of capacity, rather than as an appointment criterion in its own right, was recognised and, in some submissions, was even preferred over a focus on disability. Action for Community Living argued:

> *Action for Community Living considers it discriminatory that guardianship and administration measures apply only to people who have impaired decision making capacity and also have a disability. It would be preferable to rely on concepts such as 'lack of capacity' or 'vulnerability' rather then 'disability' to ensure that the rights of all people in need of protection are catered for.*[75]

10.63 The Public Advocate noted that other jurisdictions have already started to take legislative measures to protect vulnerable adults other than those under the guardianship framework:

> *OPA strongly supports the argument that society has a duty to protect vulnerable people, including those who are not eligible for the protective mechanism of guardianship.*
>
> *OPA would support Victoria undertaking some of the initiatives that have been implemented in overseas jurisdictions in this regard, such as the United Kingdom and United States, and which have recently received the support of the South Australian Public Advocate.*
>
> *There is a pressing need for greater policy focus on adult vulnerability, and the broadening out of guardianship to cover such situations would often be unhelpful and even problematic.*[76]

10.64 The Public Advocate argued for the introduction of adult protection legislation as part of an overall adult protection strategy, drawing on similar initiatives already undertaken or being considered in other jurisdictions, including the United Kingdom, the United States and South Australia.[77]

10.65 Although the Commission does not see vulnerability as a reason in itself for the appointment of a substitute decision maker, it may suggest the need for the Public Advocate's involvement in other ways, as discussed in Chapter 20.

The relevance of 'need'

10.66 The current legislative requirement that VCAT find that a person 'is in need of a guardian'[78] or an administrator[79] before it can make an appointment is controversial. In practice, it has meant that VCAT generally will make a guardianship appointment only when, at the time of the hearing, a decision needs to be made or is likely to need to be made in the near future.[80] For the most part, the pending decision will also need to be one of consequence and, in most cases, one where a third party—such as a bank or a service provider—requires certainty and clear authority before it will respond to the decision. Viewed from this perspective, the 'need' of a third party for contractual certainty sometimes determines whether a guardian is appointed.

10.67 In practice, this has meant that guardianship orders tend to be relatively less common, and more short-lived, than administration orders, especially because the criterion of pressing need is generally much easier to satisfy when dealing with management of a person's financial affairs.[81]

10.68 This practice has raised concerns that the system has become predominantly crisis-driven, preventing people from successfully applying for guardianship in an anticipatory way:

> *The guardianship regime currently works very much in the present in response to a crisis and does not allow VCAT to put in place arrangements that can operate when and if they are needed in the future. There should be some ability to do this, without locking people into protective arrangements that turn out not to be needed.*[82]

10.69 Further, some submissions argued that a large amount of time is spent demonstrating the need for a guardian or administrator in relation to people whose circumstances are unchanging and for whom substitute decision making will be an ongoing reality. This happens at the expense of adequate scrutiny of the ways in which the guardian or administrator exercises their powers and responsibilities:

69 Submission IP 58 (Mental Health Legal Centre) 16–17.

70 Ibid 17.

71 Peteris Darzins et al, 'What is Capacity?' in Dr Peteris Darzins et al (eds), *Who Can Decide?—The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 3.

72 Submission IP 47 (Law Institute of Victoria) 17.

73 See, eg, consultation with seniors groups (26 March 2010).

74 See, eg, consultation with David Green (21 April 2010).

75 Submission IP 50 (Action for Community Living) 5.

76 Submission IP 8 (Office of the Public Advocate) 6.

77 Ibid 6–7.

78 *Guardianship and Administration Act 1986* (Vic) s 22(1)(c).

79 Ibid s 46(1)(a)(iii).

80 *Re BWV* [2003] VCAT 121 (28 February 2003).

81 Information provided to the Commission by State Trustees and the Office of the Public Advocate reveals that the average duration of a guardianship appointment is 12 months: Email from Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010. The average duration of administration orders (excluding administration orders that are currently in force) is 5.08 years. The average duration of administration orders (including administration orders that are currently in force) is 6.72 years: Email from State Trustees to Victorian Law Reform Commission, 4 November 2010.

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

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> *We are concerned that more emphasis is placed by VCAT on the person's need for a guardian, than on the suitability of the guardian/s. There is ongoing scrutiny by VCAT on the person's need for a guardian, yet little ongoing scrutiny of the guardian/s by VCAT … Caring parents need easier access to plenary guardianship in order to better support, and to better monitor their family member's quality of life care. Getting plenary guardianship was a four year nightmare for us, even with legal support.*[83]

10.70 It was also noted that the question of 'need' is vague and requires clarification:

> *The crux of the G&A Act in testing capacity refers to a person 'unable by reason of the disability to make reasonable judgement in respect of all or any of the matters relating to her or his person or circumstances' and 'in need of a guardian'. This is a circular argument. Also, there is nothing to specify what constitutes 'need' in this context—should it relate to a particular category of need; or to potential severity of outcome; or to irreconcilable opinions?*[84]

10.71 The question of onus of proof in relation to need was also raised in submissions, with Victoria Legal Aid arguing:

> *A person who is the subject of a guardianship or administration order, or is seeking to have an order revoked, should not bear the onus of proving that they do not require a guardian or administrator. Instead the Guardianship and Administration Act (the Act) should make explicit that the onus for proving that a guardian or administrator is required, or continues to be required, rests with the applicant … In VLA's experience, once an order is made, it can be disproportionately onerous for a person to establish that they no longer require it.*[85]

PROBLEMS WITH LAW AND PRACTICE

10.72 Community responses suggested that a number of matters require careful consideration when designing the criteria for appointing a substitute decision maker in new guardianship laws. They are:

- the people who should be eligible for a VCAT appointment of a guardian or an administrator
- the different ways in which incapacity and need are manifested in people's lives
- assessment of incapacity and how evidence of incapacity should be presented to VCAT
- dealing with the question of 'need' to ensure that appointments are made when appropriate and not merely in response to crises.

Who the laws are for

10.73 It was noted throughout our consultations that supported decision making is the means by which most of us make important decisions in our lives. Scope, for example, saw the notion of supported decision making as essential to any legislative regime:

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

There is significant value in human beings supporting one another to make decisions;

Everyone uses their support networks in making decisions that are difficult for them.[86]

10.74 This suggests that the criteria for entry into a supported decision-making regime might need to be broader than criteria that would apply to a substitute decision-making regime. The issues of how a supported decision-making system might work, and to whom it might apply, are discussed in Chapter 7.

10.75 It seems clear that the G&A Act was intended to provide an open, transparent and accountable regime for decision making for people who lack capacity to make decisions themselves. The legislation sought to open up opportunities for people who had been living in institutions to engage in community life in a way that would have been impossible by virtue of their inability to consent to many of the transactions that form part of daily life.

10.76 Our consultations demonstrated that this is not the way that substitute decision making—and particularly administration—is perceived or experienced by some of the people for whom appointments have been made.[87] For these people, guardianship and administration is restrictive and disempowering; it is viewed as a means of controlling people's lives rather than liberating them.

10.77 Some people argued that guardianship laws should only be used in a way that benefits the represented person. In other words, guardianship should not be used to force a represented person to do things that they do not want to do. The Public Advocate wrote:

> *OPA draws a clear distinction between the mechanisms by which a society seeks to provide protection for an individual, and the mechanisms by which a society seeks to protect its members from dangerous people. Guardianship is one example of the former, and the Supervised Treatment Order is an example of the latter. Guardianship, in OPA's view, should never be used as a means of protecting society from dangerous individuals. Therefore, in OPA's view, the question of when guardianship might be sought, as against when a Supervised Treatment Order might be sought, is relatively clear. The law, in OPA's view, ought to reflect this clarity, and could easily do so if new guardianship legislation contained the principle that a guardianship order should only be made when this is in the interests of the represented person, and should not be made in order to protect society from the person.*[88]

10.78 This point is relevant when considering the issue of who the laws are for, because if guardianship laws are meant to promote participation by people with disabilities, and not to protect society, then this will affect how we conceptualise 'need'. It will mean that the laws are for people who require assistance to enable them to participate in society, rather than for people who require some form of compulsory intervention to prevent them from harming others. In both cases, decision-making capacity might be an issue, but the issue of 'need' is vastly different.

Capacity

10.79 As noted above, capacity—and, more importantly, incapacity—manifests itself very differently within the context of different disabilities and circumstances.

10.80 While the clear intent of Victoria's guardianship legislation was to permit a tribunal to 'tailor make orders to each case',[89] some people suggested that we now have a 'one size fits all' system that lacks individual responsiveness.[90]

83 Submission IP 11 (Tony and Heather Tregale) 2.

84 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 3.

85 Submission IP 43 (Victoria Legal Aid) 3.

86 Submission IP 19 (Scope (Vic) Ltd) 17–18.

87 This was noted broadly, and most often in relation to administration orders, throughout consultations with consumers—see, eg, consultations with people with disabilities, carers and advocates in Morwell (29 March 2010), Mental Health consumers (7 April 2010), VALID Southern Regional Client Network (20 April 2010), carers and people with disabilities in Mildura (27 April 2010), Self Advocacy Resource Unit, (4 May 2010) and State Trustees client (7 May 2010).

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

89 Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986 (JH Kennan) 558.

90 See, eg, consultation with service providers in Mildura (27 April 2010).

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10.81 Some of the overarching principles discussed in Chapter 5 deal with our understanding of capacity and how it should be assessed. It is important to safeguard against inappropriate assessments that a person lacks capacity. For example, it should be impossible to assume that a person lacks capacity simply because:

- they have a disability
- of their advanced age
- they might dress, or groom themselves, or behave, in ways that others find 'odd'
- they have made decisions others consider to be unwise
- they have lacked capacity at some time in the past, or in relation to some decisions.

10.82 In discussing options for reform, we advance proposals that might help guard against inappropriate findings of incapacity.

10.83 It is valuable to consider the differences between assessing capacity and assessing incapacity. The common law presumes that an adult has capacity unless incapacity can be established.[91] This means that the primary focus is upon determining the nature and extent of any incapacity, rather than assessing capacity. It places an evidentiary responsibility on the person who seeks to assert incapacity.

10.84 The presumption of capacity is, however, a complex matter and, while in principle it might imply this evidentiary responsibility on the person seeking to assert incapacity, in practice this is often done by assessing the person's capacity—that is, by asking them to demonstrate their capabilities. This apparent contradiction has been well explained by Dr Peteris Darzins, who notes the parallel between the legal concepts of capacity and incapacity, and innocence and guilt:

> *In our society there is a presumption of capacity—people above a certain age are presumed capable to make choices for themselves … But in some instances this presumption of capacity is called into doubt. In this regard capacity and incapacity parallel the legal concepts of innocence and guilt. In most situations there is a presumption of innocence which is sustained until there is sufficient evidence to the contrary. In the same way as in questions of innocence or guilt the onus is on the party that alleges guilt to provide the evidence of guilt, rather than on the accused to provide evidence of innocence, in situations where incapacity is suspected, the onus is on society to prove this is indeed the case. Strictly speaking individuals do not have to prove they are capable. Nonetheless, when there are valid suspicions that people are incapable and at risk because of incapacity, then it is reasonable to perform capacity assessments. It could be argued that capable people have a responsibility to demonstrate capacity, at least as far as the courts are concerned. This is similar to asking the accused to provide evidence of innocence should there be any such evidence, for example an alibi, rather than choosing to remain silent.*[92]

10.85 This obviously gives rise to the importance of undertaking capacity assessments appropriately. Darzins goes on to stress the importance of doing this through a thorough process that is initiated by a valid trigger, and that properly engages the person. He sets out a six-step capacity assessment process, entailing:

- ensuring that there is a valid trigger for assessing capacity, such as a person demonstrating behaviour that puts themselves or others at risk, or making choices that seem inconsistent with their previously held values
- engaging the person in the process and informing them what is happening
- gathering information to describe the context, choices and their consequences
- educating the person about the context, choices and consequences
- conducting the assessment
- taking action on the basis of the results of the assessment.[93]

10.86 A number of factors need to be considered when addressing this issue, particularly in relation to understanding and assessing incapacity. This includes the need to understand incapacity within the context of support networks, reflecting the interdependent nature of decision making:

> *Scope believes that any discussion of decision making capacity should include the importance of human interdependence, particularly in relation to their decision making. Scope is of the view that current Guardianship legislation generally fails to reflect this important premise, only deeming someone competent to make a decision if they can do so independent of support. Scope are concerned that this approach to competency is not reflective of how most people make important decisions.*[94]

10.87 Incapacity is not necessarily indicated by the outcomes of the decisions people make, nor through diagnosis of disability or impairment. Rather, it is understood more through assessing whether a person has the ability to understand and process the information necessary to meet the demands of the situation before them—that is, a time-specific and decision-specific approach to capacity. As the Australian Psychological Society argued:

> *There are three potential approaches to the assessment of capacity that have been described in the literature. The 'diagnostic' approach is based on the idea that individuals with particular diagnoses or disabilities lack capacity on the basis of their diagnosis or disability alone. The 'outcome' approach is based on the idea that individuals can be classified as lacking capacity based on the wisdom or outcome of the decisions that they make. The current G&A Act is based on the third approach, the 'functional' approach. This approach involves assessing whether the person's abilities are sufficient for the demands of the particular situation at hand.*[95]

10.88 The Australian Psychological Society went on to argue that the functional approach to capacity, and therefore to the assessment of incapacity, is a complex one, involving a thorough process of information collection, interview and cognitive assessment.

10.89 According to the Australian Psychological Society, the 'information collection' phase involves obtaining medical, education and occupational histories, looking at medical records and talking with family carers, and others. The 'interview' phase involves asking the person structured questions to find out about the person's understanding of the decisions that need to be made. Finally, a 'formal cognitive assessment' involves applying various tests designed to assess memory and problem solving, and that provide information to complement that obtained in the interview .[96]

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 Peteris Darzins et al, 'What is Capacity?' above n 71, 3.

93 Peteris Darzins et al, 'The Capacity Assessment Process' in Dr Peteris Darzins et al (eds), *Who Can Decide?—The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 12.

94 Submission IP 19 (Scope (Vic) Ltd) 10–11.

95 Submission IP 55 (The Australian Psychological Society Ltd) 5.

96 Ibid 5–6.

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10.90 As the costs involved in obtaining thorough neuropsychological assessments can be considerable,[97] this creates a significant practical dilemma when there is debate or uncertainty about the extent of a person's decision-making incapacity.[98]

10.91 It is a challenge to ensure that incapacity is assessed in a way that takes all relevant matters into account, while also occurring in a way that is economically viable. The current G&A Act fails to provide any specific guidance on these matters, unlike some other jurisdictions that include various principles directly relevant to the assessment of incapacity.[99] The merit of including some sort of similar guidance in a new legislative framework for Victoria will be discussed in our possible reform options below.

OTHER JURISDICTIONS AND VIEWS

Other jurisdictions

10.92 Most Australian jurisdictions have similar criteria for the appointment of a guardian or administrator to that currently operating in Victoria, but there are often important differences of emphasis and detail. These differences are discussed below.

New South Wales

10.93 In New South Wales, a person is said to be in need of a guardian if the person, because of a disability, is totally or partially incapable of managing his or her person.[100] As well as being satisfied that the person meets this criterion, the tribunal must also consider a range of other matters before appointing a guardian, including:

- any views of the person, their spouse and carer
- the importance of maintaining family relationships
- the importance of preserving cultural and linguistic environments
- the practicability of services being provided to the person without needing to make an order.[101]

10.94 Financial management orders (the New South Wales equivalent of administration orders) can be made when the tribunal is satisfied that:

- a person is incapable of managing their own affairs
- there is a need for another person to manage those affairs on the person's behalf
- it is in the person's best interests that an order be made.[102]

The New South Wales provisions for financial management orders make no reference to disability.

10.95 The New South Wales Legislative Council's Standing Committee on Social Issues has recently also recommended that entry into the guardianship system should be based on a single definition of capacity that does not depend on the person having a disability.[103]

Queensland

10.96 In Queensland, there is no requirement for a person to have a disability before the tribunal can make an appointment. The Queensland legislation provides that a guardian can be appointed for a personal matter, or an administrator for a financial matter, if:

- the adult has impaired capacity for the matter
- there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property
- without an appointment the adult's needs would not be adequately met, or the adult's interests would not be adequately protected.[104]

10.97 In Queensland, incapacity is not linked to any diagnosis of disability but instead relies upon a three-pronged test that is decision-specific and asks, in particular, if the person:

- can understand the nature and effect of the decision
- has made the decision voluntarily
- is able to communicate their decision in some way.[105]

South Australia

10.98 In South Australia, guardians and administrators can be appointed if the Board is satisfied that the person has a mental incapacity and a guardian or administrator should be appointed.[106]

10.99 The South Australian Act includes principles that should guide the Board in making orders (as well as guardians and administrators in making decisions). These principles include:

- consideration of what the person would be likely to want if they were able to make their own decisions
- the present wishes of the person to the extent that these can be obtained
- the adequacy of existing informal networks in supporting the person
- making orders or decisions that involve the least restriction of the person's autonomy.

These principles should always be consistent with the person's care and protection.[107]

Western Australia

10.100 In Western Australia, the tribunal may appoint a guardian if it is satisfied that a person needs a guardian because they are either:

- incapable of looking after their own health and safety
- unable to make reasonable judgments about matters relating to their person, or
- in need of oversight, care or control in the interests of their own health and safety or for the protection of others.[108]

10.101 An administrator may be appointed where a person is unable, because of mental disability, to make reasonable judgments about matters concerning all or any part of their estate and is in need of an administrator.[109]

10.102 Western Australia's Act includes principles that should underpin these and other decisions of the tribunal. These include:

- the best interests of the person
- a presumption of capacity
- meeting the person's needs in a way that is least restrictive of their freedom of decision and action
- the wishes of the person, in whatever form they can be expressed, including through previous actions.[110]

97 See, eg, Submission IP 9 (Royal District Nursing Service) 7.

98 Consultation with Villamanta Disability Rights Legal Service (19 April 2010).

99 See, eg, *Mental Capacity Act 2005* (UK) ss 1–3, which outlines a number of principles relevant to capacity assessment; *Guardianship and Administration Act 2000* (Qld), sch 1 s 1, which affirms a person's right to an presumption of capacity.

100 *Guardianship Act 1987* (NSW) s 3.

101 Ibid s 14.

102 Ibid s 25G.

103 Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-Making for People Lacking Capacity* (2010) 35.

104 *Guardianship and Administration Act 2000* (Qld) s 12(1).

105 Ibid sch 4 (Dictionary): definition of 'capacity'.

106 *Guardianship and Administration Act 1993* (SA) ss 29, 35.

107 Ibid s 5.

108 *Guardianship and Administration Act 1990* (WA) s 43.

109 Ibid s 64.

110 Ibid s 4.

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10.103 While Western Australia's Act does not explicitly require a person to have a decision-making impairment or disability for a guardian to be appointed, in practice guardianship orders are only made where a decision-making disability has been found.[111]

Tasmania

10.104 The Tasmanian Act requires the Board, in deciding whether or not to appoint a guardian or administrator, to consider the same criteria of disability, inability to make reasonable judgments and need as is required under Victoria's legislation.[112]

Australian Capital Territory

10.105 In the ACT, the tribunal may appoint a guardian for a person who has impaired decision-making ability in relation to a matter concerning their health or welfare. The appointment can only be made if, while their decision making is impaired, a decision needs to be made or they are likely to do something that will place themselves at risk, and, without a guardian being appointed, their needs will not be met or their interests will be adversely affected.[113]

10.106 The Act's provisions for the appointment of managers (the ACT equivalent of administrators) mirror those for appointment of guardians.[114]

10.107 The ACT's use of the provision 'while the person has the impaired decision-making ability' explicitly recognises the time-specific nature of decision-making impairment.

10.108 The ACT legislation also provides that impaired decision-making ability means decision-making ability that is impaired 'because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness'.[115]

Northern Territory

10.109 In the Northern Territory, the criteria for appointing a guardian are that the person must have an intellectual disability and be in need of a guardian.[116]

10.110 The decision about whether to appoint a guardian is also guided by the requirement that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by the Act is exercised in a way that adopts the means that least restricts the person's freedom of decision and action, that promotes their best interests and gives effect, wherever possible, to their wishes.[117]

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

10.111 The Victorian Parliament Law Reform Committee made recommendations about assessing capacity in its recent report concerning powers of attorney. The Committee recommended that the following principles should guide capacity assessments:

- Capacity is specific to each decision to be made.
- Impaired decision-making capacity may be temporary or permanent.
- Capacity should not be assumed based on a person's appearance.
- A person must not be presumed to have impaired decision-making capacity merely because they make a decision that is, in the opinion of others, unwise.
- A person should not be treated as unable to make a decision if it is possible for them to make that decision with appropriate support.[118]

England And Wales

10.112 The England and Wales *Mental Capacity Act 2005* (UK) contains principles to guide the assessment of capacity which are similar to those recommended by the Victorian Parliament Law Reform Committee. They include:

- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because they make an unwise decision.[119]

10.113 The *Mental Capacity Act 2005* (UK) also prohibits a finding of incapacity merely by reference to:

- a person's age or appearance
- a condition or aspect of their behaviour that might lead others to make unjustified assumptions about their capacity.[120]

POSSIBLE OPTIONS FOR REFORM

10.114 The Commission has considered a number of possible approaches to the criteria or grounds that must be satisfied before VCAT can appoint a guardian or administrator for an adult. We provide options for appointment, assessing incapacity, and determining the need for a substitute decision maker below.

CRITERIA FOR APPOINTMENT

Option A: Retain current entry criteria

10.115 This option would entail no change to the existing criteria for the appointment of a guardian or administrator set out in sections 22 and 46 of the G&A Act. The three criteria of disability, incapacity and need would be retained, as would the requirement that VCAT consider the three overarching principles set out in section 4(2) of the Act when exercising its discretionary power to make an appointment.

10.116 The primary advantage of this option is that it reflects a system that has been in operation for many years and is reasonably well known to those who work in the field.

10.117 One important issue associated with the existing grounds for appointment is that 'disability' is a criterion in its own right, even though most people with disabilities are quite capable of making their own decisions. A person's disability is only a relevant consideration when it affects their capacity to make decisions for themselves.

Option B: Remove disability as a criterion in its own right (preferred)

10.118 This option would involve removing disability as a separate criterion, but would provide that a person's lack of capacity to make decisions must be caused by a disability.

10.119 The advantage of this option is that it removes any perception that disability is, in itself, a relevant factor in determining the need for a guardian or administrator, but still recognises that a lack of capacity to make reasonable judgments needs to be linked to something that can be objectively assessed. This reduces the likelihood that an assessment of the reasonableness of a person's judgments will rely only on the outcomes of their decisions, and the serious risks of value judgments to which this gives rise.

