Part 7

Responsibility and Accountability under the Law

In this part, we consider the responsibilities of substitute decision makers and the ways in which they are accountable for their activities. We examine the concept of 'substituted judgment' and ask whether it should replace the 'best interests' approach to substitute decision making. In Chapter 17 we consider the legislative instructions to substitute decision makers about how to fulfil their responsibilities. In Chapter 18 we consider specific responsibilities relating to confidentiality. In Chapter 19 we look at ways to improve the accountability of decision makers and whether decisions of some or all guardians and administrators should be reviewable.

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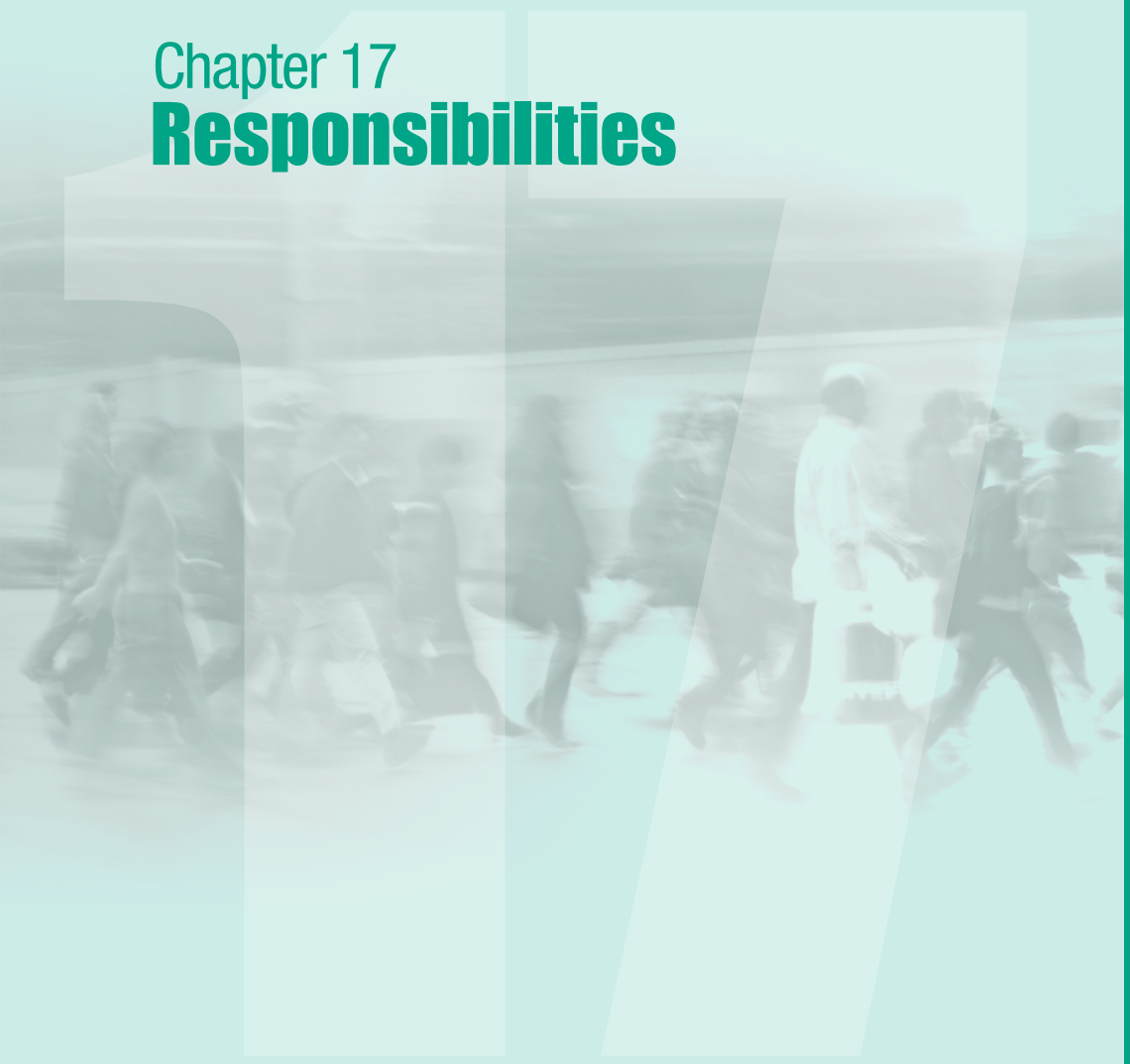

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Chapter 17 Responsibilities

INTRODUCTION

17.1 In this chapter, we consider the role of substitute decision makers. We examine the responsibilities of all substitute decision makers, whether they are appointed personally, by the Victorian Civil and Administrative Tribunal (VCAT) or automatically by legislation. We also ask whether the responsibilities of substitute decision makers could apply to the proposed new category of supporters.