111 See, eg, the Western Australian Public Advocate's information about guardianship at: Office of the Public Advocate, *Guardianship* (15 July 2010) <http://www.publicadvocate.wa.gov.au/G/guardianship.aspx?uid=1541-4327-7273-5606>.

112 *Guardianship and Administration Act 1995* (Tas) ss 20, 51.

113 *Guardianship and Management of Property Act 1991* (ACT) s 7.

114 Ibid s 8.

115 Ibid s 5.

116 *Adult Guardianship Act 1988* (NT) s 15.

117 Ibid s 4.

118 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 120.

119 *Mental Capacity Act 2005* (UK) s 1(3)(4).

120 Ibid s 2(3).

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10.120 The disadvantage of this option is that it still calls for a diagnosis of disability and could, therefore, exclude people who have a decision-making incapacity that cannot be linked to a diagnosable disability. A person with an addiction, but who does not have any disability such as a drug-related brain injury or a diagnosable mental illness, might fall into this category.

10.121 The Commission currently prefers this option.

Option C: Remove disability from the criteria altogether

10.122 This option would remove all reference to disability from the criteria for appointing a substitute decision maker. It would retain the requirements that a person is unable to make reasonable judgments (or some similar concept involving incapacity), regardless of the cause of that inability, and has a need for a guardian or administrator.

10.123 The advantage of this option is that it removes any reference to disability and focuses solely on the issues of capacity and need. It might make it easier to have substitute decision makers appointed for people who abuse alcohol or drugs, or who have a gambling addiction.

10.124 The disadvantage of this option is that it leaves open the question of how incapacity would be assessed without a link to a diagnosable disability. It is likely that lack of capacity would be assessed by considering the decisions people make and the processes they follow when making them. It might be difficult to ensure that such an assessment was not susceptible to the influence of value judgments about the quality of those decisions.

Q **Question 50** Do you agree with the Commission's proposal that disability should no longer be a separate criterion for the appointment of a substitute decision maker, but that it should be necessary for VCAT to find that a person is incapable of making their own decisions because of a disability before it can appoint a guardian or an administrator?

UNDERSTANDING AND ASSESSING CAPACITY

10.125 An adult's lack of capacity to make decisions for themselves lies at the centre of guardianship law. In some cases, such as those involving a person in a coma or in an advanced stage of Alzheimer's disease, there may be no debate about a person's incapacity to make decisions for themselves. In other cases, the issue of a person's capacity—or more correctly, the extent of their incapacity to make decisions for themselves—may be a hotly contested issue.

10.126 Two important questions arise when considering incapacity. First, what degree of incapacity is required before VCAT may appoint a guardian or an administrator for a person and, secondly, how should incapacity be assessed?

10.127 The terminology currently used in the G&A Act to describe the degree of incapacity that must be established before a guardian or an administrator can be appointed is open to the criticism that it invites value judgments about the quality of decisions that people make. Before a guardian can be appointed for a person, VCAT must be satisfied that the person 'is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances'.[121] The term 'reasonable judgments' is also used when dealing with the appointment of an administrator.

10.128 The G&A Act does not provide VCAT with any guidance about how it should determine whether a person is unable to make 'reasonable judgments' about their personal affairs or their estate. In practice, VCAT usually relies heavily upon written reports from health professionals when making this determination.

10.129 The Commission has developed options for dealing with these two important questions.

Option A: Provide legislative capacity principles

10.130 Under this option, new guardianship legislation would contain some broad capacity principles, which would provide guidance for both VCAT and health professionals when assessing incapacity.

10.131 Despite the fact that the common law recognises a presumption of capacity for adults, the G&A Act says nothing about this issue. There might be considerable value in following the lead of the United Kingdom and other Australian jurisdictions by including a presumption of capacity in Victorian guardianship laws. This step was strongly supported in our consultations.[122]

10.132 Our consultations also indicated a strong desire for a more structured approach to assessing capacity, including recognition of the fact that for many people, capacity can be decision-specific and can fluctuate over time.[123] A number of groups also supported the principle in the United Kingdom's *Mental Capacity Act 2005* that a finding of incapacity should not be made about a person 'merely because [they] make an unwise decision'.[124]

10.133 The Commission suggests that the following capacity principles could be included in new guardianship laws:

- A person must be presumed to have capacity.
- Incapacity is sometimes time-specific and decision-specific and will fluctuate over time for many people.
- Capacity should not be assumed based on a person's appearance.
- The fact that an adult makes a decision that others consider to be unwise does not necessarily mean they lack capacity.
- A person should not be treated as unable to make a decision if it is possible for them to make that decision with appropriate support.[125]

10.134 The primary advantage of this option is that it recognises the complexity of incapacity assessment. It seeks to provide some legislative guidance about how to undertake the difficult task of determining whether a person is experiencing a level of incapacity that might warrant the appointment of a guardian or an administrator.

10.135 The primary disadvantage of this option is that it might add significantly to the cost of determining guardianship and administration applications.

Option B: Provide a legislative definition of incapacity

10.136 Under this option, new guardianship legislation would describe the level of incapacity that VCAT must find before it could appoint a guardian or administrator for a person.

10.137 This option is not mutually exclusive with Option A, but proposes complementing capacity principles with an actual definition of incapacity. The definition in section 3(1) of the *Mental Capacity Act 2005* (UK) merits serious consideration. It provides that:

121 *Guardianship and Administration Act 1986* (Vic) s 22(1)(b).

122 See, eg, Submissions IP 1 (Carers Australia (Victoria)) 18 and IP 8 (Office of the Public Advocate) 15.

123 Submissions IP 1 (Carers Australia (Victoria)) 18, IP 30 (Victorian Aboriginal Legal Service) 7–8 and IP 37 (Victorian Equal Opportunity and Human Rights Commission) 5.

124 Submissions IP 43 (Victoria Legal Aid) 8 and IP 54 (PILCH Homeless Persons' Legal Clinic) 29. See also *Mental Capacity Act 2005* (UK) s 1(4).

125 The principles listed here are largely adapted from those provided in the *Mental Capacity Act 2005* (UK) ss 1–3, as well as those recommended by the Victorian Parliament Law Reform Committee in its *Inquiry into Powers of Attorney*, as noted above.

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a person is unable to make a decision for himself if he is unable—
a) to understand the information relevant to the decision

b) to retain that information

c) to use or weigh that information as part of the process of making the decision, or

d) to communicate his decision in some way (whether by talking, using sign language or any other means).

10.138 A primary advantage of this option is that it deals with incapacity rather than capacity and provides a useful and transparent checklist of matters to consider when determining whether a person is unable to make decisions for themselves.

10.139 A disadvantage of this option is that it might not incorporate all of the matters that should be considered when determining whether a person is unable to make decisions for themselves.

Option C: No change

10.140 This option would retain the status quo, providing no legislative guidance around the assessment of capacity, leaving the matter to be determined on a case-by-case basis in accordance with the common law.

10.141 The advantage of this option is that it allows great flexibility. It impliedly recognises that the factors that are relevant when assessing incapacity will vary from one situation to the next.

10.142 The disadvantage of this option is that it does not address the various reservations about capacity assessments described in the community responses sections above.

Question 51 Do you agree with the Commission's suggestions for capacity principles (Option A) and a legislative definition of incapacity (Option B) in order to provide legislative guidance on how to determine when a person is unable to make their own decisions? Are there additional or other ways to provide this guidance?

ASSESSING THE NEED FOR A GUARDIAN OR ADMINISTRATOR

10.143 The G&A Act provides that VCAT must be satisfied that a person is in need of a guardian or administrator before it can make an appointment. In practice, these provisions have been interpreted to mean that there must be an existing need for a guardian or administrator rather than a possibility that a person might need a substitute decision maker at some time in the future.[126]

10.144 This practice has led to the suggestion that the current regime is unnecessarily crisis-driven and does not encourage effective advance planning for people with seriously impaired decision-making capacity who might need a guardian or administrator at some time. It might also promote the use of unaccountable informal decision-making practices for people who are unable to make their own decisions.

10.145 The options below address the issue of whether VCAT should be expressly permitted to appoint a guardian or administrator in anticipation of future need, as well as in response to a proven existing need.

Option A: Remove the criterion of need

10.146 This option would involve removing the criterion of need for the appointment of a guardian or administrator in those cases where there is little or no dispute about a person's ongoing incapacity. The criteria for appointment would be either the first two of the existing three criteria—disability and incapacity—or would become the single criterion that a person was incapable of making decisions for themselves because of a disability.

10.147 Under this option, there would be no requirement that an identified decision needs to be made, either at the time of the hearing or in the near future, but simply evidence that the person would be unable to make a decision should one need to be made in the future. If this option is adopted, it would be desirable to include a requirement that VCAT be satisfied that the person is unlikely to be able to make decisions in the future, even with support.

10.148 In order to ensure proper accountability of guardians and administrators appointed in 'anticipatory' circumstances, it might be necessary to include in the VCAT order some extra safeguards that involve additional external monitoring of the ways in which the powers are being exercised.

10.149 The advantage of this option is that it would reduce the crisis-driven nature of the system. It could enable guardians or administrators to be appointed in a more proactive way and thereby avoid some of the stresses involved in seeking an order at a time of crisis.

10.150 The disadvantage of this option is that it could lead to the appointment of guardians or administrators in situations where they might not really be needed. It could be difficult to articulate the extent of the guardian's or administrator's powers without the context of actual identifiable decisions needing to be made.

Option B: Allow appointments to be made in anticipation of future need (preferred)

10.151 This option would be similar to Option A as it would remove the current practical requirement that the need for a guardian or administrator arises only when a decision must be made now or in the near future that requires a formal substitute decision maker. It would differ from Option A, however, in that it would still require need to be established, albeit in a broader, less immediate sense.

10.152 Under this option the legislation would require that the need for a guardian or administrator arises because of decisions that have to be made either now or in the reasonably anticipated future.

10.153 As with Option A, it is proposed that this broader concept of need would only apply where the tribunal is satisfied that it is unlikely that the person will achieve capacity with support or regain it.

10.154 The advantage of this option is that it retains the current recognition that an appointment should only be made if it needs to be made, and still links the concept of need with the issue of decision making, but arguably interprets and applies this in a more realistic way for people with ongoing and significant incapacity.

10.155 It shares similar disadvantages with those outlined above for Option A.

Option C: No change

10.156 This option would retain the current practice for there to be an existing need for a guardian or administrator before one is appointed—there must be a decision that needs to be made at the time of the hearing or in the foreseeable future, which could not be made without a guardian or administrator being appointed.

126 *Re BWV* [2003] VCAT 121 (28 February 2003).

Chapter 10

VCAT Appointments and Who They are For

10.157 The advantage of this option is that it retains the current safeguard against unnecessarily appointing a substitute decision maker when there is no demonstrated need.

10.158 The disadvantage of the option is that it continues to require people to deal with the stress of the application process, often at a time of pressing crisis, and in situations where the proposed represented person's inability to make autonomous decisions, either at the time of the hearing or in the future, was never under question anyway.

Q

Question 52 Do you agree with the Commission's proposal (Option B) that new guardianship laws should allow VCAT to appoint a guardian or an administrator for a person when it is satisfied that the person is unable to make their own decisions because of a disability—and is unlikely to regain or achieve that capacity—and might have some future need for a guardian or an administrator?

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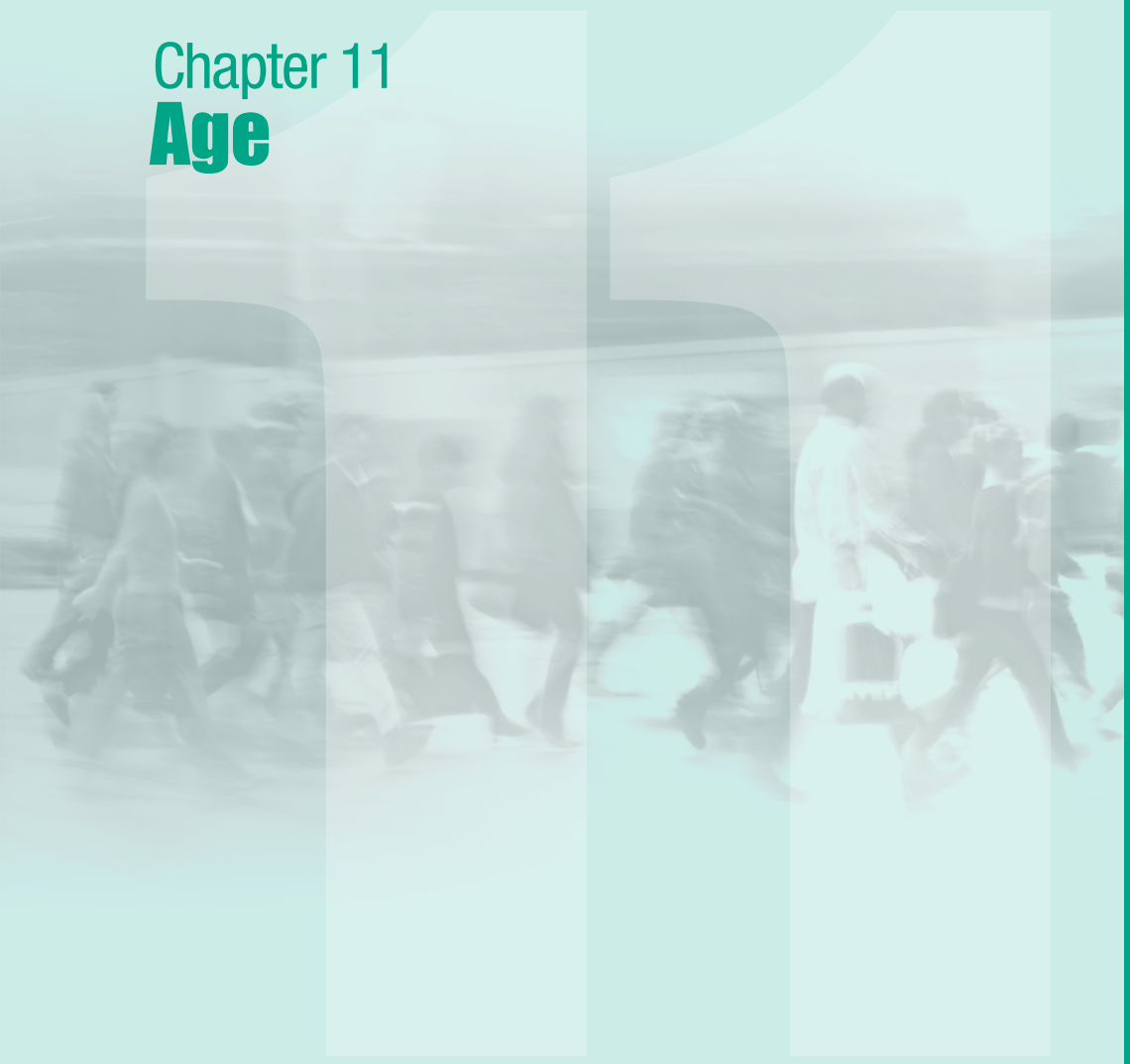

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INTRODUCTION

11.1 Our terms of reference ask the Commission to consider if the provisions of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) should be extended so that they apply to people with impaired decision-making capacity who are 17 years of age. A gap in the current law means that a 17-year-old person is too young to have a guardian or administrator appointed under the G&A Act, but too old to have a guardian appointed under the *Children, Youth and Families Act 2005* (Vic) (CYF Act).

11.2 An order appointing either a guardian or administrator under the G&A Act can only take effect when the person is aged 18 years or over.[1] The parents of a person under the age of 18 have authority to make most decisions for a child or young person with impaired decision-making capacity.[2] In some circumstances, a parenting order made under the *Family Law Act 1975* (Cth) (Family Law Act) will authorise someone other than a parent to make certain decisions for a young person.[3]

11.3 If a young person is placed on a protection or permanent care order under the CYF Act and the protection order is of a type that transfers guardianship from a parent,[4] decision-making authority may lie with the Secretary of the Department of Human Services or another nominated person.

11.4 This chapter considers how best to provide for young people who fall in the gap between the coverage of the CYF Act and the G&A Act.

CURRENT LAW

11.5 In some instances, the law draws a sharp line between childhood and adulthood; in others it recognises a more subtle and variable progression from one state to the other.

11.6 The sharp line is used for a large number of important matters, often because it would be administratively difficult or impossible to make individual determinations about each young person's capacity to engage in a particular activity. Achieving a particular age acts as a substitute for individual assessments of capacity. Examples include eligibility to:

- vote[5]
- learn to drive and be licensed to drive[6]
- drink alcohol[7]
- marry[8]
- engage in a sexual relationship.[9]

A young person has to reach a certain age before they can engage in these activities.

11.7 However, in other areas, such as consent to medical treatment, the common law has taken a more individualised—and more labour intensive—approach. The common law recognises that because young people mature at different times, each situation needs to be considered on its merits when determining whether a young person has the capacity to consent to their own medical treatment.[10]

SUBSTITUTE DECISION MAKERS UNDER THE *GUARDIANSHIP AND ADMINISTRATION ACT 1986* (VIC)

11.8 An appointment under the G&A Act can only take effect when a person is aged 18 years or over.[11] A guardianship or administration order may be made for a person *under* the age of 18, but the order only takes effect when the person reaches the age of 18.[12]

Substitute decision making for young people

11.9 The G&A Act does not provide for substitute decision making for people under the age of 18. If substitute decision making is required for a person under 18, each of the person's parents generally has this power and responsibility.[13] The Family Law Act affirms that, as a default position, 'each of the parents of a child who is not 18 has parental responsibility for the child'.[14] Parental responsibility is defined as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[15]

11.10 There are a number of situations in which Commonwealth or Victorian law provides for someone other than a young person's parents to make substitute decisions, if the young person does not have capacity to make the decision on their own behalf. These include:

- situations in which a parenting order has been made under the Family Law Act that gives 'parental responsibility' to someone other than a parent
- situations in which guardianship is given to someone other than a parent under the CYF Act
- some special medical procedures, such as a 'planned' sterilisation,[16] which require court authorisation.[17]

11.11 A 'special procedure',[18] such as a sterilisation, may not be lawfully carried out on a person aged 18 or over who is incapable of giving consent without authorisation from the Victorian Civil and Administrative Tribunal (VCAT).[19]

PARENTING ORDERS UNDER THE *FAMILY LAW ACT 1975* (CTH)

11.12 A parenting order made under the Family Law Act may alter the usual position, which is that each parent has decision-making powers and responsibility for their child.[20] For instance, one parent may be granted sole responsibility, to the exclusion of the other parent, for making decisions in relation to a child.[21] A parenting order may also give 'parental responsibility' to someone other than a parent, for example a grandparent.[22] The terms of the order specify which of the duties, powers, responsibilities or authority in relation to the child are given to the person named in the order.[23] The best interests of the child are the paramount consideration in making a parenting order.[24]

1 *Guardianship and Administration Act 1986* (Vic) ss 19(1), 43(1).

2 *Family Law Act 1975* (Cth) ss 61B, 61C. There are some medical procedures, such as sterilisation, that parents cannot authorise. These require external authorisation from a court or tribunal: see *Secretary, Department of Health and Community Services (NT) v JWB* (*'Marion's case'*) (1992) 175 CLR 218.

3 *Family Law Act 1975* (Cth) ss 64B, 64C.

4 *Children, Youth and Families Act 2005* (Vic) ss 289, 290, 319.

5 The legal age at which a person is entitled to vote is 18 years. *Commonwealth Electoral Act 1918* (Cth) s 93(1).

6 The legal age at which a person may obtain a learner permit is 16 (except a motorcycle learner permit): *Road Safety Act 1986* (Vic) s 22(2)(b).

7 Subject to certain exceptions, it is an offence for licensed or authorised premises to supply liquor to a person under 18 years: *Liquor Control Reform Act 1998* (Vic) s 119.

8 Generally, only a person aged 18 years or over is entitled to be married. A person aged 16–18 may apply to a judge or magistrate for permission: *Marriage Act 1961* (Cth) ss 11, 12.

9 The age of consent to sexual relations is 16 years: *Crimes Act 1958* (Vic) s 45. Consent is a defence to sexual penetration of a child under the age of 16 in limited circumstances.

10 Instead of a fixed age test, the law says that determining whether a young person can consent to a medical treatment will depend upon the specific procedure or treatment in question and the young person's maturity. See *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *Secretary, Department of Health and Community Services (NT) v JWB* (*'Marion's case'*) (1991) 175 CLR 218.

11 *Guardianship and Administration Act 1986* (Vic) ss 19(1), 43(1).

12 Ibid ss 19(1), 43(1).

13 A young person will not always require a substitute decision maker just because they are under the age of 18. The age at which a young person may provide legally effective consent on their own behalf varies depending on factors such as the type of decision and the maturity and understanding of the young person. For a discussion of this issue in relation to consent to medical treatment, see New South Wales Law Reform Commission, *Young People and Consent to Health Care,* Report No 119 (2008) 78–88.

14 *Family Law Act 1975* (Cth) s 61C. This reflects common law principles: see *Department of Health and Community Services (NT) v JWB* (*'Marion's case'*) (1992) 175 CLR 218.

15 *Family Law Act 1975* (Cth) s 61B.

16 In *P v P* (1994) 181 CLR 583, 597, the term 'planned' sterilisation was used to describe a sterilisation that is not a by-product of surgery carried out to treat some malfunction or disease. The term 'non-therapeutic' sterilisation was used in *Department of Health and Community Services (NT) v JWB* (*'Marion's case'*) (1992) 175 CLR 218, 250.

17 See *Department of Health and Community Services (NT) v JWB* (*'Marion's case'*) (1992) 175 CLR 218. *Family Law Act 1975* (Cth) s 67ZC. In Victoria, this would generally be the Family Court but in some cases could be the Supreme Court of Victoria. For a general discussion of the jurisdictional issues, see Belinda Fehlberg and Julia Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 73–81.

18 *Guardianship and Administration Act 1986* (Vic) s 3.

19 Ibid s 42G.

20 *Family Law Act 1975* (Cth) ss 61C, 61D. The *Family Law Act 1975* (Cth) also provides that parental responsibility may be varied or displaced by any court order, including orders made under other legislation: s 61C(3).

21 *Family Law Act 1975* (Cth) ss 61D, 64B(2)(c).

22 Ibid s 64C.

23 Ibid s 61D(1). The range of people who may apply for a parenting order is broad. It includes parents, the child, a grandparent or any other person concerned with the care, welfare and development of the child: s 65C.

24 *Family Law Act 1975* (Cth) s 60CA.

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GUARDIANSHIP OF CHILDREN IN THE CHILD PROTECTION SYSTEM

11.13 A primary purpose of the CYF Act is to 'provide for the protection of children'.[25] In some cases, this might require transfer of guardianship from a parent to someone else to protect the child. Guardianship is defined in the CYF Act as 'all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of the child'.[26] It does not include the right to have the daily care and control of the child or the right and responsibility to make decisions concerning the daily care and control of the child.[27]

11.14 The Children's Court may place a child on a protection order if it finds that the child is in need of protection, or that there is a substantial and irreconcilable difference between the person who has custody of the child and the child.[28] Some protection orders (guardianship to secretary order[29] and long-term guardianship to secretary order[30]) transfer guardianship from a parent to the Secretary of the Department of Human Services (DHS).

11.15 Another type of order, called a permanent care order, may transfer custody and guardianship of the child from the parent to another person (other than the Secretary).[31] This type of order can only be made when the child's parent has not had care of the child for a specified period.[32] The Court must also be satisfied that the parent is unable or unwilling to resume custody and guardianship of the child, or that it would not be in the child's best interests for the parent to resume custody and guardianship of the child.[33]

11.16 None of these orders, which provide guardianship powers to someone other than a parent, may be made once a person has turned 17.[34] However, an existing order made before the person turns 17 may remain in force until the person has turned 18.[35]

CURRENT GAP IN THE SYSTEM FOR 17 YEAR OLDS

11.17 The Children's Court of Victoria was originally given exclusive jurisdiction for both child protection and criminal matters concerning children under the age of 17.[36] Between 1982 and 1984, the Carney Committee conducted a comprehensive review of the Victorian child welfare system. It recommended that the age jurisdiction of the Court's Criminal Division and the Family Division should extend to 18 year olds.[37]

11.18 The Cocks Committee, which developed policy recommendations for the original G&A Act in 1982, also acknowledged the presence of a gap for 17 year olds. It recommended that the proposed guardianship tribunal should be able to make an order for a 17 year old in 'exceptional circumstances'.[38] This recommendation was not adopted.

11.19 The *Children and Young Persons (Age Jurisdiction) Act 2004* (Vic) increased the age limit for the jurisdiction of the of the Children's Court Criminal Division to 18.[39] However, the Family Division child protection jurisdiction was not increased at the same time. Consequently, the longstanding gap between the child protection and adult guardianship systems remained.

11.20 At present, there is no jurisdiction under the CYF Act to grant guardianship to the Secretary (or permanent carer) and there is no jurisdiction under the G&A Act to appoint a guardian or administrator for 17 year olds. As a result, some 17 year olds with impaired decision-making capacity may find themselves without any substitute decision maker.

ELIGIBILITY REQUIREMENTS FOR DHS SERVICES

11.21 Young people with a disability may require services from either or both of DHS's disability and child protection arms. As these two areas of DHS service delivery operate in quite different ways and under different legislation, the availability and quality of those services could have a significant impact on the young person's need for guardianship.

Disability services

11.22 People with a disability, their family and their carers can access support services through local community organisations or the DHS disability support system.[40] There are various types of supports available for people with disabilities, including funding and services in the areas of:

- information, planning and capacity building
- individual support; targeted services
- residential accommodation services.[41]

11.23 These services are provided under the *Disability Act 2006* (Vic), with eligibility determined by need rather than by age.[42] The Act does not give a person with a disability, or their family, an enforceable entitlement to services.

Child protection services

11.24 The child protection service supports vulnerable children and families in a variety of ways. In some cases a family will seek support on a voluntary basis. In others, a child may be supported because they have come under the custody or guardianship of the Secretary of the Department of Human Services through an order of the Children's Court. The Secretary is obliged to provide services in these circumstances.

11.25 Under the CYF Act, DHS is not required to act in a protective role or provide child protection services once a child reaches the age of 17, unless an existing order is extended until the child turns 18.[43] However, in some circumstances the Secretary has a responsibility to provide or arrange for the provision of services for young people to assist in supporting a person under the age of 21 to make the transition to independent living. This responsibility arises if a person has been in the custody or guardianship of the Secretary and, on leaving, is of an age to, or intends to, live independently.[44]

COMMUNITY RESPONSES

CLOSING THE AGE 'GAP' BETWEEN THE ADULT GUARDIANSHIP AND CHILD PROTECTION SYSTEMS

11.26 A number of community responses argued that Victoria should aim to correct inconsistencies between the age limits applicable to guardianship legislation and other relevant laws. Advocacy agencies told us that guardianship age requirements should be consistent with juvenile justice provisions.[45]

11.27 The majority of submissions that commented on this issue acknowledged the current gap between the child protection and adult guardianship systems for 17 year olds and supported reform.[46] There were a variety of opinions as to how this should be addressed, with two main proposals emerging from community responses. These were:

- lowering the age jurisdiction of the G&A Act
- increasing the age jurisdiction of the CYF Act.

25 Ibid s 1(b).

26 Ibid s 4.

27 Ibid.

28 Ibid s 274.

29 Ibid s 289. In 2008–09, the Court made 74 guardianship orders: see Children's Court of Victoria, *Annual Report 2008–2009* (2009) 22.

30 *Children, Youth and Families Act 2005* (Vic) s 290. In 2008–09, the Court made 43 long-term guardianship orders: see Children's Court of Victoria, *Annual Report 2008–2009* (2009) 19.

31 *Children, Youth and Families Act 2005* (Vic) s 321(1)(a). If particular conditions are fulfilled, it may also vest guardianship of the child jointly in the person(s) named in the order and the child's parent: s 321(1)(b).

32 *Children, Youth and Families Act 2005* (Vic) s 319(1)(a).

33 Ibid s 319(1)(b). Section 319 also requires the Court to be satisfied of a number of other matters for an order to be made.

34 A protection order or a permanent care order may be made for a child. The *Children, Youth and Families Act 2005* (Vic) s 3 defines a child for this purpose as a person who is under the age of 17.

35 *Children, Youth and Families Act 2005* (Vic) ss 275(2), 321(1)(c).

36 *Children's Court Act 1906* (Vic) s 12.

37 Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 2, 409–13. See the definition of 'child' in s 3 of the draft Bill proposed by the Carney Committee: Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 1.

38 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) 74. This report is discussed in more detail in Chapter 2.

39 *Children and Young Persons (Age Jurisdiction) Act 2004* (Vic) s 3.

40 Department of Human Services (Victoria), *Disability Support Register (DSR) Registration Guidelines* (2008) 3.

41 Department of Human Services (Victoria), *Disability Services Policy and Funding Plan 2009–2012* (2009) 31.

42 *Disability Act 2006* (Vic) s 49.

43 *Children, Youth and Families Act 2005* (Vic) s 275(2).

44 Ibid s 16(1)(g).

45 Consultation with Disability Advocacy Resource Unit (5 May 2010). Under ss 3(a)–(b) of the *Children, Youth and Families Act 2005* (Vic), 'a child' means a person who is under the age of 18 years in relation to criminal matters or in situations where a child protection order is already in place; or a person who is under the age of 17 years of age in any other case.

46 See, eg, Submissions IP 27 (Marillac) 27, IP 29 (Australian Association of Social Workers) 1, IP 30 (Victorian Aboriginal Legal Service) 10 and IP 42 (Health Services Commissioner) 8.

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Lowering the age jurisdiction of the G&A Act to 17 years and over

11.28 There was significant support for lowering the age jurisdiction in the G&A Act to allow a guardian or administrator to be appointed for young persons aged 17 and over.[47] The Australian Association of Social Workers considered that:

> *being able to appoint a guardian for those aged 17 is a good suggestion for exceptional cases as child protection services do not act at that point and many young people at that age are no longer under parental control or living with parents.*[48]

11.29 Some submissions expressed concern that if the age were lowered and a guardian or administrator was appointed for a young person under the G&A Act, appropriate services and funding may not be available. The Law Institute of Victoria suggested that if the age for guardianship under the G&A Act were lowered to 17 years, DHS funding and services would continue to be required in order for the Public Advocate to undertake a guardianship role for this new group of people.[49]

11.30 The Public Advocate suggested that the easiest way to deal with the current gap in the law would be to lower the guardianship age jurisdiction to 17 years, but also raised concerns that if younger people were eligible for adult guardianship this could lead to the withdrawal of social services.[50]

11.31 Victoria Legal Aid expressed concern about the exposure of young people to 'multiple agency responses where one agency is able to meet their needs'.[51] However, it considered that in some instances it might be appropriate to appoint a guardian or administrator for someone under the age of 18, suggesting that there may be times when neither the parents, nor DHS, will be the appropriate decision maker for a person under 18 years of age.[52] It considered that if guardians or administrators were appointed for young people, they should receive specialised training.[53]

Lowering the age jurisdiction of the G&A Act to 16 years and over

11.32 Some people suggested that the age requirements of the G&A Act should be lowered to allow the appointment of guardians or administrators for people aged 16 and above.[54] One submission advocated that the legislation should provide the ability to appoint substitute decision makers for young people aged 15 years and over.[55]

11.33 The Mental Illness Fellowship Victoria considered that the age requirement should be lowered to age 16, because of the 'increase of youth homelessness/ transientness and mental illness in teenagers'.[56]

Lowering the age jurisdiction of the G&A Act for administration

11.34 Some organisations raised specific concerns about financial management for people with disabilities who are under 18, suggesting that they might be particularly vulnerable to financial exploitation because they may receive various benefits but an administrator cannot manage their financial affairs until they are 18.[57]

11.35 A young person with a disability may be eligible for a Disability Support Pension once they reach the age of 16.[58] They may also be eligible for other benefits including:

- a youth disability supplement (payable to disability support pension customers under 21)[59]
- a pharmaceutical allowance[60]
- a mobility allowance (available for people with a disability aged 16 or over if they require assistance in travelling from their home to undertake work, training or job seeking and are unable to use public transport without substantial assistance).[61]

11.36 Marillac expressed concern that:

> *A young person with a disability can start getting a disability support pension when they are 16 years old, but unless they are a ward of the state they do not have an independent administrator appointed until they turn 18, leaving them vulnerable to financial exploitation for that interim period. VCAT would be an appropriate body to assess each situation and appoint a financial substitute decision-maker.*[62]

11.37 State Trustees also supported lowering the age restrictions of the G&A Act to allow administration for 17 year olds.[63]

Increasing the age jurisdiction of the CYF Act to 18 years

11.38 Other groups offered an alternative solution to lowering the age requirements of the G&A Act. These groups suggested extending the age jurisdiction of the CYF Act to include people up to the age of 18 years, rather than utilising the adult guardianship system.[64]

11.39 The Royal District Nursing Society argued that:

> *It would be preferable for the Children Youth and Families Act to be amended to provide substitute decision makers for young persons up to the age of 18 ... The Guardianship and Administration Act should remain an Act with jurisdiction over adults only. As age 18 is the accepted standard of adulthood in most contexts, this would be the least confusing way to try and meet the needs of 17 year olds currently not covered by any legislation.*[65]

11.40 The Victorian Aboriginal Legal Service suggested that it might be preferable to cover the gap by extending the coverage of the CYF Act, because this might provide better consistency between guardianship laws and other Victorian legislation.[66]

47 Consultations with Villamanta Disability Legal Centre (19 April 2010) and Julian Gardner (26 March 2010); Submissions IP 5 (Southwest Advocacy Association) 7, IP 29 (Australian Association of Social Workers) 1, IP 33 (Trustees Corporation Association of Australia) 6, IP 50 (Action for Community Living) 10, IP 59 (State Trustees Limited) 9–10.

48 Submission IP 29 (Australian Association of Social Workers) 1.

49 Submission IP 47 (Law Institute of Victoria) 30.

50 Submission IP 8 (Office of the Public Advocate) 30.

51 Submission IP 43 (Victoria Legal Aid) 14.

52 Ibid.

53 Ibid.

54 Consultation with Alzheimer's Australia (Victoria) (19 April 2010); Submission IP 23 (Mental Illness Fellowship Victoria) 9.

55 Submission IP 16 (Mark Feigan) 16.

56 Submission IP 23 (Mental Illness Fellowship Victoria) 9.

57 Submissions IP 27 (Marillac) 5, IP 47 (Law Institute of Victoria) 30 and IP 59 (State Trustees Limited) 9–10. Submission IP 44 (Australian Bankers' Association) 6 expressed concern that when a person reaches 18 they may still need financial management and suggested that there should be better provision for transition to administration under the G&A Act.

58 The current maximum disability support pension rate of payment for a single person is $658.40 per fortnight ($496.30 per fortnight for each member of a couple). Variable rates apply if the person is under 21 and has no dependent children according to relationship status: see Centrelink (Commonwealth), *Disability Support Pension—Payment Rates* (20 September 2010) <http://www.centrelink.gov.au/internet/internet.nsf/payments/dsp_rates.htm>.

59 The maximum rate of youth disability supplement rate is $106.70 per fortnight. See Centrelink (Commonwealth), *Youth Disability Supplement— Payment Rates* (20 September 2010) <http://www.centrelink.gov.au/internet/internet.nsf/payments/yds_rates.htm>.

60 Pharmaceutical allowance rate is $6.00 per fortnight for an eligible single person: Centrelink (Commonwealth), *Pharmaceutical Allowance—Payment Rates* (20 September 2010) <http://www.centrelink.gov.au/internet/internet.nsf/payments/phar_rates.htm>.

61 Mobility allowance rate is $80.50 per fortnight or $112.70 per fortnight if the person qualifies for the higher rate: Centrelink (Commonwealth), *Mobility Allowance—Payment Rate* (20 September 2010) <http://www.centrelink.gov.au/internet/internet.nsf/payments/mobility.htm>.

62 Submission IP 27 (Marillac) 5.

63 Submission IP 59 (State Trustees Limited) 10. The submission did not comment on whether the age should be lowered for guardianship as well as administration.

64 Submissions IP 9 (Royal District Nursing Service) 12, IP 27 (Marillac) 5, IP 30 (Victorian Aboriginal Legal Service) 10 and IP 42 (Health Services Commissioner) 8.

65 Submission IP 9 (Royal District Nursing Service) 12.

66 Submission IP 30 (Victorian Aboriginal Legal Service) 10.

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OTHER AGE-RELATED ISSUES

11.41 Responses to our information paper raised a number of other age-related issues. While these were not necessarily relevant to the question of extending the G&A Act's provisions to cover 17 year olds, it is appropriate to raise these matters here.

Parental responsibility and adults with disabilities

11.42 During consultations, some people told us that, in some respects, the law draws an arbitrary line in determining that a person has full legal capacity at the age of 18.[67] Some parents suggested to us that this expectation of being ready to assume full legal capacity at the age of 18 is unrealistic for a person with, for example, a severe or profound intellectual disability. Consequently, it is unfair to require a parent to go through the formal, and often stressful, process of applying for guardianship, simply to be allowed to continue what they were already doing anyway:

> *Like many parents, I object, in fact I find it insulting—to think that after 40 years of caring for my son, I need to apply for Guardianship in order to have any 'legal' say in his life!*[68]

11.43 Parents raising these concerns suggested that the law should allow their guardianship to continue automatically where, at the age of 18, their child is unable to assume the responsibilities of adult legal capacity because of a disability.[69]

Special medical procedures for minors

11.44 The Public Advocate raised concerns about the current law for consent to special medical procedures performed on people under the age of 18.[70] A 'special procedure',[71] such as a sterilisation, may not be lawfully carried out on a person aged 18 or over with a disability, who is incapable of giving consent without authorisation from VCAT.[72]

11.45 The Public Advocate observed that VCAT does not have this jurisdiction in relation to children and argued that in some circumstances, VCAT would be a more appropriate body to make these decisions for children with a disability than the Family Court.[73] The Public Advocate considered that VCAT should have shared jurisdiction with the Family Court to consent to special procedures to be performed on children with disabilities.[74]

Problems with the current law and practice

11.46 Problems identified with the age jurisdiction of the G&A Act include:

- the presence of a gap between the child protection and adult guardianship systems for 17 year olds
- the increased potential for financial exploitation of young people under the age of 18 years because of this gap
- the degree to which the Family Court is the appropriate jurisdiction to consent to special medical procedures for children with disabilities
- the legal presumption that a person has full legal capacity when they turn 18.

OTHER AUSTRALIAN JURISDICTIONS

11.47 New South Wales is the only Australian state in which guardianship laws apply to people at age 16.[75] All other states and territories have legislation similar to the current Victorian provisions. They either allow only for the appointment of a guardian for a person aged 18 years or over, or provide that an appointment is only to take effect when the person turns 18.[76]

11.48 Victoria is the *only* Australian jurisdiction to exclude 17 year olds (not subject to an existing protection order) from its child protection system. In every other state and territory the age limits of the respective child protection jurisdictions extend to 18 year olds.[77]

NEW SOUTH WALES

11.49 New South Wales legislation provides an overlap between the age jurisdictions of the child protection and adult guardianship systems. A person up to the age of 18 who is in need of protection may be placed on a care order under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).[78] It is also possible to appoint a guardian for a young person aged 16 or over under the *Guardianship Act 1987* (NSW).[79] This means that a person aged 16 to 18 years could be subject to either a guardianship order or a care order.

11.50 The Commission understands that the majority of applications for guardianship orders made for 16 to 18 year olds are for young people who are already under the protection of the Director-General of the Department of Community Services and who have an ongoing need for substitute decision making after age 18.[80] In most cases, the New South Wales Public Guardian is appointed as guardian.[81] There has been significant concern about the transition of people from the child protection to the adult guardianship system because of a time lag between the removal of support by the Department of Community Services and the appointment of a guardian under the *Guardianship Act 1987* (NSW).

International obligations

11.51 The current age jurisdiction of the CYF Act is incompatible with Australia's obligations under the *United Nations Convention on the Rights of the Child* (CROC).[82] Article 19 of CROC requires state parties to implement statutory systems to protect children from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (including sexual abuse) while in the care of parents or legal guardians.[83]

67 Submission IP 1 (Carers Australia (Victoria)) 9.

68 Submission IP 12 (Katherine Haggarty) 2.

69 Submission 3 (Stephanie Mortimer) 3.

70 Submission IP 8 (Office of the Public Advocate) 30. See also Office of the Public Advocate (Victoria), *What role should VCAT have for persons under the age of 18 years?* (June 2010), 3 <http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2010/VCAT%20age%20criteria.doc>, which suggests that applications for sterilisation are usually brought to the Family Court 'for the purpose of menstrual management, burden of care, contraception or "social" purposes, in association with medical issues'.

71 *Guardianship and Administration Act 1986* (Vic) s 3.

72 Ibid ss 42E, 42G.

73 Submission IP 8 (Office of the Public Advocate) 30.

74 Ibid. See also Office of the Public Advocate (Victoria), *What role should VCAT have for persons under the age of 18 years?* (June 2010) 4 <http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2010/VCAT%20age%20criteria.doc>.

75 *Guardianship Act 1987* (NSW) s 15(1)(a).

76 *Guardianship and Management of Property Act 1991* (ACT) s 8C. See *Legislation Act 2001* (ACT) Dictionary pt 1 which defines 'adult' as an individual who is at least 18 years old; *Adult Guardianship Act 1988* (NT) ss 3(1), 11(1); *Guardianship and Administration Act 2000* (Qld) ss 11A, 13; *Guardianship and Administration Act 1995* (Tas) s 19(1); *Guardianship and Administration Act 1990* (WA) ss 43(1), (2a).

77 *Children and Young People Act 2008* (ACT) s 12. See *Legislation Act 2001* (ACT) Dictionary pt 1, which defines 'adult' as an individual who is at least 18 years old; *Care and Protection of Children Act 2007* (NT) s 8; *Child Protection Act 1999* (Qld) s 8; *Children's Protection Act 1993* (SA) s 6; *Children, Young Persons and Their Families Act 1997* (Tas) s 3; *Children and Community Services Act 2004* (WA) s 3.

78 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 3, 231B(1). Section 3 of the Act distinguishes between a 'child' and a 'young person'. A 'child' is a person under 16 and a 'young person' is a person aged 16 or over, but under 18. A care order may be made for a child or young person.

79 *Guardianship Act 1987* (NSW) s 15(1)(a).

80 Teleconference with Malcolm Schyvens and Ester Cho from the New South Wales Guardianship Tribunal (24 August 2010).

81 Teleconference with Malcolm Schyvens and Ester Cho from the New South Wales Guardianship Tribunal (24 August 2010).

82 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention on the Rights of the Child*'). The incompatibility with CROC of having an under 17 jurisdictional limit for the Criminal Division was one of the reasons given for increasing the upper age limit of the Criminal Division's jurisdiction in 2004: see Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 2004, 566 (Rob Hulls Attorney-General).

83 *Convention on the Rights of the Child* art 19.

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11.52 Importantly, article 1 of CROC defines 'child' to mean a person under the age of 18, with one limited exception that is not applicable to Australia.[84] The absence of child protection jurisdiction in the Children's Court for 17 year olds may be inconsistent with the obligation in article 19 for the state to take all appropriate legislative measures to protect persons under the age of 18.

POSSIBLE OPTIONS FOR REFORM

THE LAW'S PRESUMPTION OF LEGAL CAPACITY WHEN A PERSON TURNS 18 YEARS OF AGE

11.53 As noted in our community responses section, some parents told us that the presumption that a person is able to exercise full legal capacity when they turn 18 is neither realistic for a person with a major intellectual disability, nor fair for their parent or other family carer.

11.54 The 'sharp line' drawn by the law in determining when a person is old enough to assume certain responsibilities endeavours to strike some sort of generalised compromise. Inevitably, the age will be too low for some, and too high for others, depending on their maturity and circumstances. The Commission believes that the guardianship system provides a way of correcting this presumption when it is inaccurate due to a person's decision-making impairment.

11.55 As acknowledged at many points in this paper, the role of family and carers is of vital importance in the lives of people with disabilities. We believe that the law needs to make it as easy as possible for carers to carry out that role without unnecessary or cumbersome legal processes getting in the way.

11.56 This section does not provide specific options for reform of the law's presumption of legal capacity when a person turns 18 because some of the reform proposals in this paper should make it easier for the families and carers of a young person to deal with decision-making issues. In particular, we believe that the system will be more workable for carers and families through:

- a more integrated legal framework overall
- consideration of the use of anticipatory orders where there is no controversy or question concerning the proposed represented person's ongoing decision-making incapacity, as discussed in Chapter 10
- extending the automatic appointment provisions to apply to some decisions regarding residential placement and care, as discussed in Chapter 15
- formally recognised supported decision-making mechanisms, as discussed in Chapter 7.