THE FUNCTION OF SUBSTITUTE DECISION MAKERS

17.2 The central function of substitute decision makers is to make decisions for another person who is unable to do so themselves. Substitute decision making provides a means by which people who lack the capacity to make their own decisions can exercise their legal rights through the agency of a guardian or an administrator. The *Guardianship and Administration Act 1986* (Vic) (G&A Act) declares that the decision of a guardian or administrator has the same effect as if made by the represented person and with the capacity to do so.[1]

17.3 The Commission is not proposing any changes to the core function of guardians and administrators. There is, however, scope for greater guidance and oversight in the performance of this function.

DECISION-MAKING RESPONSIBILITIES OF SUBSTITUTE DECISION MAKERS

INTRODUCTION

17.4 The role of a substitute decision maker is challenging because it involves making decisions for a person who is unable to do so themselves and accepting responsibility for those decisions.

17.5 In this section, we consider the responsibilities of substitute decision makers in the performance of their role.

CURRENT LAW AND PRACTICE

17.6 As outlined in Chapter 5, all decision makers under the G&A Act must exercise their powers so that:

- the means which is **least restrictive** of a person's freedom of decision and action as is possible in the circumstances is adopted
- the **best interests** of a person with a disability are promoted
- the **wishes** of a person with a disability are, wherever possible, fulfilled.[2]

17.7 These are the core objects of the Act, which guide the interpretation of 'every function, power, authority, discretion, jurisdiction and duty conferred or imposed' by the G&A Act.

17.8 The G&A Act also provides specific guidance about how particular substitute decision makers—guardians, administrators and the person responsible for medical or dental decisions—should exercise their powers.

GUARDIANS

17.9 The overriding responsibility for guardians in the exercise of their powers is to act in the best interests of the represented person.[3] The G&A states this can be achieved by:

- acting as an advocate for the represented person
- encouraging the represented person to participate as much as possible in the life of the community

- encouraging and assisting the represented person to become capable of caring for themselves and making reasonable judgments in relation to matters affecting them
- protecting the represented person from neglect, abuse or exploitation
- acting in consultation with the represented person, taking into account their wishes as far as possible.[4]

17.10 These principles apply equally to 'private guardians', such as a family member or friend, and the Public Advocate when appointed as a guardian by VCAT. They also apply to personally appointed enduring guardians.[5]

Guardianship standards

17.11 The Australian Guardianship and Administration Council has developed a set of National Guardianship Standards.[6] The Public Advocate has largely adopted these standards in her own Guardianship Standards.[7] These standards are additional to the core guiding principles for guardians outlined in the G&A Act.

17.12 The Public Advocate's Guardianship Standards include:

- providing information to the represented person about the guardian's role, authority and guardianship service standards, and providing information to relevant health care professionals about substitute decision making
- seeking views from the represented person through ongoing personal contact, following these views wherever possible, and considering any objections the represented person has to a proposed course of action
- seeking views of family and others in the represented person's life for important decisions
- taking into consideration the recommendations of health professionals where relevant
- advocating for the least restrictive alternative that meets the needs of the person
- making decisions in accordance with the legislative principles and the terms of the order, and providing written reasons for decisions upon request
- recording information relevant to making decisions, including reasons for decisions
- participating in guardianship reassessments, including by requesting a reassessment if the guardian believes a cancellation or change of the order is appropriate, and by providing a written report to VCAT detailing decisions made and a recommendation about the order
- ensuring the privacy and confidentiality of the represented person and key people in their life.[8]

17.13 These standards apply to public guardians and community guardians appointed by the Public Advocate. They are also recommended in the Public Advocate's publication *Good Guardianship: A guide for people appointed as guardians under the Guardianship and Administration Act 1986*, which is provided to all private guardians appointed by VCAT.[9] While the standards are not enshrined in law, they are indicative of the expectations and responsibilities of guardians in the performance of their role.

1 See *Guardianship and Administration Act 1986* (Vic) ss 24–5, 48, 58B(1)(c). Decisions of guardians and administrators are only valid and have this legal effect if made within the confines of their powers. For example, a guardian appointed to make decisions about health care matters could not make a valid and effective decision to sell the represented person's house.

2 *Guardianship and Administration Act 1986* (Vic) s 4(2).

3 Ibid s 28(1).

4 Ibid s 28(2).

5 Ibid s 35B(2).

6 Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (7 October 2009) http://www.agac.org.au/images/stories/national_stands_public_guardianship.pdf *('National Standards of Public Guardianship')*.

7 Office of the Public Advocate (Victoria) *Guardianship Standards* (11 August 2010) http://www.publicadvocate.vic.gov.au/about-us/199/ ('*Guardianship Standards*').

8 Ibid.

9 Office of the Public Advocate (Victoria), *Good Guardianship: A guide for people appointed as guardians under the Guardianship and Administration Act 1986* (2008), 8–9 <http://www.publicadvocate.vic.gov.au/file/file/Guardianship/Good_Guardianship_08.pdf>; Office of the Public Advocate (Victoria), *Community Guardianship Manual* (2008), 23–5 <http://www.publicadvocate.vic.gov.au/file/file/Volunteers/Community_Guardianship_Manual.pdf>.

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ENDURING GUARDIANS

17.14 The responsibilities of a guardian appointed through an enduring power of guardianship are the same as those of a guardian appointed by VCAT.[10] However, in practice, enduring guardians have the added responsibility of determining when the appointer has lost the ability to make a decision, and therefore when their powers come into force.

17.15 Although the powers of an enduring guardian may be limited by the document that appoints them, the default position is that a person appointed as an enduring guardian may exercise the powers of a plenary guardian to the extent that the person is no longer able to make reasonable judgments about any of those matters themselves.[11] Ideally, the enduring guardian will seek medical advice about the extent to which the person is unable to make these decisions, but this may not always be practical.[12]

ADMINISTRATORS

17.16 Like guardians, administrators are required to act in the best interests of the represented person. The G&A states this includes:

- encouraging and assisting the represented person to become capable of managing their estate
- acting in consultation with the represented person, taking into account their wishes as far as possible.[13]

17.17 In the publication *Administration Guide: A guide for people appointed as administrators under the Guardianship and Administration Act 1986*, the Public Advocate summarises the core responsibilities of administrators as:

- always acting in the best interests of the represented person
- consulting with the represented person as much as possible
- avoiding transactions where there is a real or perceived conflict of interest
- ensuring the ongoing appropriateness of any investments made on behalf of the represented person.[14]

General responsibilities

17.18 The G&A Act also contains detailed instructions about the powers and duties of administrators.

17.19 Administrators, to the extent that their authority under the G&A Act and the administration order allows, have 'the general care and management of the estate of the represented person'. It is their duty to

> *take possession and care of, recover, collect, preserve and administer the property and estate of the represented person and generally to manage the affairs of the represented person and to exercise all rights statutory or otherwise which the represented person might exercise if the represented person had legal capacity.*[15]

Personal use

17.20 Administrators may provide money to the represented person for personal use if the administrator considers this 'expedient and reasonable', or provide any personal property to the represented person for personal use.[16]

Gifts

17.21 Administrators are able to make gifts on behalf of the person, but only if the gift is reasonable in the circumstances, affordable, and either a gift of a seasonal nature to close family and friends, or a type of donation that the person might reasonably be expected to have made if they had capacity.[17] Administrators may receive gifts, but VCAT must be notified of gifts to administrators of $100 or more in value.[18]

Investment of funds

17.22 In exercising their powers to invest the funds of the represented person, administrators may:

- continue investing the represented person's money in the same way it had been previously invested
- in the case of money deposited in the person's bank account, redeposit this money into the account when it becomes payable
- exercise the same powers as if the administrator were a trustee of the estate under the *Trustee Act 1958* (Vic).[19]

17.23 The *Trustee Act 1958* (Vic) imposes additional responsibilities in relation to the power of investment. In particular, it contains the 'prudent person principle', which guides the exercise of investment responsibilities.[20]

17.24 Under this principle, professional investors are required to 'exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons'.[21] Non-professional investors are required to 'exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons'.[22]

17.25 The *Trustee Act 1958* (Vic) also imposes more specific obligations in relation to investment decisions, which the Public Advocate advises should guide administrators.[23] This requires administrators to consider:

- the purposes of the administration order and the needs and circumstances of the represented person
- the desirability of diversifying the represented person's investments
- the nature of and risk associated with existing investments and other property
- the need to maintain the real value of the capital or income
- the risk of capital or income loss or depreciation
- the potential for capital appreciation
- the likely income return and the timing of income return
- the length of the term of the proposed investment
- the probable duration of the order
- the liquidity and marketability of the proposed investment
- the total value of the estate
- the tax consequences of the proposed investment
- the likely affect of inflation on the proposed investment
- the costs (including commissions, fees, charges and duties payable) of making the proposed investment
- the results of a review of existing trust investments.[24]

10 See *Guardianship and Administration Act 1986* (Vic) s 35B.

11 Ibid ss 35B(1)–(3).

12 We consider issues around the activation of enduring powers in more detail in Chapter 8.

13 *Guardianship and Administration Act 1986* (Vic) s 49(2).