CLOSING THE GAP BETWEEN THE CHILD PROTECTION AND THE ADULT GUARDIANSHIP SYSTEMS

11.57 The Commission presents three possible reform options, which aim to address the current gap between child protection and adult guardianship laws for 17 year olds—either by introducing consistent age limits or by having the jurisdictions overlap. These are:

- increase the age jurisdiction under the CYF Act
- lower the age jurisdiction under the G&A Act
- lower the age jurisdiction under the G&A and increase the age jurisdiction in the CYF Act.

Option A: Increase the age jurisdiction in the *Children, Youth and Families Act 2005* (Vic) to people up to the age of 18

11.58 This option would extend the age jurisdiction of the CYF Act to allow a protection application to be made for a young person up to the age of 18. This would close the gap between the child protection and adult guardianship systems by introducing consistent age limits. It would mean that the upper limit of the CYF Act coincided with the lower limit of the G&A Act.[85]

11.59 There has been strong support in Australia for child protection jurisdictions to apply to young persons up to 18 years of age. In a 1997 report, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended that care and protection legislation in all Australian jurisdictions should define a child as a person under the age of 18.[86]

11.60 An advantage of this approach is that it would allow 17 year olds who are in need of guardianship to be brought within the Children's Court protective jurisdiction. It would also ensure that Victoria's child protection system is consistent with all other Australian jurisdictions and international obligations under CROC.[87]

11.61 A potential disadvantage of this option is that DHS may be reluctant to provide care and protection for an additional group of 17 year olds because of funding and services requirements. Consequently, increased resources would be required by DHS if it were to fulfil these requirements and provide assistance beyond its current levels.

Option B: Lower the age jurisdiction in the *Guardianship and Administration Act 1986* (Vic) to 17 years and over

11.62 This option would address the current gap between the age jurisdictions of the child protection and adult guardianship systems by lowering the age jurisdiction of the G&A Act to allow a guardian or administrator to be appointed for a person aged 17 and over.

11.63 A disadvantage of this option is that it would mean that Victorian guardianship laws would be inconsistent with age jurisdictions in all other Australian states and territories, except for New South Wales. The age limit of 17 years would also be incompatible with international obligations that advocate for the protection of children under the age of 18.[88] It would also have the disadvantage that a young person over age 17 might be unable to access particular services provided by DHS under the CYF Act.

11.64 In order for the Public Advocate to act as guardian of last resort for 17 year olds, increased funding and resources would be required.

11.65 This option would also require careful consideration of how to ensure that a guardian or administrator could access age-appropriate services on behalf of the represented person.

Option C: Lower the age jurisdiction in the *Guardianship and Administration Act 1986* (Vic) to 16 years and over and increase the age jurisdiction in the *Children, Youth and Families Act 2005* (Vic) to 18 (preferred)

11.66 This option would address the current gap between the age jurisdictions of the child protection and adult guardianship systems by creating an overlap between the adult guardianship and child protection systems for people aged 16–18 years. It would be possible to make either a protection application under the CYF Act or an application for a guardianship or administration order under the G&A Act for a young person with a disability aged 16–18. This is the Commission's preferred option.

84 *Convention on the Rights of the Child* art 1. The limited exception applies if the law of the state party provides that the age of majority is younger than 18 years old.

85 The Commission notes that it has already proposed increasing the age jurisdiction in the CYF Act to allow protection applications to be made for any child under the age of 18: Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Report No 19 (2010) 346.

86 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 463.

87 *Convention on the Rights of the Child*.

88 *United Nations Convention on the Rights of the Child* art 1.

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11.67 This means that, in some circumstances, both the Children's Court and VCAT would have jurisdiction to make orders for 16 and 17 year olds. It is likely that the decision of which system to apply under would turn on whether the primary purpose of the application was to provide protection or substitute decision making. Both the Children's Court and VCAT could be given the power to transfer a case involving a person between the ages of 16 and 18 to the other tribunal or court if it believes that the case would be more appropriately dealt with in the other jurisdiction.

11.68 An application for guardianship or administration under the G&A Act could be brought by an individual or by DHS, if the department considered that guardianship or administration under the G&A Act was more appropriate than a protection application.

11.69 The advantage of this option is that it provides flexibility when dealing with a particularly vulnerable group of people. This option would allow a determination to be made about whether the key requirement is protection or substitute decision making. It would have the advantage of allowing for the appointment of a guardian or administrator for someone with a disability aged 16 to 18. This person could continue to fulfil that role, if required, once the person turned 18.

11.70 The advantages of this option could be further enhanced if the Public Advocate became involved in advocacy for young people with disabilities already in the child protection system prior to taking on a guardianship role. This would help ensure a smoother transition between the two systems.

11.71 There is a risk that a person may not have the same access to services if a guardianship or administration order is made under the G&A Act as they do if an order is made under the CYF Act.

11.72 Frequently the services required by a young person with a disability are provided under the Disability Act rather than under the CYF Act. Age is not a factor in assessing eligibility under the Disability Act; services are prioritised on the basis of need.[89] This means that in many cases, the availability of the guardianship system as an alternative to the child protection system will have no impact on what services the person does or does not receive.

Question 53 Do you agree with the Commission's proposal (Option C) to lower the age limit of the *Guardianship and Administration Act 1986* (Vic) to 16 and to raise the age limit of the *Children, Youth and Families Act 2005* (Vic) to 18?

Question 54 Is there a risk that young people may not have access to the same services that are currently available if the Commission's proposal is adopted? What could be done to manage this risk?

89 Department of Human Services (Victoria), *Disability Services Access Policy* (2009) 4.

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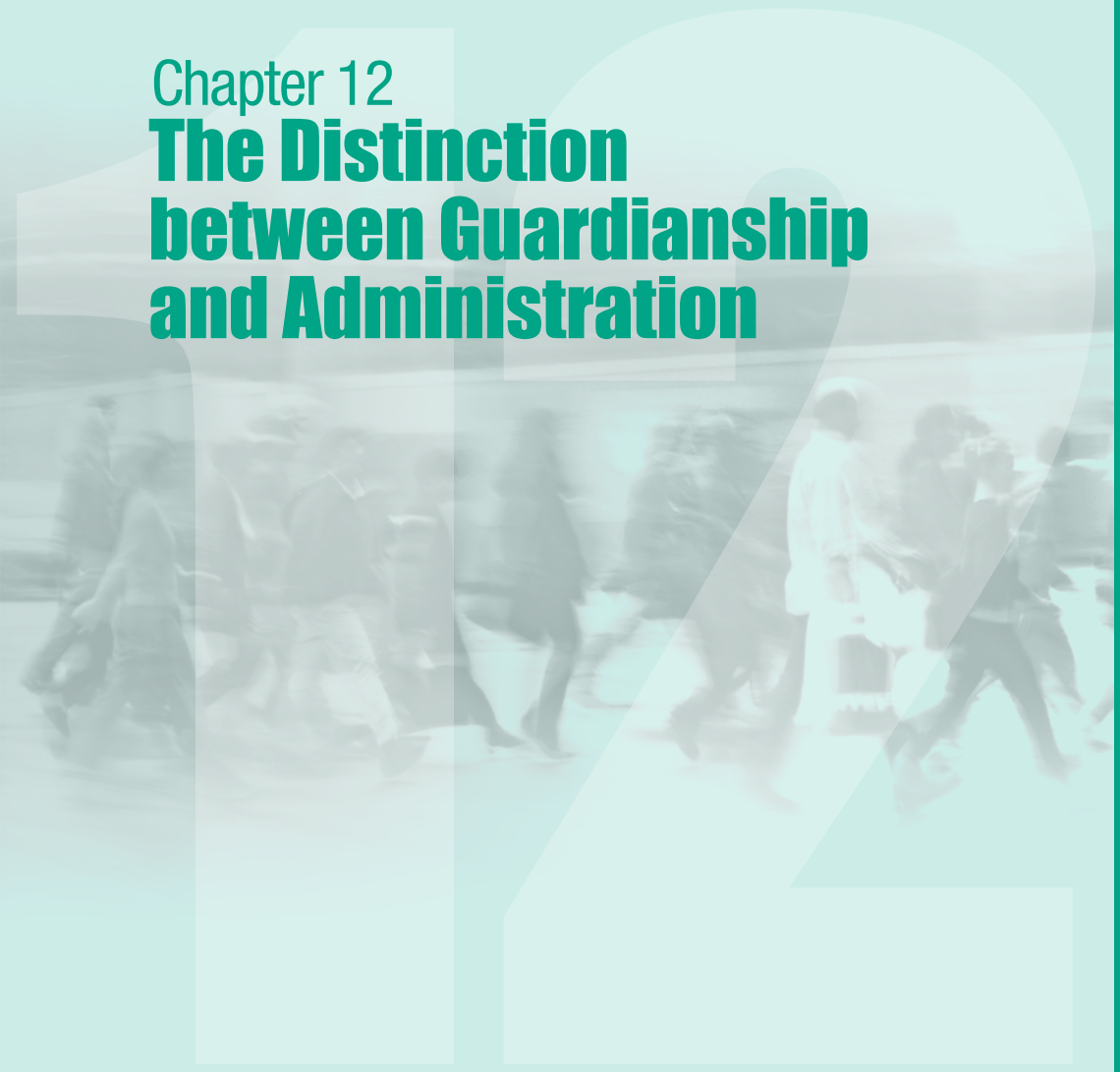

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Chapter 12

The Distinction between Guardianship and Administration

INTRODUCTION

12.1 In our information paper we asked whether there is a need for two types of Victorian Civil and Administrative Tribunal (VCAT) appointed substitute decision makers—guardians and administrators. We asked whether it would be preferable to provide VCAT with a range of different financial, medical and lifestyle powers, which could be given to one decision maker to meet the individual needs of a person with impaired decision-making capacity.

12.2 We asked this question because it could be argued that there is unnecessary duplication in providing a person who has impaired decision-making capacity with separate substitute decision makers to deal with personal (or lifestyle) and financial matters. In daily life, these decisions do not fall into neat categories. Financial decisions often involve personal choice and many lifestyle decisions, such as where a person will live, involve financial considerations.

12.3 The major reason for including two categories of substitute decision makers in the *Guardianship and Administration Act 1986* (Vic) (G&A Act) was the different 'qualities' required of a guardian and an administrator. In his second reading speech, then Attorney-General Jim Kennan referred to the 'special qualities' required of a guardian, suggesting that 'he or she will often be a family member, living in reasonable proximity to the person concerned'.[1] The Attorney-General went on to say that 'different qualities are required for an estate administrator'. In some instances, this person 'must have business acumen', and in every case the administrator must 'be able to exercise a professional disinterest in the administration of the estate of the represented person'.[2]

12.4 In this section, we discuss community responses to the distinction between guardianship and administration and consider whether change is needed.

CURRENT LAW

12.5 As we discussed in Chapter 2, the law currently provides for two types of VCAT appointed substitute decision makers: guardians, who are appointed to make personal and lifestyle decisions for the represented person, and administrators, who are appointed to make financial decisions.

12.6 Both guardians and administrators may be either a private individual or a public officer. The Public Advocate may be appointed as a guardian of last resort when there is no other suitable person available.[3] There is no formal public administrator of last resort. In practice, State Trustees is generally appointed as administrator where no other suitable administrator is available.

DUAL APPOINTMENTS

12.7 Although the G&A Act maintains a distinction between the roles of administrator and guardian, it does permit one person to be appointed as both guardian and administrator.[4] This type of dual appointment is quite common.[5] A dual appointment recognises the overlapping roles of administrators and guardians and the practical benefits of having one person perform both roles.

12.8 Dual appointments are made when a private individual is proposed as guardian and administrator and there is a 'close' or 'special' relationship between the represented person and the guardian/administrator.[6] The 'special relationship' is generally that of family members but might also be a close friendship. Generally, this type of dual appointment is only made in cases where the estate of the represented person is not large due to the high level of skill and expertise required to successfully administer a large estate.

12.9 It is theoretically possible for VCAT to appoint the Public Advocate as both guardian and administrator for a person because the G&A Act does not expressly exclude this option.[7] In practice, this does not occur because the Public Advocate is a specialist guardian who does not provide administrator services. The Public Advocate considers that keeping the roles of public guardians and professional administrators separate provides important safeguards for the represented person.[8]

OVERLAP BETWEEN ROLES OF ADMINISTRATORS AND GUARDIANS

12.10 In practice, the division between the roles and responsibilities of guardians and administrators is not clear-cut. There are obvious overlaps between financial and lifestyle decisions.

12.11 An example of an overlap between the roles of administrator and guardian, where both have been appointed, is the decision about where a represented person should live. On the face of it, the identity of the substitute decision maker is straightforward; this is a lifestyle decision so the appropriate decision maker is the guardian. In reality, however, the decision involves significant financial considerations. Although the guardian may be able to make the decision that a person should live in a particular place, the administrator would be required to release funds to pay for the accommodation.[9]

12.12 The legal safeguards that currently exist for managing the overlap are:

- Guardians and administrators are required to act in the 'best interests' of the represented person.[10] As outlined above, this does not always result in agreement between substitute decision makers, but it does guide them in their approach to decision making. It provides a conceptual framework within which guardians and administrators can talk to each other about the best decision. The 'best interests' concept is discussed in more detail in Chapters 5 and 17.
- The G&A Act requires VCAT to consider whether a proposed guardian or administrator is compatible with the other substitute decision maker, if one has been appointed.[11]
- Guardians and administrators can seek advice from VCAT about the scope of the order appointing them, or how to exercise a power they have been given.[12] However, the legislation does not indicate whose decision should prevail in the event that an administrator and guardian disagree about a decision that requires the consent of both.
- VCAT can reassess guardianship and administration orders on the application of any person.[13] VCAT has the power to amend, vary, continue or replace the order.[14] If there was an intractable dispute between an administrator and guardian, where one considered that the other was not acting in the best interests of the represented person, they could apply for a reassessment of the guardianship or administration order.

12.13 There is no explicit requirement in the G&A Act that a guardian and administrator consult with each other.

12.14 In practice, the Public Advocate and the most commonly appointed professional administrator, State Trustees, often work together where their roles overlap. They are currently in the process of negotiating a new protocol to better manage the points of crossover between their roles as guardians and administrators.[15]

1 Victoria, *Parliamentary Debates*, Legislative Council, 22 April 1986, 559 (JH Kennan, Attorney-General).

2 Ibid.

3 *Guardianship and Administration Act 1986* (Vic) s 23(4).

4 Ibid ss 23, 47. There is nothing in these two sections, which set out who is eligible for appointment as an administrator or guardian, that excludes an individual from being appointed to both roles.

5 The Office of the Public Advocate website estimates that in 80% of cases, private guardians also assume the role of administrator of the represented person: Office of the Public Advocate (Victoria), *Guardianship and Support for Private Guardians* (2010) <http://www.publicadvocate.vic.gov.au/services/104/>.

6 Submission IP 8 (Office of the Public Advocate) 20. The fact that a 'special relationship' may allow an individual to act effectively as an administrator even though they do not have the same level of financial expertise as a professional administrator is specifically acknowledged in s 47(1)(c)(iv) of the *Guardianship and Administration Act* (Vic). It provides that a person may be eligible as administrator if they have 'sufficient expertise to administer the estate or there is a special relationship or other special reason why that person should be appointed as administrator'.

7 *Guardianship and Administration Act 1986* (Vic) s 47. In the *Guardianship and Administration Board Act 1986* (Vic), as originally passed, s 47(1)(b) specifically listed the Public Advocate as eligible to act as administrator. This was repealed by the *Guardianship and Administration (Amendment) Act 1999* (Vic) s 15(1)(a).

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

9 In its submission, the Office of the Public Advocate identified the sale of a house as a routine example of the overlap between the roles of guardians and administrators: Submission IP 8 (Office of the Public Advocate) 20.

10 *Guardianship and Administration Act 1986* (Vic) ss 28(1), 49(1).

11 Ibid ss 23(2)(c), 47(2)(b).

12 Ibid ss 30, 55.

13 Ibid s 61(3).

14 Ibid s 63.

15 Submission IP 8 (Office of the Public Advocate) 22.

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12.15 There are clear rules about whose decision prevails if the decision of an enduring attorney (financial) conflicts with a decision of a guardian or an enduring guardian. In this case, the decision of the guardian or enduring guardian prevails.[16] The same rule does not apply when there is a conflict between the decisions of a guardian and administrator. There is no obvious reason why the decision of a lifestyle decision maker who is appointed either by VCAT (guardian) or through a personal appointment (enduring guardian) should prevail over a financial decision maker who is appointed through a personal appointment, but not over that of a financial decision maker appointed by VCAT (administrator).

COMMUNITY RESPONSES

RETAIN SEPARATION OF ROLES

12.16 The majority of people we consulted considered that it was useful and important to retain a distinction between the roles of administrator and guardian.[17]

DIFFERENT SKILLS REQUIRED

12.17 During consultations and in submissions, numerous groups and individuals highlighted that financial decision making (administration) and personal or lifestyle decision making (guardianship) require different and specialised skills.[18]

12.18 Several submissions supported the idea of preserving a separation between the two types of decision makers while taking a flexible approach that allowed for the appointment of a single person to undertake both roles where appropriate.[19]

12.19 The Australian and New Zealand Society for Geriatric Medicine supported a case-by-case approach to dual appointments, considering that:

> *At times [it] may be sensible for the same person to be both guardian and administrator. At times, having two separate persons appointed can provide further accountability (checks and balances) than if one person serves both roles.*[20]

12.20 The Royal District Nursing Service also favoured this flexible approach to appointments. Its submission highlighted the significant overlap between the role of administrator and guardian and the difficulties that may arise for a guardian because they do not have financial powers:

> *[T]he demarcation of powers especially becomes a problem if there is a separately appointed administrator who happens to be in conflict with the guardian or, alternatively, if the represented person has no administrator and refuses to pay the bills incurred by the guardian.*[21]

12.21 The Royal District Nurse Service suggested that a guardian who does not have financial powers is a 'toothless tiger'.[22] For this reason, it submitted that in most situations it would be preferable to provide a range of powers, including financial powers, to a single decision maker.[23] However, it considered that there should be the flexibility to appoint more than one decision maker because the specialised skills needed for each role may not exist in one person.[24] In addition, the checks and balances provided by a decision-making process that requires the agreement of two parties may be in a person's best interests despite the fact that the process may take longer.[25]

12.22 Marillac also supported a flexible approach to appointments. It favoured a default approach of separate decision makers, with the possibility of the appointment of a single decision maker with a range of powers. It emphasised that the focus for appointment should be on ensuring that the person appointed has the appropriate skills for the relevant decision making:

We can see some benefit in VCAT having the flexibility and power, in consultation with OPA, to allow single decision-makers in certain circumstances. However, we would want separate decision-makers to continue to be the norm, and protection in the system to make sure single decision-makers aren't being appointed just because it is more efficient—the more critical issues of personal protection for the individual and choosing people with the best possible skills to fill two quite different roles should be the key considerations.[26]

12.23 Other submissions also emphasised the need for the represented person to get the best quality of decision making available and considered that the different and specialist skills required for each role are unlikely to be combined in one person.[27] For example, Action for Community Living argued that:

While it may be less complicated and often preferable to have one substitute decision maker there are also disadvantages. It may not be possible to find the appropriate skills, values and expertise needed for a represented person in one substitute decision maker and there are risks associated with one person having such a significant degree of control over decisions. Action for Community Living believes that the system should retain the possibility of appointing more than one substitute decision maker if needed, with a requirement for appropriate co-ordination between the substitute decision makers.[28]

12.24 Several people emphasised the benefits of retaining separate roles for professional decision makers who make decisions for multiple individuals, such as the Public Advocate and State Trustees.[29] Retaining separate roles ensures that the decision maker has the appropriate level of skill and expertise for the decision that must be made. It also allows for systemic training, allowing staff to draw on the advice and skills of other decision makers in the organisation.

12.25 There was more support for the appointment of a single individual to act as both administrator and guardian for one-off decisions where the substitute decision maker has the required competency and commitment to perform both financial and personal or lifestyle decision making.[30] However, at one consultation the participants specifically opposed dual appointments as guardian and administrator for private individuals because of potential conflicts of interest.[31]

12.26 A small number of people considered that there should only ever be one decision maker.[32] The reasons identified were simplification of the system and the overlap between the roles of guardians and administrators. BENETAS's submission captures this viewpoint:

In our opinion there is a need to continue the substitute decision-making laws but there needs to be only one decision maker. The current system of two types of decision-makers is clumsy and leads to real difficulties where guardianship and administration are managed by separate people/organisations. Also it is not always easy to completely separate the areas for financial, lifestyle and personal decisions and differences can arise between a guardian and an administrator.[33]

12.27 Stephanie Mortimer's submission strongly advocated for the appointment of a single individual to act as both financial administrator and guardian because of the overlap in roles. She submitted that '[i]t is incongruous to have a different financial administrator and guardian. It just does not work. Who decides how the money is spent?'[34]

16 *Instruments Act 1958* (Vic) s 125F(2).

17 See, eg, Submissions IP 11 (Tony and Heather Tregale) 3, IP 23 (Mental Illness Fellowship Victoria) 4, 8, IP 27 (Marillac) 4, IP 46 (Troy Huggins) 2 and IP 47 (Law Institute of Victoria) 24.

18 Consultations with John Billings (17 March 2010), Julian Gardner (26 March 2010) and Villamanta Disability Legal Centre (19 April 2010); Submissions IP 16 (Mark Feigan) 11–12, IP 27 (Marillac) 4, IP 33 (Trustee Corporations Association of Australia) 4, IP 43 (Victoria Legal Aid) 10, IP 46 (Troy Huggins) 2, IP 47 (Law Institute of Victoria) 24, IP 50 (Action for Community Living) 7 and IP 59 (State Trustees Limited) 3.

19 Consultation with Villamanta Disability Legal Centre (19 April 2010); Submissions IP 5 (Southwest Advocacy Association) 5, IP 9 (Royal District Nursing Service) 8–9, IP 27 (Marillac) 4, IP 36 (Royal College of Nursing Australia) 1, IP 40 (Australian & New Zealand Society for Geriatric Medicine) 5, IP 42 (Health Services Commissioner) 6 and IP 50 (Action for Community Living) 7.

20 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 5.

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

22 Ibid 9.

23 Ibid.

24 Ibid 8.

25 Ibid.

26 Submission IP 27 (Marillac) 4.

27 Submissions IP 16 (Mark Feigan) 11–12, IP 39 (Aged Care Assessment Services of Victoria) 6, IP 43 (Victoria Legal Aid) 10 and IP 50 (Action for Community Living) 7.

28 Submission IP 50 (Action for Community Living) 7.

29 Consultations with John Billing (17 March 2010) and Julian Gardner (17 March 2010); Submissions IP 8 (Office of the Public Advocate) 20 and IP 16 (Mark Feigan) 12.