14 Office of the Public Advocate (Victoria), *Administration Guide: A guide for people appointed as administrators under the Guardianship and Administration Act 1986* (2009), 7 http://www.publicadvocate.vic.gov.au/file/file/Administration/Administration%20Guidev2%20for%20web5.pdf ('*Administration Guide*').

15 *Guardianship and Administration Act 1986* (Vic) s 58B(1)(a)(b).

16 Ibid s 58B(3).

17 Ibid s 50A.

18 Ibid ss 50A(2)–(3).

19 Ibid s 51.

20 *Trustee Act 1958* (Vic) s 6(1).

21 Ibid s 6(1)(a).

22 Ibid s 6(1)(b).

23 *Administration Guide*, above n 14, 7–8.

24 *Trustee Act 1958* (Vic) s 8(1).

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Fees

17.26 Professional administrators such as State Trustees charge fees to the represented person for the services they provide, but private administrators may only claim out-of-pocket expenses for performing their role unless VCAT orders otherwise.[25] The fees a professional administrator may charge are set out in the VCAT order.

VCAT advice and approval

17.27 VCAT administration orders commonly require that major transactions such as the sale of property require VCAT approval before they can go ahead. Administrators may also seek advice from VCAT before undertaking a course of action.[26]

ATTORNEYS APPOINTED UNDER THE *INSTRUMENTS ACT 1958* (VIC)

17.28 The responsibilities of personally appointed financial attorneys are derived from the *Instruments Act 1958* (Vic) (Instruments Act), and the general law. Upon accepting their appointment, an attorney must make an undertaking to:

- exercise their powers with reasonable diligence to protect the interests of the donor
- avoid acting where there is any conflict of interest between the interests of the person and the attorney's interests
- exercise their powers in accordance with the requirements under the Instruments Act.[27]

17.29 The Instruments Act also requires attorneys to keep and preserve accurate records and accounts of all dealings and transactions made under the power.[28]

17.30 The Instruments Act does not place a clear duty on enduring attorneys to consider the donor's preferences when making a decision. In its submission to the Victorian Parliament Law Reform Committee's *Inquiry into Powers of Attorney*, the Office of the Public Advocate considered that the provisions

> *suggest that attorneys will tend to be guided by their views as to what constitutes the 'best interests' of the donor. It is not at all clear that attorneys should act in accordance with donors' preferences, whether they be current preferences or those held prior to any incapacity.*[29]

17.31 The Public Advocate has summarised attorneys' other legal responsibilities as:

- acting in the person's best interests
- recognising the person's right to participate in decisions as much as possible
- respecting the person's worth, dignity and human rights
- recognising the person as a valued member of society and encouraging their participation in community life
- taking into account the importance of the person's existing supportive relationships, values, culture and language
- ensuring that decisions are appropriate to the person's characteristics and needs
- ensuring confidentiality
- keeping the person's property separate, except where it is jointly owned
- not exceeding the powers set out in the appointment form.[30]

17.32 These requirements are not explicitly set out in the Instruments Act.

PERSON RESPONSIBLE

17.33 The primary responsibility of the person responsible for medical and dental decisions is to make decisions that are in the best interests of the patient.[31] In doing so, the person responsible must take into account:

- the wishes of the patient, as far as they can be ascertained
- the wishes of any nearest relative or any other family members
- the consequences to the patient if the treatment is not carried out
- any alternative treatment available
- the nature and degree of any significant risks associated with the treatment or any alternative treatment
- whether the treatment is only to promote and maintain the health and wellbeing of the patient.[32]

17.34 The person responsible may only consent to a medical research procedure if they believe it would be in the patient's best interests.[33] The matters to consider are similar to those that are relevant when making medical treatment decisions.[34]

AGENT APPOINTED BY AN ENDURING POWER OF ATTORNEY (MEDICAL)

17.35 Where an agent appointed under an enduring power of attorney (medical) is making a decision to consent to treatment, they may do so as the 'person responsible'.[35] Their overriding responsibility will be to make decisions that are in the patient's best interests, in accordance with guidelines set out in the previous section.

17.36 Agents (and guardians with relevant powers) may also make decisions to refuse treatment under the *Medical Treatment Act 1988* (Vic), which is different to a decision to 'withhold consent' to treatment under the G&A Act (we discuss this distinction in more detail in Chapter 16).

17.37 Before an agent or guardian can refuse medical treatment for a patient, they must be informed about the patient's current condition. This information must be sufficient to allow the patient, if they had capacity, to make their own decision about whether to refuse the treatment.[36] If this has happened, and the agent or guardian understands that information, they may make a decision to refuse treatment on behalf of the patient.[37] An agent may refuse medical treatment (rather than 'withhold consent') only where:

- the medical treatment would cause unreasonable distress to the patient, or
- there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to their health and wellbeing, would consider that the medical treatment is unwarranted.[38]

COMMUNITY RESPONSES

17.38 In Chapter 5 we outlined community responses to the current core principles of the G&A Act—'best interests', 'wishes of the person' and 'least restrictive of freedom of decision and action'. As outlined in that chapter, there were different perspectives and interpretations of each of these principles.

17.39 There was significant support for the principle of 'best interests', but a recognition that more guidance is required than the Act currently provides. Some criticised 'best interests' as a paternalistic phrase, and the Public Advocate proposed 'promotion of the personal and social wellbeing of the person' as an alternative.[39]

25 *Guardianship and Administration Act 1986* (Vic) s 47A.

26 Ibid s 55.

27 *Instruments Act 1958* (Vic) s 125B(5). This undertaking is part of the compulsory form for enduring power of attorney (financial) approved by the Secretary of the Department of Justice. See *Instruments Act 1958* (Vic) ss 123(1), 125ZL and '*The Instruments (Enduring Powers of Attorney) Act 2003*—Approved Forms' in Victoria, *Victorian Government Gazette*, G9, 2004, 437–41.

28 *Instruments Act 1958* (Vic) s 125D.

29 Office of the Public Advocate (Victoria), Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 4 August 2009, 15.

30 Office of the Public Advocate (Victoria) *Advice for Attorneys (Financial)*, 3 <http://www.publicadvocate.vic.gov.au/file/file/Powerofattorney/OPA_Advice%20for%20Attorneys%20Financial_Web_08.pdf>.

31 *Guardianship and Administration Act 1986* (Vic) s 42H(2).

32 Ibid s 38(1).

33 Ibid s 42S(3).

34 Ibid s 42U(1). The major difference between medical research procedures and medical treatment is that for medical research procedures the availability of alternative treatment, and whether the procedure is only to promote the health and wellbeing of the patient, are not required considerations.

35 Agents appointed under the *Medical Treatment Act 1988* (Vic) are at the top of the hierarchy of people who may be the 'person responsible' for a medical treatment decision: *Guardianship and Administration Act 1986* (Vic) s 37(1)(a).

36 *Medical Treatment Act 1988* (Vic) s 5B(1)(a).

37 Ibid s 5B(1).

38 Ibid s 5B(2).

39 See discussion at [5.33]–[5.36].

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17.40 There was also discussion about what the 'wishes of the person' means, and the extent to which substitute decision makers should be required to follow these wishes. The importance of the person's wishes to decision making was widely accepted, but there were different perspectives about the circumstances under which a substitute decision maker should depart from these wishes.[40]

17.41 While there was wide support for adopting approaches that are the 'least restrictive' of a person's freedom of decision and action, there was some debate about what this means, and whether it is appropriate to characterise substitute decision making as 'restrictive' in all cases.[41]

GUARDIANSHIP

17.42 Consumer participants in our consultations generally had more experience of administration than guardianship, and therefore comments in relation to guardians tended to be based on observation, rather than direct experience as a represented person.

Skills and training of guardians

17.43 There was a widely held view that VCAT needs to be rigorous in choosing who should be appointed as a guardian, and that guardians should be provided with more training and ongoing support to carry out their role.[42] The Public Advocate also expressed concern about the differing practices and knowledge of private guardians, and the need for further training and oversight.[43]

Relationship with represented person

17.44 Some participants in our consultations felt that the relationship between guardians and administrators should be one of trust.[44] Many people emphasised that a guardian should consult regularly with the represented person, and involve them whenever a decision is to be made.[45] There was dissatisfaction in some regional areas that this too often occurs via telephone, when it should be face-to-face.[46]

17.45 In addition to asking the represented person what they want, people felt that guardians should know or learn as much as possible about the person, and use this information to inform decision making.[47]

Supported decision making

17.46 The importance of guardians helping and encouraging people to make their own decisions was also emphasised.[48] Carers Australia (Victoria) suggested that 'supported decision making' could be enshrined in the role of guardians and administrators.[49]

Guardians as case managers

17.47 There was some disagreement about the role of guardians as 'case managers' for people with a disability. Some service providers felt that guardians should take on the role of 'super case managers',[50] coordinating care and services for the person as needed, whereas the Public Advocate argued that guardianship was never intended as a substitute for case management, and should not be seen as a remedy for inadequate service provision.[51]

Guardianship and coercive powers

17.48 There was debate about the extent to which guardians should use their powers in a 'coercive' way. The Public Advocate argued that while guardianship may be used to protect the represented person from harm, it should never be used as a means of protecting society from the person.[52]

ADMINISTRATION

17.49 Many community responses to our information paper concerned State Trustees. This is unsurprising given they are the largest provider of administration services in Victoria, with approximately 9000 clients.[53] Some responses also considered other administrators such as FTL Judge and Papaleo, as well as the role of private administrators.