30 Submissions IP 8 (Office of the Public Advocate) 20 and IP 16 (Mark Feigan) 12.

31 Consultation with service providers in Mildura (27 April 2010).

32 Consultation with carers in Hastings (8 April 2010), although dual appointments were raised more as an option at this consultation than as representing a set view of participants that this is what should occur; Submissions IP 7 (Stephanie Mortimer) and IP 21 (BENETAS) 3.

33 Submission IP 21 (BENETAS) 3.

34 Submission IP 7 (Stephanie Mortimer) 3.

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12.28 One submission suggested that it might benefit people with disabilities to have fewer people involved in decision making, suggesting that a useful approach would be to combine the roles in one person and monitor their performance each year.[35]

SAFEGUARDS

12.29 A number of submissions considered that the appointment of two separate people as decision makers provides safeguards for the represented person.[36]

12.30 The Mental Illness Fellowship Victoria suggested that the appointment of two separate people encourages better decision making in two ways. First, it encourages discussion and debate between guardians and administrators, which results in better decisions.[37] There may be a tension between what is in the 'best interests' of a person financially as compared to personally:

> *Two parties, or three if medical is included, can provide specific perspectives from their angle and a creative tension is created. In the end the best decision taking into account all angles can be arrived at.*[38]

12.31 Secondly, the appointment of more than one decision maker provides safeguards around decision making in that the different decision makers 'act as a check and balance in respect of the other decision makers'.[39]

12.32 Mark Feigan's submission echoed this point. He suggested that the roles of administrator and guardian might involve a conflict of interest that makes it difficult for a single person to fulfil both roles:

> *Do they first assume the administrator role, and ascertain what kind of accommodation a person can afford, and then act on this within the already determined constraint as a guardian? Do they instead conduct a deep inquiry into determining a person's best interest in relation to the question of where the person should live? And then tell themself as administrator to order the person's financial arrangements so that they achieve this result?*[40]

12.33 For this reason, he submitted that the represented person's interests are best protected:

> *when there are clearly differentiated roles being carried out by two (or more) different persons, each with a concern for the best interest of the person. They then need to be able to persuade at least one more person of the rightness of their proposal for action.*[41]

12.34 Similarly, Victoria Legal Aid suggested that confining decision-making power within different roles might provide an important safeguard from abuse.[42]

12.35 The New South Wales Guardianship Tribunal suggested that having two separate people or organisations appointed as guardians and administrators may help avoid any potential conflict of interest. It suggested that:

> *having a separate guardian and administrator avoids the conflict of interest which may arise if they were combined in one decision-maker. For instance, a guardian may decide that a person should be allowed to go on a holiday organised by their group home however the administrator may consider that all the person's savings should be preserved for future contingencies, even though they could afford the holiday.*[43]

12.36 Aged Care Assessment Services also made this point in its submission. It considered that although substitute decision making by only one decision maker has the appeal of providing a seamless approach to decision making, its attendant risks are too great:

> *The challenge for one person to have two roles/powers may result in decisions by that person not being in the person's best interest. For example, a decision could be based on financial constraints rather than what is in the person's best interest.*[44]

12.37 The Public Advocate considered that when professional entities are appointed as guardians and administrators, the role should be played by two separate entities, as currently occurs in practice.[45] It identified two ways in which the appointment of separate guardians and administrators may protect the represented person. First, the distinction 'stops too much power over a person's life residing in one person or organisation'.[46] Secondly, it:

> *enables financial decisions to be made within an understandably 'cautious' cultural environment, while enabling guardianship decisions to be informed by the range of rights-promoting and tolerance-promoting principles that have always underpinned the work of OPA.*[47]

12.38 Despite acknowledging the possible benefits of appointing a single decision maker, such as simplification and streamlining of decision making, the Law Institute of Victoria also favoured the retention of two types of decision makers. It considered this preferable because it provides checks and balances and reduces the possibility of conflict of interest.[48]

DEALING WITH OVERLAPPING DECISION-MAKING ROLES

12.39 A substantial number of consultations and submissions noted the considerable overlap between the roles of guardians and administrators.[49]

12.40 A number of people suggested to the Commission that the lack of clear boundaries around the roles resulted in administrators making decisions that should probably be made by guardians.[50] Problems with the overlapping roles were most frequently noted in relation to accommodation decisions, which involve lifestyle and welfare considerations as well as financial aspects.

12.41 Carers Victoria provided us with the following case study to illustrate the difficulties that sometimes arise because of the overlap between the roles of guardians and administrators.

> Sarah, a 27 year old mother, was under administration and guardianship orders following a stroke after a hospital procedure went wrong. The administrator had commenced litigation against the hospital. Sarah's mother, who was caring for her grandchildren while Sarah was undertaking rehabilitation, wanted to rent a property that could accommodate her grandchildren, Sarah and herself. The guardian requested funds from the administrator to make modifications to the rental property and pay for Sarah's move to the accommodation. The administrator refused because it was not in Sarah's 'best interests'. The administrator considered that Sarah should be discharged from the rehabilitation facility into a nursing home until the litigation was finalised so that the costs of care could be accurately quantified and the highest payout possible secured to cover her future care.[51]

12.42 In the case study, the administrator's and the guardian's views of Sarah's best interests are different. Arguably, they are both acting properly because they are assessing Sarah's best interests from the standpoint required of them by the G&A Act. Ideally, this tension will ensure that all aspects of the 'best interests' paradigm are considered and in many cases, the guardian and administrator will negotiate and agree on a decision. However, in some cases agreement cannot be reached. In such cases, the current law provides no clear answer as to whose decision should prevail and it is necessary to return to VCAT to resolve the matter.

35 Submission IP 13 (Anonymous) 1.

36 See, eg, Submissions IP 8 (Office of the Public Advocate) 20, IP 16 (Mark Feigan) 11, IP 23 (Mental Illness Fellowship of Victoria) 4, IP 43 (Victoria Legal Aid) 10 and IP 59 (State Trustees Limited) 3–4.

37 Submission IP 23 (Mental Illness Fellowship Victoria) 4.

38 Ibid 8.

39 Ibid.

40 Submission IP 16 (Mark Feigan) 11.

41 Ibid.

42 Submission IP 43 (Victoria Legal Aid) 10.

43 Submission IP 32 (NSW Guardianship Tribunal) 3.

44 Submission IP 39 (Aged Care Assessment Services of Victoria) 6.

45 Submission IP 8 (Office of the Public Advocate) 20. It should be noted that these comments were expressly limited to the safeguards required for public guardians and professional administrators. The Public Advocate supported the current practice that allows VCAT to make dual appointments for individuals as both guardian and administrator, but recommended more safeguards.

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

47 Ibid.

48 Submission IP 47 (Law Institute of Victoria) 24.

49 See, eg, Submissions IP 1 (Carers Australia (Victoria)) 13, IP 7 (Stephanie Mortimer) 3, IP 8 (Office of the Public Advocate) 20, IP 21 (BENETAS) 3 and IP 33 (Trustee Corporations Association of Australia) 5.

50 See, eg, consultations with Mental Health Legal Centre (7 April 2010), Ruth Vine (9 April 2010) and Trustees Corporations Association of Australia (9 April 2010); Submission IP 1 (Carers Australia (Victoria)) 12.

51 This is a summary of the case study provided by Carers Australia (Victoria). The complete case study can be found in Submission IP 1 (Carers Australia (Victoria)) 12–13.

Chapter 12

The Distinction between Guardianship and Administration

12.43 As discussed above, a small number of people favoured providing a range of powers to a single decision maker to provide for this factual overlap.

12.44 The majority favoured retaining a distinction between the roles while allowing the flexibility for VCAT to appoint one person to perform both roles when appropriate.

12.45 During consultations and in submissions, a number of suggestions were made to the Commission for ways to better provide for the overlap of roles. These included:

- legislative clarification of the roles of guardians and administrators[52]
- increased training for guardians and administrators[53]
- the ability for VCAT to give specific powers to the guardian or administrator in respect of certain major decisions[54]
- enhancing community and stakeholder understanding of the different powers of each role[55]
- requiring coordination between the substitute decision makers[56]
- formal processes to address issues between guardians and administrators.[57] This could take the form of a legislative requirement that the guardian and administrator establish a plan for how issues will be managed or the process could be set down in legislation.

PROBLEMS WITH CURRENT LAW AND PRACTICE

THE OVERLAP BETWEEN THE ROLES AND POWERS OF GUARDIANS AND ADMINISTRATORS

12.46 The lack of clarity around who should make certain decisions, or how the overlapping roles should be managed, may result in disputes between the guardian and administrator which cannot be resolved without going to VCAT.

12.47 Furthermore, administrators may end up making guardianship decisions because no guardian has been appointed or because there is a lack of clarity or agreement about the roles when both a guardian and an administrator have been appointed. The most commonly noted example of this in our submissions and consultations was decisions about accommodation. Other examples provided were access to services and medical decisions. Because of the apparent reluctance of VCAT to appoint guardians, administrators may be asked to make decisions that extend beyond the management of a person's financial affairs.

GUARDIANS HAVING INSUFFICIENT POWER TO EFFECTIVELY MAKE AND IMPLEMENT DECISIONS

12.48 Although many lifestyle decisions have financial implications, guardians have no access to funds to implement their decisions. This can be especially problematic if no administrator is appointed because there may not be anyone who can give legally effective consent to the release of funds belonging to the represented person.

REASSESSMENT PERIODS

12.49 If an individual is appointed to the role of both guardian and administrator, the reassessment periods for the orders do not necessarily coincide. The two types of orders may be made for different periods. This places an undue strain on the appointee who is required to prepare for and attend multiple hearings.

OTHER JURISDICTIONS AND VIEWS

DEALING WITH OVERLAPPING DECISION-MAKING ROLES

New Zealand

12.50 The equivalent New Zealand legislation, the *Protection of Personal and Property Rights Act 1998* (NZ), provides for the appointment of two types of substitute decision makers, called a property manager (administrator) and a welfare guardian (guardian).[58] A range of other personal orders are also available that fall short of the appointment of a substitute decision maker.[59]

12.51 In contrast to the G&A Act, the New Zealand legislation provides that in the event of conflict between the powers and duties of the property manager (administrator) and the terms of the personal order, the personal order will prevail.[60] If this happens, the property manager may apply for the variation, suspension, or discharge of the personal order, or for directions relating to its implementation.[61]

12.52 In further contrast to Victorian legislation, the *Protection of Personal and Property Rights Act 1998* (NZ) places a duty on property managers and welfare guardians to consult on a regular basis, if both have been appointed.[62]

Queensland

12.53 The Queensland legislation (the *Guardianship and Administration Act 2000* (Qld)) also requires substitute decision makers to consult with each other. It directs attorneys, administrators and guardians (if there is more than one) to consult on a regular basis to ensure that the adult's interests are not prejudiced by a breakdown in communication.[63]

12.54 The *Guardianship and Administration Act* 2000 (Qld) also provides a procedure to be followed if substitute decision makers (guardians, administrators and attorneys) disagree about the way decision-making power for a matter should be exercised. The first step is mediation between the parties conducted by the Adult Guardian.[64] If the disagreement cannot be resolved by mediation, the Adult Guardian or the parties who disagree may apply to the tribunal for directions.[65]

RANGE OF POWERS IN SINGLE ORDER

Scotland

12.55 The relevant legislation in Scotland does not have two differently named orders for these two types of decision making. Instead, the *Adults with Incapacity (Scotland) Act 2000* (Scot)[66] provides for one type of order, called a guardianship order, which includes both financial and personal matters.[67] These fused orders provide for the appointment of a guardian if:

> *the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable.*[68]

However, the public official who is the guardian of last resort cannot be given responsibility for a person's financial affairs.[69]

12.56 The *Adults with Incapacity (Scotland) Act 2000* (Scot) specifically provides that more than one guardian may be appointed to exercise different powers in relation to the adult.[70]

12.57 The Scottish legislation does not create fused appointments for enduring attorneys. It provides for two different types of personal appointments of enduring attorneys, depending on whether the appointment is for financial matters (continuing power of attorney)[71] or welfare matters (welfare power of attorney).[72]

52 Consultation with John Billings (17 March 2010).

53 Consultation with Ruth Vine (9 April 2010).

54 Submission IP 33 (Trustee Corporations Association of Australia) 5. The New South Wales Guardianship Board told us that guardians and financial managers (administrators) generally work together, but a financial manager will leave the initial decision making on personal decisions to the guardian and will then consider whether the finances are available to implement that decision: see IP 32 (NSW Guardianship Tribunal) 3.

55 Submission IP 43 (Victoria Legal Aid) 10.

56 Submission IP 50 (Action for Community Living) 7.

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

58 *Protection of Personal and Property Rights Act 1988* (NZ) ss 12, 31.

59 Ibid ss 10(1)(b)–(i). Personal orders relate to the care and welfare of the person. A range of personal orders are available relating to matters such as living arrangements and medical care and include the appointment of a substitute decision maker, called a welfare guardian. The types of personal orders available include directions as to the administration of property for an item of property that does not exceed $5000 in value, or an income or benefit that does not exceed $20 000 a year.

60 *Protection of Personal and Property Rights Act 1988* (NZ) ss 16, 42.

61 Ibid s 16(2).

62 Ibid ss 18(5), 43(6).

63 *Guardianship and Administration Act 2000* (Qld) s 40(1). However, it should be noted that a failure to comply with this section will not invalidate an exercise of power by a guardian, administrator or attorney: s 40(2).

64 *Guardianship and Administration Act 2000* (Qld) s 41(1).

65 Ibid s 41(1). If the dispute is about a health matter and it cannot be resolved by mediation by the adult guardian, the adult guardian may exercise power for the health matter: s 42(1).

66 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4.

67 Ibid asp 4, s 64.

68 Ibid asp 4, s 58(1)(a).

69 Ibid asp 4, s 59(2).

70 Ibid asp 4, s 58(5). Section 62 allows for the appointment of joint guardians, but only if the joint guardians are parents, siblings or children of the adult. The difference between ss 58(5) and 62 is that the joint guardianship provisions (s 62) provide for more than one guardian to exercise power in relation to the same matters. In contrast, the ability to appoint more than one guardian under s 58(5) is intended to allow for more than one guardian to exercise power in relation to different matters.

71 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, s 15.

72 Ibid asp 4, s 16.

Chapter 12

The Distinction between Guardianship and Administration

POSSIBLE OPTIONS FOR REFORM

DISTINCTION BETWEEN GUARDIANSHIP AND ADMINISTRATION

12.58 In this section, we discuss a number of options for dealing with the various types of decisions that may need to be made by a substitute decision maker. The options fall into two major categories:

- options in which the distinction between guardianship and administration is retained
- options in which the distinction between guardianship and administration is removed.

Option A: Retain the distinction between guardianship and administration

12.59 Retaining the current distinction has a number of possible advantages:

- There is an existing level of community awareness of the roles of guardians and administrators and the distinct duties and responsibilities relating to each of them.
- There is a high level of skill and expertise built up within the bodies who perform these roles in a professional capacity—the Public Advocate and State Trustees.
- The separation allows for a person with the appropriate skills to be appointed to each role. It does not prevent one person being appointed to perform both roles if they have the appropriate skills.
- It allows for professional guardians or administrators such as the Public Advocate or State Trustees to maintain their specialisation; this reduces the risks of compromised decision making because of a generalist approach to decision making.
- Many people consider financial and lifestyle decisions to be different. This is evidenced by the fact that when people make personal appointments using powers of attorney they frequently appoint different people to make financial and welfare or medical decisions.

12.60 The primary disadvantage of this option is the lack of clarity about the distinction between guardianship and administration.

12.61 The distinction between guardianship and administration could be maintained in many ways. We use the term 'dual appointment' to describe the appointment of a single person to the roles of both guardian and administrator. We use the term 'single appointment' to refer to the more common situation where an individual is appointed to only one role.

i. Allow dual appointments for all guardians and administrators

12.62 The G&A Act currently allows a person to be appointed as both guardian and administrator. As discussed, in practice this option is used only in the case of the appointment of a private individual, even though it might be possible for VCAT to appoint the Public Advocate as a person's guardian and administrator.[73] The Public Advocate is not appointed as an administrator because she does not have specialist expertise in financial management and she considers that keeping the roles of public guardians and professional administrators separate provides important safeguards for the represented person. State Trustees does not accept appointments as a person's guardian and it does not appear to possess any power that would permit it to do so.

12.63 There are several advantages of retaining the approach of allowing dual appointments in which one person is appointed as both administrator and guardian, and no distinction is made between private and public appointees. It allows a flexible and tailored approach to the actual circumstances that arise; in some cases it will be appropriate to appoint an individual to both roles, in other cases it will be appropriate to appoint two different people to the roles. This will depend on factors such as the degree of skill required for the role in the particular circumstances and the relationship between the person who needs a guardian or administrator and the proposed appointee.

12.64 Another advantage is that it provides one method for managing the factual overlap between the roles of guardian and administrator. Furthermore, it is a straightforward and streamlined system in the sense that there is no automatic distinction made between private and professional guardians and administrators.

12.65 Appointing one individual to act in both roles may also allow for a more global, less fragmented approach to decision making, in which financial and welfare matters are considered together.

12.66 The disadvantages of this approach are that there are increased risks of abuse if one person has all of the decision-making powers. There is also a risk that a person who does not have the appropriate skills may be appointed to both roles as a matter of convenience or expediency. Under the current system, this risk is ameliorated by the requirement that each decision is made on a case-by-case basis rather than starting from a presumption that one person will be appointed to perform both roles, or that there will always need to be two different decision makers appointed.

ii. Allow dual appointments for private administrators and guardians only

12.67 During consultations, it was suggested that the ability to appoint one person as both guardian and administrator should be limited to appointments of private administrators or guardians.[74]

12.68 The advantages of making such a distinction would be that it allows VCAT to provide a pragmatic solution to the practical difficulties faced by private individuals acting as guardians and administrators, while at the same time allowing professional guardians and administrators to maintain their specialisation.

12.69 Another advantage is that it allows VCAT to distinguish the 'special relationship' that often exists between a private guardian or administrator (a role often undertaken by family members) and the person who needs a guardian or administrator, and that which exists between a professional guardian or administrator and the person who needs guardianship or administration. It also reflects the reality of family situations in which parents or siblings make daily decisions for adult family members (with a disability as defined under the G&A Act) that involve both financial and welfare aspects. Often only small amounts of money are involved and, in many cases, the decision maker themselves funds shortfalls.

12.70 Allowing dual appointments for private administrators and guardians only would also provide greater opportunity to avoid the use of professional decision makers and allow for a 'light touch' that acknowledges and preserves family relationships.

12.71 The disadvantages of making such a distinction are that it reduces the ability of VCAT to provide a tailored approach based on the particular circumstances of the person in need of a guardian and/or administrator because it does not allow a professional guardian or administrator to be appointed to both roles.

73 While the G&A Act does not expressly exclude the possibility of the Public Advocate being appointed the administrator for a person, there are two reasons why this step is unfeasible in practice. First, VCAT can only appoint a person who consents to the appointment as an administrator (*Guardianship and Administration Act 1986* (Vic) s 47(1)(c)). Secondly, it might be beyond the power of the Public Advocate to accept an appointment because although the Act expressly permits the Public Advocate to be appointed as a person's guardian by VCAT, it says nothing about an appointment as an administrator: *Guardianship and Administration Act 1986* (Vic) s 16(1)(a).

74 Generally, this option would apply to the case of a private individual appointed as guardian and administrator for one person. However, at consultations a number of people drew our attention to the fact that a single family may have a number of members who need guardians or administrators. In this situation, a private individual may be appointed as guardian and/or administrator for more than one person. This situation can still be clearly distinguished from that of a professional administrator or guardian who is appointed for multiple individuals.

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The Distinction between Guardianship and Administration

12.72 It also runs the risk of reducing the safeguards for people under private guardianship or administration as compared to those who have a professional guardian and administrator, or a combination of private and professional appointments. It could place a heavy burden on private individuals who feel that they 'should' take on the dual roles of guardian and administrator for a family member, even though they may not feel that they have the skills or capacity to undertake both roles.

12.73 Allowing dual appointments for private administrators and guardians only would also increase the chances of a conflict of interest.

iii. Allow dual appointments for public bodies only

12.74 A third approach is to permit only public bodies to accept dual appointments. The practical effects of this proposal would be either to merge the Public Advocate and State Trustees or to ensure that both organisations had sufficient expertise to undertake both guardianship and financial management activities.

12.75 The advantages of this approach are that it would provide for a streamlined approach and allow the public guardian/ administrator to take an integrated approach to decision making that weighs up financial as well as welfare considerations as part of the overall decision-making process. It also acknowledges the factual overlap between the two roles.

12.76 There are many disadvantages of this approach. There is currently no existing entity that has the combination of skills necessary to act as a 'super-agency' that makes both guardianship and administration decisions on a regular basis.

12.77 It would also be costly to set up such an agency or to restructure an existing agency such as the Office of the Public Advocate to allow it to effectively perform both roles.

12.78 There is a risk that such a change could produce decision makers who have insufficient expertise to make the decisions required because the agency becomes overly generalist. The appointment of a single person to perform both roles also reduces the checks and balances that exist if two decision makers are appointed.

12.79 Finally, allowing dual appointments for public bodies only may reduce the safeguards for people under professional guardianship or administration, as compared to those who have a professional guardian and administrator or a combination of private and professional appointments.

iv. Do not allow dual appointments

12.80 Another approach would be to remove the possibility of making any dual appointments. This means that if a need for both a guardian and administrator arises, VCAT would be required to appoint separate people to each role.

12.81 The advantages of this approach are that it would reduce the chances of abuse of powers because it would be impossible to concentrate all the decision-making power in the hands of one individual or agency. It would also provide VCAT with very clear guidelines as to who can be appointed.

12.82 The disadvantages of this approach are that it is inflexible and provides less opportunity for VCAT to tailor the orders to suit the particular circumstances of the person who needs a guardian and administrator. The approach would be less streamlined because it requires the appointment of two separate decision makers when both a guardian and administrator are needed. It is also cumbersome and does not resolve the problem of what to do when two decision makers, whose roles overlap, disagree about a decision.

v. Only allow dual appointments

12.83 The opposite approach could also be taken, in which only dual appointments are allowed. Under this approach, the ability for VCAT to appoint two separate individuals or entities to the roles of guardian and administrator would be removed.

12.84 The advantages of this approach are that it is streamlined and would make it easier to align reassessment periods of orders which would reduce the need for multiple hearings. It would also remove the difficulties associated with disagreements between decision makers with overlapping powers.

12.85 The disadvantages of this approach are that it is inflexible and provides less opportunity for VCAT to tailor the orders to suit the particular circumstances of the person who needs a guardian and administrator. By concentrating all powers in the hands of one decision maker, it increases the chances of abuse of powers.