17.50 Although State Trustees was sometimes criticised, some people suggested that State Trustees' standards have improved in recent years.[54] Some observed that State Trustees' task as administrator can be very challenging,[55] and the sheer volume of its clients means that providing a high quality service is very difficult.[56]

Communication with represented people

17.51 Probably the biggest single complaint people had about the current practice of administration was the lack of adequate consultation and communication with represented people.[57] This was particularly prominent in regional areas, where there was significant concern that because State Trustees is based in Melbourne, it rarely visits regionally based clients and have little first-hand understanding of their needs and circumstances.[58] State Trustees is currently implementing a decentralisation strategy, which may address some of these concerns. This has involved opening a new office in Dandenong in April 2010, with another new office planned for Bendigo, and an enhanced regional visitation program across Victoria.[59]

17.52 Some people with disabilities and disability advocates found it very difficult to contact administrators at State Trustees by telephone, and found this enormously frustrating.[60] Some also criticised the lack of clear, comprehensible written information.[61]

17.53 Some people who had experienced mental illness felt that administrators had spoken to them in a patronising and demeaning way, and felt administrators needed much more training around mental illness and other disabilities.[62]

17.54 It was argued that clients of State Trustees might be more likely to accept some of the decisions made by State Trustees if they were more involved in the decision-making process, and if the reasons for decisions were properly explained to them.[63]

17.55 A number of people felt that they needed an advocate when dealing with State Trustees.[64]

Experience of administration can be dehumanising

17.56 Some groups, notably Advocacy Disability Ethnicity Community, expressed concern that State Trustees' processes can be dehumanising.[65] Advocacy Disability Ethnicity Community and others acknowledged that a small number of State Trustees' clients have challenging behaviour and that there is a need to protect State Trustees staff, but it was also suggested that the level of security at State Trustees' cash dispensary in Melbourne is excessive.[66] One State Trustees client stated that it was humiliating to have to 'go to an office with security guards to ask for money for a haircut'.[67]

Wishes of the represented person

17.57 There were concerns that State Trustees administrators often have limited knowledge of the person's circumstances, and do not take an individualised, person-centred approach to decision making.

40 See discussion at [5.37]–[5.40].

41 See discussion at [5.28]–[5.32].

42 Consultations with service providers in Mildura (27 April 2010), Self Advocacy Resource Unit (4 May 2010) and Royal District Nursing Service (10 May 2010); Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 36.

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

44 Consultations with service providers in Mildura (27 April 2010) and Principal Aged Care Mildura (28 April 2010).

45 Consultations with VALID Northern Region Client Network (3 March 2010) and service providers and advocates in Ballarat (15 April 2010); Submission IP 5 (Southwest Advocacy Association) 2.

46 Consultations with people with disabilities, carers and advocates in Morwell (29 March 2010) and service providers in Mildura (27 April 2010).

47 Consultations with service providers and advocates in Ballarat (15 April 2010), service providers in Mildura (27 April 2010) and people with acquired brain injuries (3 May 2010); Submission IP 56 (JacksonRyan Partners) 4.

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

49 Submission IP 1 (Carers Australia (Victoria)) 13.

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

51 Submission IP 8 (Office of the Public Advocate) 5.

52 Ibid 41.

53 State Trustees, *State Trustees Annual Report 2009* (2009) 1.

54 See, eg, consultations with Julian Gardner (26 March 2010) and Self Advocacy Resource Unit (4 May 2010).

55 FTL Judge and Papaleo, for example, acknowledged that State Trustees tends to receive the clients with the most significant needs: consultation with FTL Judge and Papaleo (13 April 2010).

56 Consultation with carers, people with disabilities and service providers in Ballarat (15 April 2010).

57 Submission IP 1 (Carers Australia (Victoria)) 13.

58 Consultations with people with disabilities, carers and advocates in Morwell (29 March 2010), carers, people with disabilities and service providers in Ballarat (15 April 2010), service providers in Mildura (27 April 2010) and Self Advocacy Resource Unit (4 May 2010).

59 State Trustees, above n 53, 38–9.

60 Consultations with people with disabilities, carers and advocates in Morwell (29 March 2010) and Mental Health consumers (7 April 2010).

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

62 Consultations with people with disabilities, carers and advocates in Morwell (29 March 2010) and Mental Health consumers (7 April 2010).

63 Consultations with mental health consumers (7 April 2010) and Self Advocacy Resource Unit (4 May 2010).

64 Consultations with people with disabilities, carers and advocates in Morwell (29 March 2010) and Royal District Nursing Service (10 May 2010).

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

66 Ibid.

67 Consultation with mental health consumers (7 April 2010).

Responsibilities

17.58 There was concern that administrators often consider only the person's financial interests, and not other important lifestyle considerations.[68] For example, some groups were concerned that State Trustees emphasised saving money for the future, when this was not necessarily consistent with the person's wishes or goals in life, or realistic given their financial circumstances.[69]

17.59 Some people with disabilities argued that relatively small things like having money for cigarettes or pet food could make an enormous difference to their wellbeing, and some administrators did not seem to appreciate this.[70] Others felt that they had enough savings for larger expenses, such as a holiday or a car, but these expenses had been rejected without proper explanation.[71]

Protection of financial interests and advocacy

17.60 State Trustees were also criticised for not advocating sufficiently for people's financial rights. Examples provided in our consultations included:

- paying for medication or other goods which the person should actually have received for free[72]
- selling items of property owned by the person for amounts far below market value[73]
- not pursuing waivers to fines and infringements the person may be eligible for.[74]

17.61 Conversely, there was also criticism that some expenses and bills owed by the person were not being paid on time, leading to stress and added cost to the represented person.[75]

17.62 However, State Trustees highlighted that their staff have significant knowledge in areas such as pension entitlements, and regularly take steps that the person themselves, or a private administrator or attorney, would be unaware of or unable to properly pursue.[76]

Financial independence

17.63 In keeping with the requirement that administrators encourage and assist the person to become capable of managing their estate,[77] State Trustees run a financial independence program to assist some people under administration to become capable of managing their finances, and work towards the point where they no longer need an administrator.[78] However, the Commission heard that this program can be difficult to access,[79] and State Trustees was criticised by some for not doing enough to assist people to become capable of managing their estate.[80]

17.64 Approximately two per cent of State Trustees' administration clients participate in the Financial Independence Program, and in 2009–10, 35 financial independence program clients had their administration order revoked.[81]

17.65 It was suggested that the law should require administrators to do more to assist people to manage their own estate.[82]

Concerns about fees for administration services

17.66 A number of groups were concerned about the fees administrators charge to the represented person's estate.[83] Some groups argued that administration services should be provided free of charge.[84] The Public Advocate argued that the way fees are charged at present acts as a disincentive to making more limited administration orders, and this should be changed.[85]

17.67 State Trustees' administration fees are publicly available, and in most cases are as follows:

- a commission on gross income not exceeding 3.3 per cent of Centrelink or Veterans' Affairs pensions and allowances, and not exceeding 6.6 per cent of other income
- a once-only capital commission of 4.4 per cent of the gross value of any assets in the estate
- a fee of 1.1 per cent per annum on the capital sum invested in any common fund of State Trustees.[86]

17.68 For temporary orders, or in exceptional circumstances, State Trustees may charge a fee of $176 per hour.[87]

17.69 In our consultations, State Trustees noted that a large number of their clients have very limited income, and its administration services for these people are subsidised by a Community Services Obligation Agreement with the Minister for Community Services.[88] Subsidies are only available for people who, in the opinion of the Minister for Community Services, are unable to pay for State Trustees services themselves.[89] Of the 10 197 clients State Trustees provided administration services to during 2009–10, 8978 received a component of subsidy under this agreement.[90] There is an expectation that State Trustees will be able to provide these subsidised administration services on a costs-neutral basis.[91]

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

17.70 The *Convention on the Rights of Persons with Disabilities* contains principles that are relevant when considering the responsibilities of substitute decision makers. Articles 12(4) and 12(5) are the most helpful provisions.

ARTICLE 12(4)

17.71 Article 12(4) requires that measures relating to the exercise of legal capacity (such as guardianship, administration and powers of attorney):

- respect the rights, will and preferences of the person
- are free of conflict of interest and undue influence
- are proportional and tailored to the person's circumstances
- apply for the shortest time possible
- are subject to regular review by a competent, independent and impartial authority.[92]

Respect for the rights, will and preferences of the person

17.72 'Respect for the rights, will, and preferences of the person' is to some extent reflected in the way the G&A Act considers the 'wishes' of the person. A core principle of the G&A Act is that it is to be interpreted so that the 'wishes of the person are wherever possible given effect to'.[93] More specifically, guardians and administrators are required to act 'in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person'.[94] However, this requirement is far more qualified than the wording of the Convention, which places the rights, will and preferences of the person as the starting point for decision making. While the Convention emphasises supporting people in the exercise of their rights, will and preferences, the G&A Act places the person's wishes alongside other considerations.

68 Consultation with mental health consumers (7 April 2010); Submission IP 1 (Carers Australia (Victoria)) 13.

69 Consultations with carers and service providers in Shepparton (22 April 2010) and Self Advocacy Resource Unit (4 May 2010).

70 Consultation with mental health consumers (7 April 2010).

71 Consultations with people with disabilities, carers and advocates in Morwell (29 March 2010) and VALID Southern Region Client Network (20 April 2010).