Option B: Remove the distinction between guardians and administrators—have one type of order with a range of powers available

12.86 The second major option is to remove the distinction between the two types of orders and have only one substitute decision maker—perhaps called a guardian—who could be given a range of powers tailor-made for the particular represented person.

12.87 The legislation could provide for the appointment of either a single decision maker with a range of powers, or more than one decision maker with particular powers specified in the order, allowing the body making the order to determine which option is appropriate in the circumstances.

12.88 Allowing VCAT to determine whether to appoint a single decision maker with a range of powers, or more than one decision maker with powers that are specified in the order, is unlikely to differ much in practical terms from the existing regime.

12.89 As discussed, Scotland has this type of fused order that can provide a single decision maker (a guardian) with a range of welfare and financial decision-making powers.[75] However, since more than one guardian may be appointed to exercise different powers in relation to the same adult,[76] this approach does not appear to vary significantly from retaining two types of appointments (guardian and administrator) but allowing one person to be appointed to both roles.

12.90 The main advantage of this approach is that it is streamlined and might allow for less complex legislation.

12.91 The key disadvantage of this approach is that it does not appear to differ greatly from the current approach of appointing two types of decision makers (guardians and administrators).

Question 55 Should the current distinction between guardianship and administration be retained? If so, do you agree with any of the options (A (i)–(v)) described by the Commission?

MANAGING OVERLAP BETWEEN GUARDIANS AND ADMINISTRATORS

12.92 Responses to our information paper suggest that the overlap in responsibilities of administrators and guardians is a matter that requires attention if the distinction between the two substitute decision makers is retained. There are a number of ways in which this overlap could be better managed.

75 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, s 64.

76 Ibid asp 4, s 58(5).

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12.93 If the distinction between the decisions that guardians and administrators can make is maintained the Commission suggests the following ways to better manage that overlap:

- clarifying in the legislation the powers available to administrators and guardians so that VCAT can provide clear and specific orders
- creating a legislative duty for guardians and administrators to consult with each other where they are both appointed
- providing legislative guidance about whether the decision of a guardian or administrator prevails in the event of a dispute
- introducing formal processes to address disputes between guardians and administrators—this could take the form of a legislative requirement that the guardian and administrator establish a plan as to how issues will be managed, such as informal meetings, mediation or conciliation
- increased training for guardians and administrators (we discuss the provision of training for substitute decision makers in more detail in Chapter 19).

Question 56 Do you agree with any of the suggested ways to manage the overlap between the powers of guardians and administrators? Are there any other ways to manage this overlap?

WHO CAN BE A GUARDIAN AND ADMINISTRATOR

CURRENT LAW

12.94 Section 23 of the G&A Act deals with who VCAT can appoint as a guardian. The section requires VCAT to consider a range of matters, including the person's ability to act in the best interests of the proposed represented person, freedom from conflict of interest, and their suitability for the role. The appointee may be a parent, relative or friend, if no other person fulfils the requirements set out in the section, then the Public Advocate may be appointed. The appointee must consent to the appointment.

12.95 Section 47 of the Act deals with who VCAT can appoint as an administrator. It contains similar requirements to those for a guardian in section 23. It is also necessary for VCAT to be satisfied that the person has sufficient expertise to administer the estate or there is a special relationship or other special reason why that person should be appointed as administrator. While there is no legislative administrator of last resort, State Trustees is often appointed as administrator if no other suitable person is available.

COMMUNITY RESPONSES

12.96 Our consultations revealed that VCAT tends to appoint the Public Advocate as guardian[77] and State Trustees as administrator in cases of family conflict where there is dispute about the most suitable family member to appoint.[78]

12.97 One submission suggested that this practice is unfair:

> *The law is a bureaucratic nightmare. Who wants to be dragged before a Court with regards to a guardianship matter? Why should one be judged as guilty until they prove their innocence? … Why does the Guardianship List … have an anti-family agenda when 93% of people with disabilities live in the family home forever?*[79]

12.98 On the other hand, the Public Advocate drew attention to the current lack of oversight of the activities of private guardians:

> *OPA would like to record here its concerns about the current practices and levels of knowledge of some private guardians. Private guardians are not currently subject to regulatory oversight (and are not, for instance, bound in the same way as OPA by the provisions of the Victorian Charter for Human Rights and Responsibilities Act 2006).*[80]

COMMISSION'S OBSERVATIONS

12.99 The value of family and personal relationships was recognised and affirmed in the early stages of planning for guardianship legislation in Victoria. The Cocks Committee acknowledged this in two ways:

- first, by arguing that, in the majority of cases, the informal decision-making arrangements that are in place between people with disabilities and their families will be adequate and that guardianship will therefore not be needed[81]
- second, by suggesting that, in the vast majority of cases where a guardianship order is needed, a family member will be appointed:

  We believe that in a great many cases parents would be the logical and desirable choice as guardians, where a guardian is necessary. The Tribunal should be required, in appointing a guardian, to take into account the desirability of preserving existing family relationships … It would be only in the relatively rare situation in which the family unit has broken down or can no longer provide a healthy environment for a developmentally disabled person that consideration should be given to locating guardianship outside the family unit.[82]

12.100 The Act specifically requires VCAT to consider the desirability of preserving existing family relationships when it is deciding if a person is suitable to appoint as a guardian.[83] There is no parallel provision in relation to the appointment of an administrator. However, in both guardianship and administration appointments, VCAT is required to consider the compatibility of any proposed guardian or administrator with the represented person.[84]

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

77 See, eg, consultations with Julian Gardner (26 March 2010) and trustee organisations (9 April 2010).

78 See, eg, consultation with trustee organisations (9 April 2010).

79 Submission IP 7 (Stephanie Mortimer) 1.

80 Submission IP 8 (Office of the Public Advocate) 11.

81 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.

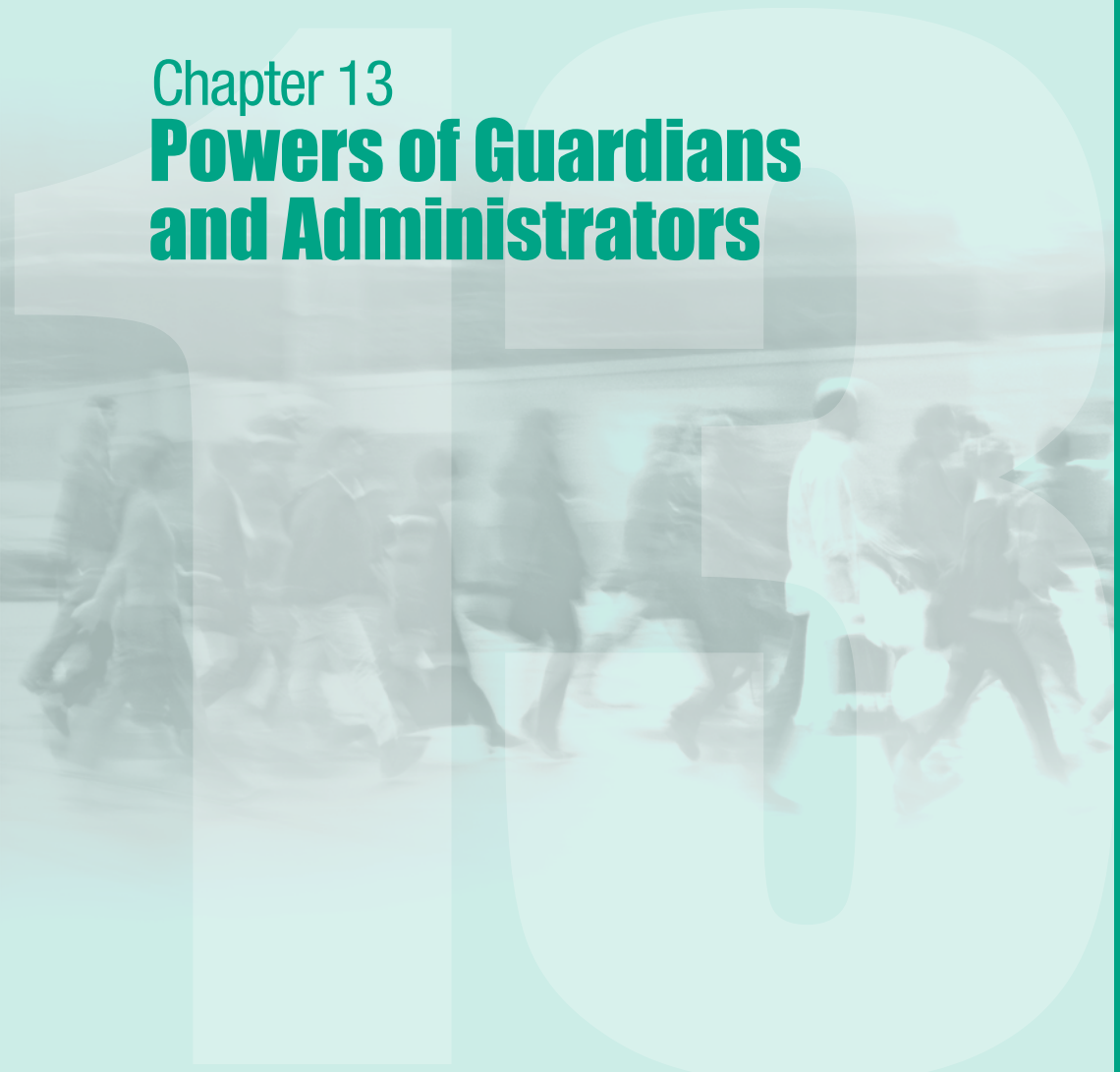
82 Ibid 51.

83 *Guardianship and Administration Act 1986* (Vic) s 23(2)(b).

84 Ibid ss 23(2)(c), 47(2)(b).

Chapter 13

Powers of Guardians and Administrators



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Chapter 13

Powers of Guardians and Administrators

INTRODUCTION

13.1 In this chapter we consider whether any legislative changes are needed to clarify, limit or extend the existing powers of guardians and administrators.

CURRENT LAW

GUARDIAN'S POWERS

13.2 As discussed in Chapter 12, a guardian has powers to make decisions about a person's welfare or lifestyle. A decision made by a guardian, in accordance with the terms of a guardianship order, has the same legal effect as if it were made by the represented person and they had legal capacity.[1]

13.3 A guardian's powers can be 'limited' to specific decisions, or they can be 'plenary'. If the powers are limited, the guardian can make decisions only in relation to those issues that are listed in the order.[2] Most guardianship orders are limited. A 'plenary guardian' has much wider powers, which extend to many aspects of the represented person's life.

13.4 The powers of a 'plenary guardian' are described in the *Guardianship and Administration Act 1986* (Vic) (G&A Act) as 'all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child'.[3] This is an outdated and unclear shorthand way of describing the powers—other than those involving financial matters—that one person could possess in relation to another.

13.5 The G&A Act describes some of the decisions a guardian with plenary powers can make. They include:

- where the represented person will live and who they will live with
- whether the represented person should work
- consent to health care
- restricting or preventing access to the represented person.[4]

13.6 Plenary orders should only be made if a more limited order will not meet the needs of the represented person.[5] These orders are rarely made.[6]

13.7 Although the outer limits of a plenary guardian's powers are unclear, there are some decisions that a plenary guardian is unable to make for a represented person because there are limits to the powers that a parent can exercise in relation to a child. For example, a parent is not entitled to authorise the removal of a child's organs or other non-regenerative tissue for the purposes of donation to another person.[7] Similarly, a parent cannot consent to sexual intercourse on behalf of a child. A plenary guardian could not exercise these powers in relation to a represented person.

13.8 A limited guardianship order authorises a guardian to make only those decisions that are authorised by the powers granted in the order. Any decisions that a limited guardian purported to make that exceed the terms of the order would be of no legal effect.[8]

Powers of enforcement against a represented person

13.9 The Victorian Civil and Administrative Tribunal (VCAT) can give a guardian or another specified person the power to take specified measures or actions to enforce a decision made by the guardian. Some limited force may be used if necessary.[9] For example, an enforcement order may ensure that a represented person complies with a decision of their guardian about where they live by authorising an ambulance service, Victoria Police or other service provider to transport them to a location directed by the guardian. In addition, the order may authorise breaking and entering premises and using reasonable force, if necessary.[10] There were 92 enforcement orders made in 2009–10.[11]

13.10 There is no comparable provision in relation to administrators, although it is likely that an administrator who is given the powers set out in section 58B of the G&A Act is entitled to use reasonable force to secure the property of the represented person.[12]

Restrictions on powers

13.11 A guardian cannot make decisions about financial matters. If the person for whom a guardian is appointed is unable to make decisions about financial matters, a separate application would need to be made to appoint an administrator. As discussed in Chapter 12, there are some decisions that involve both financial and welfare or lifestyle considerations.

13.12 Under a plenary guardianship order, or a limited guardianship order with appropriate powers, a guardian is able to consent to most medical and dental procedures. However, other people may have powers that overlap with those of a guardian. In some instances, such as the appointment of an agent under the *Medical Treatment Act 1988* (Vic), these other people take precedence over a guardian.[13]

13.13 The law provides that a guardian, whether plenary or limited, may not consent to a 'special procedure'.[14] A special procedure is a procedure that:

- is intended, or is reasonably likely, to have the effect of permanent infertility
- terminates a pregnancy
- removes tissue for the purpose of a transplant to another person.[15]

13.14 Only VCAT may consent to a 'special procedure'.[16] Other than 'special procedures', the G&A Act does not refer to any specific decisions that fall outside the scope of a guardian's powers.

Administrator's powers

13.15 An administrator must ensure that the financial affairs of a represented person are managed responsibly. Administrators can be given broad powers to perform this function. Unless otherwise indicated in an order, administration generally deprives a represented person of their right to deal with their property and make decisions about it. Decisions of an administrator have the same legal effect as if the represented person had made the decision and they had the legal capacity to do so.[17]

13.16 Unlike guardianship, the G&A Act does not formally provide for 'plenary' and 'limited' administration orders. It is possible, however, for VCAT to limit an administration order to certain functions, or to order that an administrator have the full range of powers available.[18] In effect, this is very similar to plenary or limited orders seen in relation to guardianship.

1 *Guardianship and Administration Act 1986* (Vic) ss 24(4), 25(3).
2 bid s 25.
3 Ibid s 24(1).
4 Ibid s 24(2).
5 Ibid s 22(4).
6 The Managers of the Public Advocate Guardian program estimate that plenary orders constitute less than 2% of guardianship orders where the Public Advocate has been appointed. Non-plenary orders concern accommodation decisions (64%), followed by health and medical treatment (14%). These figures relate to the 2009–10 financial year: Email from Office of the Public Advocate to the Victorian Law Reform Commission, 22 July 2010.
7 *Human Tissue Act 1982* (Vic) s 14.
8 *Guardianship and Administration Act 1986* (Vic) s 25.
9 Ibid s 26. If an enduring guardian is unable to encourage a represented person to comply with a decision, in order to make use of s 26 the enduring guardian would need to apply to VCAT to be appointed a guardian.
10 *MW (Guardianship)* [2008] VCAT 1181 (12 June 2008) [26] (Member Proctor). Another example of this is where a represented person requires urgent hospitalisation but refuses. In this situation, VCAT may make an order empowering the guardian to direct police or ambulance officers to transport the person to hospital: see Anstat, *Victorian Civil and Administrative Tribunal: Guardianship and Administration*, (September 2008) pts 4–17 [26.01].
11 Email from Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.
12 See *Guardianship and Administration Act 1986* (Vic) ss 58B(1)(b)–(c).
13 Ibid s 37.
14 Ibid s 39(1)(a).
15 Ibid s 3. It also includes 'any other medical or dental treatment that is prescribed by the regulations to be a special procedure for the purposes of Part 4A'.
16 Ibid ss 39(1)(a), 42E.
17 Ibid s 48(3).
18 Ibid s 48(1).

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13.17 Depending on the order, an administrator generally has the power to exercise all rights in relation to the estate that the represented person might have exercised had they possessed legal capacity.[19] Some examples of these powers are the right to:

- manage all of a represented person's financial affairs in general
- collect income and invest any of the represented person's money
- manage, rent out, mortgage or sell any property
- decide how much money (if any) the represented person may have for discretionary expenditure
- conduct litigation on behalf of a represented person.[20]

13.18 The G&A Act restricts, or in some cases completely removes, the ability of represented people to enter into contracts. To the extent that a person's estate is under an administration order, the represented person cannot deal with their property in any way, or create any obligations under a contract, without a further order from VCAT or the written consent of the administrator.[21] Any transfers of property without a VCAT order or the administrator's consent have no legal effect unless the exception described in the following paragraph applies.[22]

13.19 The G&A Act provides protection for an innocent third party when dealing with a represented person about that person's property. If the dealing occurs in good faith with the payment of money or other consideration and without knowledge that the represented person has an administrator, the innocent third party may retain the interest they acquire through that dealing.[23]

13.20 The extent to which an administrator may give money to the represented person for their personal use will depend upon the circumstances of the case and the amount of money in the represented person's estate.[24]

Restrictions on powers

13.21 An administrator cannot make decisions about lifestyle or welfare matters. If the person for whom an administrator is appointed is unable to make decisions about lifestyle or welfare matters, a guardian should be appointed if there is a need for a decision maker. Because many decisions involve both financial and lifestyle considerations, there is a widely held concern that some administrators make de facto guardianship decisions. This may occur because there is no guardian, or because the guardian and administrator cannot reach agreement.

13.22 An administrator does not have the power to make a will for a represented person.[25]

13.23 The G&A Act places specific restrictions on the ability of an administrator to make gifts of the represented person's property.[26] Restrictions are placed on both the value of gifts, and who may receive a gift.[27] Some community responses suggested a need to clarify or change the powers of administrators in relation to gifts.

COMMUNITY RESPONSES

13.24 Many of the community responses in consultations and submissions did not comment specifically on whether the powers provided to administrators and guardians are appropriate. As already noted, concerns were expressed about managing the overlap of powers and the need for greater clarification of the limits to those powers.

PLENARY GUARDIANSHIP AND ADMINISTRATION

13.25 There were mixed views about the appropriateness of maintaining plenary guardianship.

13.26 While plenary guardianship orders are rarely made by VCAT,[28] some people suggested that they should not be made at all. The New South Wales Guardianship Tribunal observed:

> *The Tribunal has rarely made plenary guardianship orders in its 20 year history. The Tribunal agrees that it would be preferable for VCAT to specify the guardian's functions in the Order. This also provides clarity for the guardian and the represented person about the extent of the guardian's powers.*[29]

13.27 Others argued that plenary guardianship orders are sometimes necessary and that it would be cumbersome to attempt to list all of the powers individually,[30] even though the way the order is defined in the current Act, with reference to the powers a parent may exercise in relation to a child, might need to change:

> *The [Law Institute of Victoria] considers that the reference to parent and child in this context is inappropriate, anachronistic and unclear. For example, the powers of a parent in relation to medical treatment may differ depending upon the maturity of the child. A better approach is to set out the powers, duties and responsibilities required of the substitute decision-maker … The LIV considers that there will be rare occasions where plenary orders should be made (for example, where a person is unconscious). In light of this, the G&A Act should continue to provide for plenary orders in the last resort, but … the definition of powers in s 24 should be replaced.*[31]

13.28 Further, some carers said that plenary guardianship is a realistic description of their daily role, particularly where their family member has very severe and long-term intellectual disability:

> *Given our son had/has no meaningful communications, and was unable by reason of his disability to make reasonable judgements in respect of all or any matters concerning his personal circumstances and/or estate, we saw Plenary (whole of life) Guardianship (continuing to be legal parents) as a very obvious necessity, given our son's ability was little more than that of a regular 2 year old child.*[32]

13.29 As noted above, the G&A Act gives VCAT the power to specify the extent of an administrator's powers and duties.[33] In practice, however, it is uncommon for an administrator's powers to be limited.[34]

13.30 Many people suggested that administration orders should be limited more often:

> *[W]hile VCAT can make limited administration orders, in our experience, administration orders are rarely prescriptive in terms of the scope of the administrator's duties. In the absence of clearly worded orders setting out what the administrator's duties and obligations are, and what they are not, the order becomes plenary by default. This is inconsistent with the principle set out in the Act which requires the order to be the least restrictive of the person's freedom of decision and action as is possible in the circumstances.*[35]

19 Ibid pt 5 divs 3–3A. See especially ss 48(3), 58B(1).
20 Ibid s 58B(1)–(3).
21 Ibid s 52(1).
22 Ibid s 52(2).
23 Ibid s 52(3).
24 Ibid s 58B(3).
25 Ibid s 50(2).
26 Ibid s 50A.
27 Ibid.
28 Email from VCAT Guardianship List Registry to Victorian Law Reform Commission, 15 December 2010.
29 Submission IP 32 (NSW Guardianship Tribunal) 3.
30 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 5.
31 Submission IP 47 (Law Institute of Victoria) 24.
32 Submission IP 11 (Tony and Heather Tregale) 1.
33 *Guardianship and Administration Act 1986* (Vic) s 48(1).
34 Consultation with VCAT Guardianship List (2 June 2010).
35 Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 34.

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RECOGNITION OF A GUARDIAN'S POWERS

13.31 Some groups who deal with guardians and administrators in the context of providing services to the represented person expressed concern that it can be difficult for their staff to determine the extent of the powers provided under an order. This makes it difficult to determine if the guardian or administrator is authorised to access information or make a particular decision.[36]

13.32 Guardians and administrators who experience difficulty having their powers recognised and respected by third parties, such as service providers, also raised this concern.[37]

13.33 There are at least two ways in which the powers available to administrators and guardians could be clarified. First, the legislation could provide more detail about the decisions that may and may not be made by guardians and administrators. A second way is for VCAT to provide more detailed descriptions in its orders of the specific powers available to the appointed decision maker.

Provide more detail of powers in orders

13.34 There was support for the use of orders by VCAT that set out the specific powers given to the substitute decision maker in some detail.[38] The Office of the Public Advocate favoured guardianship orders that:

> *specify as narrowly as feasible the decision-making power possessed by the guardian. This power may consist solely of the power to make one particular decision, though it may also extend to enable the making of subsequent ancillary decisions, where those ancillary decisions are closely connected to the matter that has given rise to the guardianship application.*[39]

13.35 Seniors Rights Victoria considered that the specific decisions that may be made by the guardian or administrator should be detailed in the order.[40] It suggested that this would assist with accountability.[41] It would ensure that the appointed decision maker has a clear understanding of their powers and responsibilities.

Specify restrictions on powers

13.36 Some people suggested that the legislation could be clarified by providing clear statements in the G&A Act that a particular decision may or may not be made by a guardian or administrator. Specifically, a number of people suggested an explicit list of restrictions on the powers of guardians and administrators.

13.37 The following were suggested as matters that could be included on a list of decisions that substitute decision makers should not be entitled to make or powers that they should not have:

- voting[42]
- decisions about personal relationships[43]
- marriage[44]
- divorce[45]
- making a will[46]
- consent to sexual relationships[47]
- the power to enter into a loan contract[48]
- the power to apply for a credit facility[49]
- the power to make substitute decisions about the children of represented persons[50]

- decisions that involve the infliction of pain or are coercive except in emergency situations[51]
- decisions that detain a person for the benefit of others rather than to protect the represented person[52]
- the power to decide to end a person's life[53]
- the power to consent to 'special procedures'[54]
- the powers vested in a represented person to act as a legal personal representative of deceased estates.[55]

13.38 We discuss the possibility of listing the restrictions on the powers of administrators and guardians in our options for reform below.

PROVIDE NEW POWERS

13.39 Some submissions suggested a need for additional powers for substitute decision makers or a clarification of existing powers to ensure that particular decisions can be effectively implemented.

13.40 The areas people identified as requiring greater clarification or additional powers were:

- decisions about whether a represented person should hold a driver licence[56]
- wills[57]
- gifts[58]
- organ donation[59]
- section 53 'anti-ademption' provisions[60]
- litigation on behalf of the represented person[61]
- inconsistencies between the powers granted to State Trustees when acting as administrators as compared to those granted to other administrators.[62]

Decisions about whether a represented person should hold a driver licence

13.41 The Australian and New Zealand Society of Geriatric Medicine proposed that the legislation should expressly permit plenary guardians to determine whether the represented person should be allowed to hold a driver licence.[63] It suggested that some people under guardianship, who currently hold a driver licence, might lack the capability to drive safely, as well as the insight to make a decision about their ability to drive.

36 Consultation with Centrelink (30 April 2010); Submissions IP 44 (Australian Bankers' Association) 5 and IP 45 (Victoria Police) 1.

37 Consultation with metropolitan carers (6 May 2010).

38 Submissions IP 8 (Office of the Public Advocate) 17, IP 44 (Australian Bankers' Association) 5 and IP 49b (Seniors Rights Victoria) 6.

39 Submission IP 8 (Office of the Public Advocate) 17.

40 Submission IP 49b (Seniors Rights Victoria) 6.

41 Ibid.

42 Consultation with service providers in Morwell (29 March 2010); Submissions IP 8 (Office of the Public Advocate) 23, IP 32 (NSW Guardianship Tribunal) 4 and IP 47 (Law Institute of Victoria) 24.

43 Submission IP 32 (NSW Guardianship Tribunal) 4.

44 Consultations with service providers in Morwell (29 March 2010); Submissions IP 8 (Office of the Public Advocate) 23, IP 9 (Royal District Nursing Service) 9, IP 32 (NSW Guardianship Tribunal) 4 and IP 47 (Law Institute of Victoria) 24.

45 Submissions IP 9 (Royal District Nursing Service) 9 and IP 47 (Law Institute of Victoria) 24.

46 Submissions IP 32 (NSW Guardianship Tribunal) 4, and IP 59 (State Trustees Limited) 11. The Royal District Nursing Service considered that the 'the making of wills ought to be expressly addressed by the Commission in this review although we do not suggest a preferred outcome': IP 9 (Royal District Nursing Service) 9.

47 Submission IP 32 (NSW Guardianship Tribunal) 4.

48 Submission IP 4 (Confidential).

49 Ibid.

50 Submission IP 8 (Office of the Public Advocate) 23.

51 Consultation with Jeffrey Chan (16 March 2010).

52 Submissions IP 8 (Office of the Public Advocate) 41–2 and IP 28b (People with Disability Australia) 28.

53 Submission IP 16 (Mark Feigan) 12. This submission provided the following qualification to this restriction: 'Medical treatment that is not promoting a represented person's health or well-being, and is without any benefit to them and not within their express or presumed wishes, should be withdrawn'.

54 Submissions IP 8 (Office of the Public Advocate) 23, IP 47 (Law Institute of Victoria) 24 and IP 50 (Action for Community Living) 7–8.

55 Submission IP 59 (State Trustees Limited) 10. State Trustees considered that the G&A Act and in particular s 58B and 58C(2) should be clarified to confirm that an administrator does not have the powers vested in a represented person in the character of a legal personal representative of deceased estates.

56 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 3.

57 Submissions IP 9 (Royal District Nursing Service) 9 and IP 59 (State Trustees Limited) 6.

58 Submissions IP 7 (Stephanie Mortimer) 3 and IP 32 (NSW Guardianship Tribunal) 4.

59 Consultation with Julian Gardner (26 March 2010).

60 Submission IP 59 (State Trustees Limited) 4.

61 Submissions IP 8 (Office of the Public Advocate) 10, IP 43 (Victoria Legal Aid) 11 and IP 59 (State Trustees Limited) 7–8.

62 Submission IP 59 (State Trustees Limited) 10–11.

63 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 3.

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Wills

13.42 The law does not currently allow administrators or guardians to make a will for a represented person.[64] The Royal District Nursing Service suggested that the power to make wills should be considered, but did not have an opinion as to whether this power should be available to administrators or guardians.[65] The Public Advocate suggested that:

> *Consideration should be given to whether VCAT should be able to make a will for a represented person, or alternatively whether VCAT should be empowered to make orders about the distribution of a represented person's assets.*[66]

13.43 State Trustees considered that administrators should never have the power to make a will on behalf of a represented person.[67] State Trustees did suggest strengthening the existing power of an administrator to open and read a will.[68] The current power allows an administrator to open and read any paper or writing deposited with them that alleges or purports to be the will of the represented person.[69] However, the G&A Act does not require a third party to disclose a copy of the represented person's will to an administrator. State Trustees told us that:

> *third parties frequently refuse to disclose wills to State Trustees in its role as administrator … it greatly assists the proper performance of an administration for the content of the represented person's will to be known to the administrator.*[70]

13.44 The difficulty in not placing an obligation on third parties to release a copy of a represented person's will to an administrator is that it may make it difficult for the administrator to comply with the section 53 'anti-ademption' provisions of the G&A Act. If an administrator does not know the details of the represented person's will it is difficult for them to deal with the assets in a way that maintains the interests of parties as set out in the will.

13.45 State Trustees acknowledged that there is potential for abuse of a system that provides for third parties who hold a represented person's will to disclose the will to the administrator.[71] It proposed that 'administrators should apply to VCAT if they wish to access the terms of a will so that abuses may be prevented'.[72]

Gifts

13.46 The current law allows administrators to make gifts on behalf of the represented person in limited circumstances.[73] The value of the gift must not be more than is reasonable in all the circumstances, in particular the represented person's financial circumstances.[74] A gift may only be given to a relative or close friend and must be for a special event or seasonal in nature.[75]

13.47 A donation may be made to a charity if it is the type of donation that the represented person made when she or he had capacity or might reasonably be expected to make.[76] The administrator is required to notify the tribunal if the value of the gift or donation is $100 or more, and it is made to the administrator, or to a charity with which the administrator has a connection.[77]

13.48 Two submissions suggested that administrators should have more extensive powers to give gifts.[78] Stephanie Mortimer considered that:

> *It is not right to force a person with a disability into a position where they cannot reciprocate or give when someone or a hospital has provided good care for them.*[79]

13.49 The New South Wales Guardianship Tribunal observed that:

> *an appointed substitute financial decision-maker is usually bound to make financial decisions solely in the interests of the represented person. In practice, this may mean that gifts or payments to close family members, including spouses, that the person may have made when they were capable are no longer made by the financial manager because they cannot be described as being in the financial interests of the person … it may be worthwhile considering some flexibility particularly if the person has previously indicated they would like such payments to be made.*[80]

Organ donation

13.50 The issue of whether a guardian should be able to make decisions about organ donation was raised during consultations.[81] Currently a guardian may not make a decision about organ donation on behalf of a represented person. Organ donation prior to death is a 'special procedure' that requires VCAT consent.[82] A guardian has no authority to consent to organ donation after death.[83]

13.51 It was suggested that the powers of a guardian to make decisions about organ donation may require further consideration, especially for procedures such as cardiac donation that must be performed while the represented person is still alive.[84]

Section 53 'anti-ademption' provisions

13.52 Section 53 of the G&A Act attempts to protect the rights of third parties who may have some future entitlement to the property of a represented person. It does so by providing that any proceeds arising from a disposition of the property are to be treated as representing the property itself.[85] If, for example, the represented person leaves someone a house in their will, and the administrator sells the house because it is too expensive to maintain, the person who was left the house continues to have the same rights in the money realised from the sale of the property as they had in the property before sale.

13.53 This is an exception to the general law. The general law provides that if a specific gift, such as a house, is left in a will, and the person who made the will sells the house before they die, the gift fails. The legal term used to describe this is 'ademption'.[86] Ademption occurs when the subject matter of the gift no longer exists at the date of death.[87] It refers to a change in the subject matter of the gift and does not occur if the gift has just changed in name or form.[88] In the above example, the person who was left the house in the will would not be entitled to the money from the sale because converting the property into money is a change in substance rather than form. This means that when the person who made the will dies, the specific gift fails.

13.54 The section 53 exception to the general law acknowledges the special situation of a person with an administrator. Normally a will 'speaks from the date of death'. Gifts that are no longer available because the person who made the will has disposed of them prior to death, fail. This recognises the right of a person to change their mind. In contrast, a person with an administrator has lost legal capacity so can no longer change their mind. The fact that an administrator has disposed of the property does not reflect the intention of the represented person at the time they lost capacity to make or change their will. Section 53 aims to ensure that the intentions of the represented person when they made their will are not frustrated by a subsequent need for an administrator.

64 *Guardianship and Administration Act 1986* (Vic) s 50(2) expressly states that the Act does not give administrators the power to make a will in the name of the represented person.

65 Submission IP 9 (Royal District Nursing Service) 9.

66 Submission IP 8 (Office of the Public Advocate) 10.

67 Submission IP 59 (State Trustees Limited) 11. The *Wills Act 1997* (Vic) s 21 allows the Supreme Court to authorise a will to be made in specific terms approved by the Court or revoked on behalf of a person who does not have testamentary capacity. Any person may make an application for an order under this section if the person has first obtained leave of the Court to make the application.

68 Submission IP 59 (State Trustees Limited) 6. The Public Advocate suggested that the power of administrators to inspect the will of a represented person where the will is not in their possession needs to be clarified: Submission IP 8 (Office of the Public Advocate) 10.

69 *Guardianship and Administration Act 1986* (Vic) s 58G.

70 Submission IP 59 (State Trustees Limited) 6.

71 Ibid.

72 Ibid.

73 *Guardianship and Administration Act 1986* (Vic) s 50A.

74 Ibid s 50A(1)(a).

75 Ibid s 50A(1)(b)(i).

76 Ibid s 50A(1)(b)(ii).

77 Ibid s 50A(3).

78 Submissions IP 7 (Stephanie Mortimer) 3 and IP 32 (NSW Guardianship Tribunal) 4.

79 Submission IP 7 (Stephanie Mortimer) 3.

80 Submission IP 32 (NSW Guardianship Tribunal) 4.

81 Consultation with Julian Gardner (26 March 2010).

82 *Guardianship and Administration Act 1986* (Vic) s 39(1)(a). The definition of a special procedure in s 3 includes 'any removal of tissue for the purposes of transplantation to another person'.

83 *Human Tissue Act 1982* (Vic) s 26. See generally Office of the Public Advocate (Victoria), *Organ (Human Tissue) Donations* (March 2009) <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG09_Organ_Donation_09.pdf>.

84 Consultation with Julian Gardner (26 March 2010).

85 *Guardianship and Administration Act 1986* (Vic) s 53(1).

86 See *Re Blake (dec'd)* [2009] VSC 184 (8 May 2009) for a recent discussion of ademption.

87 See, eg, *Re Blake (dec'd)* [2009] VSC 184 (8 May 2009) [43]; *Brown v Heffer* (1967) 116 CLR 344, 348; *Durrant v Friend* (1851–2) 5 De G & Sm 343, 345; 64 ER 1145, 1147.

88 See, eg, *Re Blake (dec'd)* [2009] VSC 184 (8 May 2009) [43]; *McBride v Hudson* (1962) 107 CLR 604, 613, *Pohlner v Pfeiffer* (1963) 112 CLR 52, 79.

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13.55 Section 53(3) provides that an administrator who receives money or other property under this section must keep a separate account and record of the money or other property. The legislation does not detail exactly how the administrator is to manage property to protect the interests of third parties.

13.56 State Trustees consider that '[t]he current anti-ademption provisions in section 53 of the G&A Act are unclear and should be replaced'.[89] It suggested that:

> *New provisions should permit a remedy to third parties for inevitable consequences of the substitute decision-maker's actions and should not just cover wills, but other situations such as intestacies and joint assets. Further relief should not be dependent upon the knowledge or actions of the administrator and should be identical whether decisions are being made pursuant to the Enduring Power of Attorney (EPA) or administration order.*[90]

13.57 The Commission believes that section 53 needs review and amendment to clarify the precise duties of an administrator under this section and that consideration should be given to providing remedies to third parties who suffer a loss because of the consequences of a substitute decision maker's actions.

Inconsistencies between the powers granted to State Trustees as compared to those granted to other administrators

13.58 There are two areas where State Trustees does not have the same powers as other administrators. These are section 51 of the G&A Act, which sets out the investment powers of administrators, and section 27 of the *Settled Land Act 1958* (Vic), which requires State Trustees to apply for a court order to exercise the powers of a tenant for life who becomes a publicly represented person with State Trustees as their administrator. The submission of State Trustees strongly advocated for amendments to provide State Trustees with the same powers as other administrators in these two areas.[91]

13.59 Section 51 of the G&A Act provides that, except as provided in section 53 or any order of the Tribunal, an administrator *other than State Trustees* may:

- allow any part of the estate to remain invested in the manner in which it has been invested by the represented person
- re-deposit money deposited in an authorised deposit-taking institution after it becomes payable
- exercise the same powers that the administrator would have if the administrator were a trustee under the *Trustee Act 1958* (Vic).

13.60 There is no obvious reason to exclude State Trustees from having the same powers of investment as provided to other administrators under section 51. State Trustees submitted that it should have the same powers of investment as other administrators and that section 51 should be amended to remove the exclusion.[92] The submission of State Trustees noted that investment powers equivalent to section 51 were specifically given to the State Trust (State Trustees' predecessor in law).[93]

13.61 Section 27 of the *Settled Land Act 1958* (Vic) provides that if a tenant for life becomes a publicly represented person, the State Trust may, 'under an order of the Court', exercise on behalf of the publicly represented person the powers of a tenant for life under this Act.[94]

13.62 State Trustees considers that section 27 means that if State Trustees is appointed as an administrator for a person who is a tenant for life and 'wants to exercise the powers of a tenant for life, it must first obtain a Court order'.[95] In contrast, administrators other than State Trustees seem to have authority to exercise the powers of a tenant for life under section 58B(1)(c) of the G&A Act. It provides that an administrator:

> *may generally do all acts and exercise all powers with respect to the estate as effectually and in the same manner as the represented person could have done if the represented person were not under a legal disability.*[96]

13.63 State Trustees told us that it is unaware of any policy reason for requiring State Trustees, but not other administrators, to seek a court order allowing them to exercise the powers of a tenant for life under the *Settled Land Act 1958* (Vic).[97] It proposed the repeal of section 27 of the *Settled Land Act* 1958 (Vic).[98] The repeal of this section would mean that section 58B(1)(c) would enable State Trustees to exercise the powers of a tenant for life in the same way as all other administrators, without the need to apply for a court order. The Commission notes that a number of the provisions of the *Settled Land Act 1958* (Vic) may be obsolete.[99]

Enforcement against a represented person

13.64 VCAT's ability to give a guardian, or another specified person, the power to take specified measures or actions to enforce a decision made by the guardian—which may include the use of some force—was seldom considered in submissions and consultations.[100] We were told that some guardians are reluctant to use a power to enforce a decision, even if VCAT has specified that it is an action that may be taken by the guardian to ensure that the represented person complies with a guardian's decision.[101]

13.65 The Public Advocate argued that it was important that VCAT retained the powers in sections 26 of the G&A Act, but the language of the Act should better reflect the human rights requirements of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).[102]

LEGAL PROCEEDINGS ON BEHALF OF THE REPRESENTED PERSON

13.66 In some cases, there may be a need for an administrator or guardian, or some other person, to bring or defend legal proceedings on behalf of the represented person. Section 58B(2)(l) of the G&A Act permits an administrator (with an appropriate grant of powers) to 'bring and defend actions and other legal proceedings in the name of the represented person'.[103]

13.67 A litigation guardian is an adult through whom a person under 18 years of age or a person with a disability acts in court.[104] A person with a disability may need a litigation guardian if they cannot instruct their solicitor or manage their affairs in relation to the proceeding.[105] A litigation guardian usually has to employ a lawyer to conduct the proceeding.[106] Many people are reluctant to act as litigation guardians because they may be personally liable for costs.

13.68 A litigation guardian is only appointed for civil matters. The situation of a person with a disability who is involved in a criminal proceeding, and is unable to participate in the process because of their mental impairment, is provided for under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). This Act is discussed in more detail in Chapter 24.

89 Submission IP 59 (State Trustees Limited) 4.

90 Ibid 4–5.

91 Ibid 10–11.

92 Ibid 11.

93 Ibid, n 18. *State Trust Corporation of Victoria Act 1987* (Vic) s 34(2), as repealed by *State Trustees (State Owned Companies Act) 1994* (Vic) s 24.

94 The term 'publicly represented person' is out of date. In the *State Trust Corporation of Victoria Act 1987* (Vic) s 3, it was defined to mean 'a person in respect of whose estate an order made under the *Guardianship and Administration Board Act 1986* (Vic) appointing the State Trust as administrator is in effect'. The G&A Act introduced the definition of a represented person for any person subject to a guardianship or administration order. The reference to a 'publicly represented person' in the *Settled Land Act 1958* (Vic) should be taken to mean represented person whose administrator is State Trustees. State Trustees is the successor in law of State Trust, so the reference to State Trust may be read as referring to State Trustees: see *State Trustees (State Owned Company) Act 1994 (Vic)* s 25.

95 Submission IP 59 (State Trustees Limited) 11.

96 *Guardianship and Administration Act 1986* (Vic) s 58B(1)(c).

97 Submission IP 59 (State Trustees Limited) 11.

98 Ibid.

99 See Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No 20 (2010) 74–8, which notes a large number of problems with the *Settled Land Act* 1958 (Vic) and suggests that if a new single statutory trust scheme were introduced in Victoria, as proposed in the report, there would be a need for a further review of provisions in the *Property Law Act 1958* (Vic), the *Settled Land Act 1958* (Vic), the *Trustee Act 1958* (Vic) and the *Administration and Probate Act 1958* (Vic).

100 *Guardianship and Administration Act 1986* (Vic) s 26.

101 Consultation with Royal District Nursing Service (10 May 2010).

102 Submission IP 8 (Office of the Public Advocate) 29.

103 *Guardianship and Administration Act 1986* (Vic) s 58B(2)(l).

104 *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) O 15; *County Court Civil Procedure Rules 2008* (Vic) O 15; *Magistrates' Court Civil Procedure Rules 2009* (Vic) O 32.

105 See *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) rr 15.01, 15.02; *County Court Civil Procedure Rules 2008* (Vic) rr 15.01, 15.02; *Magistrates' Court Civil Procedure Rules 2009* (Vic) r 32.02.

106 See *Supreme Court (General Civil Procedure Rules* 2005 (Vic) r 15.02(3); *County Court Civil Procedure Rules 2008* (Vic) r 15.02(3).

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13.69 Although a guardian or administrator could act as a litigation guardian, it is not always clear that this is appropriate. Victoria Legal Aid considers that family law is an area where it is unclear whether an administrator or guardian should have a role:

> *Family law is an example of where the role of a guardian or administrator is unclear. It is inappropriate for any substitute decision maker to make a fundamental decision such as whether a person should divorce a partner, however, assisting with the conduct of a complex family law property proceedings may be appropriate.*[107]

13.70 The type of legal proceedings that administrators can be involved in under section 58B(2)(l) of the G&A Act is unclear.[108] Victoria Legal Aid suggested that:

> *If the role of administrators is confined to legal matters affecting a person's financial interests, there may be a need to consider whether guardians should have greater responsibility in other areas of law.*[109]

13.71 In addition, the recent case *State Trustees Ltd v Andrew Christodoulou*[110] suggests that an administrator may be required to seek appointment as a litigation guardian to exercise power under section 58B(2)(l). A requirement that administrators seek appointment as a litigation guardian exposes them to potential personal liability for costs. This means that an administrator is unlikely to be willing to be conduct litigation on behalf of the represented person.

The Public Advocate as litigation guardian

13.72 The G&A Act says the Public Advocate may 'make representations on behalf of or act for a person with a disability'.[111] The Public Advocate interprets this section to mean that, in appropriate circumstances, it may act as litigation guardian for a represented person.[112] In its submission, it states that it

> *is sometimes asked, and even on occasion required, by courts to act as a litigation guardian in order to instruct counsel representing a person with a cognitive impairment or mental illness. Sometimes it will be appropriate for OPA to act as a litigation guardian, where the substance of the court action relates to a lifestyle issue, such as access to persons. Likewise, where the matter is more exclusively financial, it will be appropriate for an administrator to be appointed litigation guardian.*[113]

13.73 The Public Advocate believes that she should have an express power to refuse to act as a litigation guardian:

> *Since a person or body may traditionally refuse appointment as a litigation guardian, OPA would like it clearly articulated in the guardianship legislation that OPA's consent is required before it is appointed as litigation guardian.*[114]

13.74 In determining whether it is appropriate to act as a litigation guardian, the Public Advocate considers a variety of matters, which include:

- need (is there any other person who can be identified as willing and able to act in the role?)
- the costs, financial and resource related, of acting as a litigation guardian
- any liabilities raised by the matter
- the impact of not acting as a litigation guardian for the person with a disability
- whether the matter is in the public interest.[115]

13.75 In 2009, the Public Advocate acted as litigation guardian in two matters, one in the County Court (medical negligence) and one in the Children's Court.[116]

Litigation conducted by administrators

13.76 Until recently, many people assumed that an administrator was not required to seek appointment as a litigation guardian because the G&A Act allows an administrator to 'bring and defend actions and other legal proceedings in the name of the represented person'.[117]

13.77 It also appears to have been widely assumed that an administrator who brought or defended proceedings relying on the powers provided by the G&A Act would not be held personally liable for the costs of the action. State Trustees told us that:

> *in bringing an action on behalf of a represented person, any adverse costs order is generally made against the represented person, and funded out of the represented person's estate. This can be contrasted to the position of a litigation guardian appointed pursuant to the Supreme Court (General Civil Procedure) Rules 2005 … who may be liable to meet a costs order personally.*[118]

13.78 A litigation guardian may be personally liable for costs incurred in a court proceeding.[119] In its practice guidelines about litigation guardians, the Office of the Public Advocate suggests that '[d]ue to the costs implications for litigation guardians it can be presumed an administrator would prefer not to conduct proceedings as litigation guardian'.[120]

13.79 The recent Victorian Court of Appeal decision in *State Trustees Ltd v Andrew Christodoulou*[121] reveals that administrators may be personally liable for costs and suggests that they may be required to seek appointment as a litigation guardian when bringing or defending legal proceedings on behalf of a represented person. In this case, the court refused an application by State Trustees for leave to appeal against the decision of the trial judge, which had made a costs order against State Trustees in its personal capacity rather than in its capacity as administrator for a represented person.[122]

13.80 The Court of Appeal stated that:

> *it is arguable that once State Trustees decided to commence the proceedings in the name of Mrs Christodoulou and to conduct the litigation on her behalf, it ought to have taken the requisite steps under rule 15 … to have itself appointed as Mrs Christodoulou's litigation guardian.*[123]

13.81 The Court referred to rule 15.03(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), which provides that:

> *Where a person is authorised by or under any Act to conduct legal proceedings in the name of or on behalf of a handicapped person, that person shall, unless the Court otherwise orders, be entitled to be litigation guardian of the handicapped person in any proceeding to which that person's authority extends.*[124]

13.82 Rule 15.02(1) provides that '[e]xcept where otherwise provided by or under any Act, a person under disability shall commence or defend a proceeding by his or her litigation guardian'.[125] Section 58B(2)(l) of the G&A Act is a provision in an Act that empowers an administrator to bring and defend actions and other legal proceedings in the name of the represented party. However, in *State Trustees Ltd v Andrew Christodoulou* the Court of Appeal determined that, in spite of section 58B(2)(l), 'the rules relating to litigation guardians … continue to be applicable, at least in this case'.[126]

107 Submission IP 43 (Victoria Legal Aid) 11.

108 Submissions IP 8 (Office of the Public Advocate) 10 and IP 43 (Victoria Legal Aid) 11.

109 Submission IP 43 (Victoria Legal Aid) 11.

110 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86.

111 *Guardianship and Administration Act 1986* (Vic) s 16(1)(f).

112 Office of the Public Advocate (Victoria), *Litigation Guardian* (July 2008) 7 [3.1] <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG15_Litigation_Guardian_09.pdf>.

113 Submission IP 8 (Office of the Public Advocate) 10.

114 Ibid.

115 See Office of the Public Advocate (Victoria), *Litigation Guardian* (July 2008), 7–8 [3.3] <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG15_Litigation_Guardian_09.pdf>. It may be both onerous and time-consuming. For detail of the requirements of the role, see Office of the Public Advocate (Victoria), *Litigation Guardian* (July 2008), 4 [2.5] <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG15_Litigation_Guardian_09.pdf>.

116 Email from Office of the Public Advocate to Victorian Law Reform Commission, 22 July 2010.

117 *Guardianship and Administration Act 1986* (Vic) s 58B(2)(l). The court may order that the administrator is paid or reimbursed for all or part of the costs of the proceeding from the estate administered by the administrator: *Guardianship and Administration Act 1986* (Vic) s 47B.

118 Submission IP 59 (State Trustees Limited) 7.

119 *Clarey v Permanent Trustee Co Ltd* [2005] VSCA 128 (19 May 2005) [49]; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 113; *Rhodes v Swithenbank* (1889) 22 QBD 577.

120 Office of the Public Advocate (Victoria), *Litigation Guardian* (July 2008) 3 [2.4.2] <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG15_Litigation_Guardian_09.pdf>.

121 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86.

122 *Christodoulou v Christodoulou* [2009] VSC 583 (Kaye J).

123 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86 [21].

124 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.03(2).

125 Ibid.

126 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86 [21].

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13.83 The decision in this case is likely to discourage administrators from bringing legal proceedings on behalf of a represented person because it exposes the administrator to personal liability for costs.

13.84 State Trustees has indicated that if it is required to be appointed as litigation guardian in order to commence proceedings on behalf of a represented person its 'ability to run litigation on behalf of represented persons would be significantly curtailed, and consequently, so would the represented person's ability to gain access to justice'.[127] It has also made a policy decision that 'at this point ... it will not conduct proceedings as litigation guardian of represented persons, or otherwise expose itself to adverse costs orders in this regard'.[128] Other administrators may follow this approach.

13.85 There is a need to clarify exactly what type of legal proceedings are covered by section 58B(2)(l).[129] Victoria Legal Aid submitted that the Act 'should clarify the obligations of administrators to pursue a person's legal interests'.[130]

13.86 An alternative to requiring guardians or administrators to act as litigation guardians would be to have a specialised agency that acts as a litigation guardian when one is required. Victoria Legal Aid suggested that the Act could provide for:

> *targeted 'one off' administrator appointments for people who do not otherwise have an administrator but in respect of whom a court has decided assistance is required. State Trustees or the Office of the Public Advocate properly resourced and guided by clear statutory obligations, may be suited to this task.*[131]

PROBLEMS WITH CURRENT LAW AND PRACTICE

13.87 The G&A Act does not provide clear and accessible guidance about the powers of guardians and administrators. In order to understand the full extent of their powers, it is necessary for some administrators and guardians to conduct an extensive search of the G&A Act, as well as other legislation and the common law. This is a heavy burden for a person who takes on the task of making decisions for another person.

13.88 The submissions of the Public Advocate and State Trustees reveal that, at times, even professional guardians and administrators, who act for a number of represented persons, find it difficult to determine the extent of their powers. In addition, if State Trustees are appointed as administrators, they do not have the same powers as other administrators. We cannot identify any clear policy grounds for these inconsistencies.

13.89 The G&A Act does not clearly describe the way particular powers should be exercised or specific duties carried out. In some cases, a substitute decision maker needs additional powers in order to exercise a power or carry out a duty effectively. One example, outlined above, is the duties placed on an administrator under section 53. The section requires an administrator to maintain the interests of third parties by treating any proceeds arising from a disposition of the property as representing the property itself. There is an associated duty of keeping separate accounts and records of this property. It is very difficult to carry out the duties under section 53 if the administrator does not know the terms of the represented person's will. For this reason, it might be desirable to specify that an administrator should have the power to inspect a copy of the represented person's will if a third party holds it.

POSSIBLE OPTIONS FOR REFORM

13.90 The Commission proposes legislative reforms to provide:

- greater clarity about the powers of administrators and guardians
- more guidance about how administrators and guardians should perform particular duties.

13.91 In this section, we provide a range of options about the powers of guardians and administrators. We also consider the issue of litigation guardians.

PLENARY ORDERS

Option A: Abolish plenary guardianship orders

13.92 This option would involve removing plenary orders from the legislation, requiring VCAT to list in its order in each case the full range of decision-making powers given to a guardian.

13.93 Some advantages of abolishing plenary orders are that it forces the tribunal to give active consideration to the matters for which the represented person actually requires a substitute decision maker. It would also avoid any tendency to appoint a plenary decision maker simply because the person appears to have a global decision-making incapacity.

13.94 A disadvantage of this option is that it requires the tribunal to describe all the areas in which the guardian can make decisions, which could result in some areas being left out when they should have been included. This could lead to time-consuming and costly re-hearings in order to have orders amended.

How would this option work?

13.95 This option could be implemented in a variety of ways. Three possibilities are:

- list available decision-making powers in the legislation
- specify restrictions on decision-making powers in the legislation
- list a combination of available decision-making powers and restrictions on powers in the legislation.

i. List available decision-making powers in the legislation

13.96 This option would provide a list of the powers available to a guardian or administrator in the legislation. The guardianship or administration order made by VCAT would specify which of the available powers are included in the order.

13.97 This approach has been adopted in Alberta and Saskatchewan, Canada. These jurisdictions both require the guardian's powers to be specified in the guardianship order.[132] The available powers are listed in the legislation.

13.98 The approach of listing the powers available to a guardian is also used in Ontario, Canada. The *Substitute Decisions Act* distinguishes between guardians of property (which corresponds to an administrator) and guardians of the person (which corresponds to a guardian).[133]

13.99 An order appointing a guardian of the person must specify if it is for 'full' or 'partial' guardianship.[134] The *Substitute Decisions Act* attempts to list all the powers included in full guardianship.[135] An order for partial guardianship must specify which of the available powers are included.[136] It acknowledges that there may be some powers required that are not anticipated in the legislation by including the catch-all phrase 'to exercise the other powers and perform the other duties that are specified in the order'. Full guardianship provides the guardian with the power to:

127 Submission IP 59 (State Trustees Limited) 8.

128 Ibid.

129 Submission IP 8 (Office of the Public Advocate) 10.

130 Submission IP 43 (Victoria Legal Aid) 11.

131 Ibid.

132 See, eg, *Adult Guardianship and Trusteeship Act*, SA 2008, c A–4.2, s 33(1)–(2); *Adult Guardianship and Co-decision-making Act*, SS 2000, c A–5.3, s 15.

133 *Substitute Decisions Act*, SO 1992, c 30, ss 22, 55.

134 Ibid s 58(3).

135 Ibid s 59(2).

136 Ibid s 60(3).

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- exercise custodial power over the person under guardianship, determine their living arrangements and provide for their shelter and safety
- be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers
- settle claims and commence and settle proceedings on the person's behalf, except claims and proceedings that relate to the person's property or to the guardian's status or powers
- access personal information, including health information and records, to which the person would be entitled to have access if capable, and consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or powers
- on behalf of the person, make any decision to which the *Health Care Consent Act 1996* applies
- make decisions about the person's health care, nutrition and hygiene
- make decisions about the person's employment, education, training, clothing and recreation, and about any social services provided to the person
- exercise other powers and perform other duties specified in the order.[137]

13.100 The *Substitute Decisions Act* does not attempt to list all the powers of a guardian of property (administrator). Instead, the Act provides a very broad definition of the powers with one restriction listed:

> *A guardian of property has power to do on the incapable person's behalf anything in respect of property that the person could do if capable, except make a will.*[138]

13.101 No Australian jurisdictions attempt to provide an exhaustive list of the powers available to a guardian. The *Guardianship and Administration Act 2000* (Qld) provides a non-exhaustive list of the types of matters that a guardian or administrator may be empowered to make decisions about. The Act provides that:

> *Unless the tribunal orders otherwise, a guardian is authorised to do, in accordance with the terms of the guardian's appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised.*[139]

13.102 The Act uses identical wording to provide for administrators except that the power relates to a 'financial' rather than a 'personal' matter.[140]

13.103 The *Guardianship and Administration Act 2000* (Qld) provides guidance about the types of personal decisions a guardian may make and the financial decisions an administrator may make. It describes a 'financial matter' as a 'matter relating to the 'adult's financial or property matters' and provides an extensive but non-exhaustive list of examples of the types of matter this may include.[141] A 'personal matter' is defined as 'a matter, other than a special personal matter or special health matter, relating to the adult's care, including the adult's health care, or welfare'.[142] Again, the Act provides an extensive but non-exhaustive list of examples of the types of matters this may include.[143]

13.104 The advantages of detailing the potential powers available to a substitute decision maker in the legislation are that it would provide clearer guidance to the represented person, VCAT and substitute decision makers as to what powers are available. It would also enable VCAT to make detailed and specific orders, choosing appropriate powers from the list. This would help ensure that the appointed decision maker has a clear understanding of their powers and responsibilities, and would assist with accountability.

13.105 An exhaustive list would have the advantage of providing a single point of reference for the represented person, guardians, administrators and third parties. This advantage would not apply to the same extent if the list provides examples of the types of matters that may be covered rather than a comprehensive list.

13.106 There could be an open discussion involving all the relevant parties about the particular decisions a guardian or administrator should be authorised to make.

13.107 It is highly unlikely that legislation could describe every possible decision a guardian or administrator could be asked to make. As in Ontario, this difficulty could be overcome by permitting VCAT to give a guardian or an administrator the power to make decisions about personal or financial matters other than those specifically referred to in the legislation.

ii. Specify restrictions on decision-making powers in the legislation

13.108 This option would involve including a list of matters a guardian or an administrator could not be authorised to decide within the legislation.

13.109 As discussed earlier in this chapter, a number of people and organisations believe that substitute decision makers should not have the power to make decisions about the following matters:

- voting
- personal relationships
- marriage
- divorce
- making a will
- consent to sexual relationships
- entering into a loan contract
- applying for a credit facility
- the care and wellbeing of the children of represented persons
- the infliction of pain or the use of coercion except in emergency situations
- detention of the represented person for the benefit of others rather than to protect the represented person
- ending a person's life
- consenting to 'special procedures'
- acting as a personal legal representative of a deceased estate.[144]

137 Ibid s 59(2).
138 Ibid s 31(1).
139 *Guardianship and Administration Act 2000* (Qld) s 33(1).
140 Ibid s 33 (2).
141 Ibid sch 2 pt 1.
142 Ibid sch 2 pt 2.
143 Ibid.
144 See para [13.37].

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13.110 Existing law prevents a guardian or an administrator from exercising most of these powers. Some of these prohibitions are included in the G&A Act. For example, administrators may not make wills[145] and guardians may not consent to special procedures.[146] Some are expressly or impliedly prohibited under laws other than the G&A Act. For example, guardians and administrators may not make decisions about voting, marriage and divorce.

13.111 These restrictions upon the powers of guardians and administrators are often difficult to locate, for they are often contained in the common law, legislation other than the G&A Act, or within some of the complex provisions in the G&A Act. For example, the provision that an administrator may not make a will for a represented person is contained within section 50, which is entitled 'ancillary powers of administrator'. It is not helpful to require someone looking for restrictions on powers to examine a section that appears to give additional powers to an administrator.

13.112 The legislation in some other jurisdictions contains a list of decisions that guardians or administrators are not permitted to make.[147] For example, New Zealand prohibits guardians (called welfare guardians) from making decisions about:

- entering into or dissolution of a marriage or civil union
- adoption of any child of the person
- refusal of consent to the administering of any standard medical treatment or procedure intended to save that person's life or to prevent serious damage to that person's health
- consent to electroconvulsive therapy
- consent to treatment designed to destroy the brain or brain function of the person for the purpose of changing that person's behaviour
- consent to the person participating in medical experiments except if it is conducted to save the person's life or to prevent serious damage to their health.[148]

13.113 A list of the restrictions on powers that may be given to a substitute decision maker would provide a single point of reference for the represented person, guardians, administrators and third parties. This list might be particularly useful for private administrators and guardians and it might limit the number of requests for this type of information made to the Office of the Public Advocate.

iii. Include non-exhaustive list of decision-making powers and restrictions on those powers in the legislation (preferred)

13.114 This option is a combination of Options i and ii. The legislation would contain non-exhaustive lists of both the powers available to a guardian or administrator and the powers that cannot be given to a substitute decision maker. The guardianship or administration order made by VCAT would specify which of the available powers are included in the order.

13.115 This is the Commission's preferred option.

Option B: Retain plenary guardianship orders but provide a clearer explanation of the available decision-making powers

13.116 Under this option, the power to appoint a plenary guardian would be retained but the extent of the guardian's powers would be described more clearly and in modern terms. As discussed, the powers of a plenary guardian are currently described as 'all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child'.[149] This description is both paternalistic and not particularly helpful, as it is not possible to describe the powers and duties that a parent has in relation to a child with precision because they are constantly evolving.

13.117 The use of the term 'plenary order' could also be changed to a term that is modern and easier to understand, such as 'full order'.[150]

13.118 This option could be implemented in a similar way to Option A by:

- listing the available powers in the legislation
- specifying restrictions on the powers in the legislation
- listing both the available powers and restrictions on powers in the legislation.

Option C: Introduce plenary and limited administration orders

13.119 As discussed earlier, plenary guardianship orders are rarely made. Administration is handled differently. The G&A Act gives VCAT the power to specify the extent of the administrator's powers and duties, which can be all or any of those powers set out for administrators in the Act. In effect, this is very similar to the notions of plenary or limited orders seen in relation to guardianship. De facto plenary administration orders are commonly made.

13.120 This option involves bringing the provisions concerning administration orders into line with those for guardianship orders by requiring VCAT to appoint either a plenary administrator or a limited administrator when making an administration order. The provisions could mirror those relating to guardianship orders by directing that a plenary order can be made only where a limited order would be insufficient to meet the person's needs.

13.121 The advantage of this option is that it might encourage VCAT to tailor administration orders to the represented person's needs when making an administration order. This may better reflect the varying capacities of some represented people to manage some aspects of their financial affairs.

13.122 The disadvantage of this option is that it is arguably very difficult for a substitute decision maker to manage only limited aspects of a person's financial affairs due to the need for an administrator to oversee a person's entire estate and likely future requirements when making decisions about expenditure.

Option D: No change—retain plenary guardianship orders in their current form

13.123 This option would retain the current system where VCAT can make either a plenary appointment or a limited appointment in the case of a guardian, and may specify the extent of powers and duties of an appointee in the case of an administrator.

145 *Guardianship and Administration Act 1986* (Vic) s 50(2).

146 Ibid s 39(1)(a). But see s 42F.

147 See, eg, *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4 s 64(2); *Protection of Personal and Property Rights Act 1988* (NZ) s 18(1); *Guardianship and Management of Property Act 1991* (ACT) s 7B; *Guardianship and Administration Act 1990* (WA) ss 45(3)–(4).

148 *Protection of Personal and Property Rights Act 1988* (NZ) s 18(1).

149 *Guardianship and Administration Act 1986* (Vic) s 24(1).

150 The term is used in the *Adult Guardianship Act 1988* (NT) ss 15, 17. However, it refers to a parent–child relationship.

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13.124 The advantages of this option are that it maintains a system people are already familiar with and in which, in principle, any substitute decision-making appointment can be tailored to the needs of the represented person.

13.125 The disadvantages of this option are that administrators' powers are rarely limited, which might happen because the legislation does not encourage the tribunal to consider whether a limited order might suffice.

13.126 Plenary guardianship orders, although rarely made, also take away all decision-making powers of the represented person without needing to give individual attention to the specific lifestyle areas where decisions need to be made.

13.127 Plenary orders are described in the G&A Act in a way that is both paternalistic and unclear, and there currently appears to be widespread uncertainty about the powers of administrators and guardians under plenary appointments.

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

Question 59 If yes to Q 58, what decisions should a guardian be able and unable to make?

Question 60 If yes to Q 58, what decisions should an administrator be able and unable to make?

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

CLARIFYING THE POWERS OF GUARDIANS AND ADMINISTRATORS

13.128 Some submissions suggested a need to give additional powers to substitute decision makers or to clarify existing powers so that particular decisions are implemented.

13.129 The areas identified as requiring clarification are:

- whether a represented person should continue to hold a driver licence
- wills
- organ donation
- the 'anti-ademption' provisions in section 53 of the G&A Act
- gifts on behalf of the represented person
- inconsistencies between the powers granted to State Trustees when acting as administrators as compared to those granted to other administrators.

13.130 Each of these matters could be examined in detail to determine whether they should be expressly included in statutory lists of powers that may be given to a guardian or an administrator, or whether the legislation should be amended to provide further clarification of existing powers.

Question 62 Should it be possible for VCAT to order that a guardian or an administrator have the power to make decisions about any of the following matters:

- whether a represented person should continue to hold a driver licence
- a will by the represented person
- organ donation by the represented person?

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

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

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

LITIGATION GUARDIAN

13.131 The current lack of clarity about who will conduct litigation on behalf of a person who is unable to do so themselves is highly undesirable because it limits a represented person's access to justice. State Trustees' decision to refuse to conduct litigation on behalf of a represented person because of the risk of an adverse costs order is an unfortunate outcome of a complex situation involving the interests of 'stranger' litigants as well as those of the represented person.

13.132 Some possible ways to deal with this issue are:

- to clarify if and when the costs of litigation conducted on behalf of a represented person by an administrator may be awarded against the administrator personally
- to clarify what types of legal proceedings are covered by section 58B(2)(l) of the G&A Act and the obligations of administrators to pursue a person's legal interests
- to clarify if and when a guardian can conduct litigation on behalf of a represented person
- to clarify if the Public Advocate's consent is required before she can be directed to conduct litigation on behalf of an adult who is incapable of doing so themselves
- to consider if a specialised agency should be established to act as a litigation guardian when one is required.

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

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

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Powers of Guardians and Administrators

ENFORCEMENT POWERS AGAINST A REPRESENTED PERSON

13.133 While the issue of using force to implement a guardian's decisions was seldom raised during our consultation phase, it is important to examine the continuing need of a legislative power—section 26 of the G&A Act—which permits VCAT to authorise a guardian, or a third party, to use force against a represented person.[151]

13.134 The Public Advocate argued that it was important that VCAT retained the power to order that a guardian or a another specified person be empowered to enforce decisions, but that the Act should better reflect the human rights requirements of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).[152]

13.135 If VCAT makes an order under section 26 of the G&A Act that authorises a guardian or a third party to use some force or other coercive measures to ensure that the represented person complies with the guardian's decision, it must reassess that order within 42 days.

13.136 It might be appropriate to reduce the 42-day review period or require a third party, such as the Public Advocate, to report to VCAT about the use of the power.

13.137 It might also be appropriate to tighten the criteria upon which these enforcement orders can be made, and the circumstances in which these powers can be lawfully exercised. At present, VCAT may make such an order 'if having regard to the circumstances of the case it considers it appropriate to do so'.[153] A guardian or other person specified in the order is not liable to any action for false imprisonment or assault or other action, provided they are acting within the VCAT order, and the guardian believes:

- the measure or action is in the best interests of the represented person
- it is reasonable to take that measure or action in the circumstances.[154]

13.138 New criteria might limit the capacity of VCAT to make an enforcement order in circumstances where VCAT is satisfied that the measure is:

- solely intended to promote the personal and social wellbeing of the person
- reasonable and justified in the circumstances
- the least restrictive means reasonably available to achieve the purpose of the order.

13.139 The liability protection in section 26 of the G&A Act for guardians and other people specified in the order could be limited to these circumstances.

Q

Question 68 Should new guardianship laws permit VCAT to authorise a guardian, or other person, to use some force to ensure that a represented person complies with the guardian's decisions?

Question 69 If yes to Q 68, do you agree with the additional safeguards proposed by the Commission?

151 *Guardianship and Administration Act 1986* (Vic) s 26.

152 Submission IP 8 (Office of the Public Advocate) 29.

153 *Guardianship and Administration Act 1986* (Vic) s 26(1).

154 Ibid s 26(2).