72 Consultations with mental health consumers (7 April 2010) and carers in Hastings (8 April 2010).

73 Consultation with State Trustees client (7 May 2010).

74 Submission IP 43 (Victoria Legal Aid) 7.

75 Consultations with service providers and advocates in Ballarat (15 April 2010) and State Trustees client (7 May 2010).

76 Consultation with State Trustees Limited (9 March 2010).

77 *Guardianship and Administration Act 1986* (Vic) s 49(2)(a).

78 State Trustees, *Financial Independence Program* <http://www.statetrustees.com.au/uploads/content/125-PFS-FinIndepProg-FS0110.pdf>.

79 Consultation with Mental Health Legal Centre (7 April 2010).

80 Consultation with mental health consumers (7 April 2010); Submission IP 1 (Carers Australia (Victoria)) 13.

81 Email from State Trustees to Victorian Law Reform Commission, 4 November 2010, 5, 12.

82 Submissions IP 6 (Mark Lacey) 1 and IP 47 (Law Institute of Victoria) 6.

83 Consultations with carers in Hastings (8 April 2010), Advocacy Disability Ethnicity Community (21 April 2010) and Disability Advocacy Resource Unit (5 May 2010).

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

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

86 'State Trustees Fees and Charges' in Victoria, *Victorian Government Gazette*, G25, 24 June 2010, 1330–1, 1333.

87 Ibid 1331.

88 Consultation with State Trustees (9 March 2010). These services are provided in accordance with the Minister's obligations under pt 4 of the *State Trustees (State Owned Company) Act 1994* (Vic).

89 *State Trustees (State Owned Company) Act 1994* (Vic) s 21(2).

90 Email from State Trustees to Victorian Law Reform Commission, 4 November 2010, 4.

91 Consultation with State Trustees (9 March 2010).

92 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(4) ('*Convention on the Rights of Persons with Disabilities*').

93 *Guardianship and Administration Act 1986* (Vic) s 4(2)(c).

94 Ibid ss 28(2)(e), 49(2)(b).

Chapter 17 Responsibilities

Freedom from conflict of interest and undue influence

17.73 The Convention's requirement of support that is free from conflict of interest and undue influence is protected in part by the requirement that VCAT not appoint a guardian or administrator whose 'interests conflict or may conflict' with the person's.[95] Avoiding conflicts of interest is not explicitly part of the obligations of guardians and administrators under the G&A Act, but it is a component of their fiduciary responsibilities under the general law.[96]

Proportionate and tailored to the person's circumstances

17.74 The Convention's requirement that support be proportionate and tailored to the person's circumstances is similar to, but not the same as, the requirement that the G&A Act be interpreted and implemented so that 'the means which is the least restrictive of a person's freedom of decision and action in the circumstances is adopted'.[97] In their submission, People with Disability Australia argued that there are two dimensions to this requirement: support must be sufficient to enable people to exercise their capacity, but the level of support must be no more than is necessary in the circumstances.[98]

17.75 The Commission understands that in almost all cases an administrator is provided with the full set of powers. This might raise concerns about the proportionality of these orders.

Apply for the shortest time possible

17.76 There is no specific requirement in the G&A Act that guardianship or administration orders be made for the shortest time possible, but again this might be considered part of VCAT's obligation to make orders that are 'the least restrictive of that person's freedom of decision and action as is possible in the circumstances'.[99] The vast majority of administration orders in Victoria are made for three years,[100] which raises the question whether this 'shortest time possible' requirement is met in all cases.

Subject to regular review by a competent, independent and impartial authority

17.77 Guardianship and administration orders are subject to regular reassessments by VCAT.[101] Any person can make an application to VCAT to reassess an order.[102] However, VCAT does not have the power to review individual decisions made by guardians and administrators other than in the context of providing advice to guardians or administrators, or through applications for directions about administration matters.[103] In Chapter 19, we consider whether it should be possible to review decisions of guardians and administrators at VCAT.

ARTICLE 12(5)

17.78 Article 12(5) of the Convention requires that people with disabilities are not arbitrarily deprived of their property, and have the same rights as others to:

- own or inherit property
- control their own financial affairs
- access bank loans, mortgages and other forms of financial credit.

17.79 In Victoria, these rights might be protected through the appointment of an administrator or attorney in some circumstances.

17.80 People with Disability Australia have argued article 12(5) protects against both arbitrary deprivation of property and the arbitrary deprivation of the capacity to manage property, and requires that people with disabilities be provided with the support they need to exercise these financial rights themselves.[104]

OTHER JURISDICTIONS

17.81 The 'best interests' of the represented person is the core guiding principle for decisions made by guardians and administrators in Victoria and in most other Australian jurisdictions. However, South Australia and Queensland have adopted a different approach.[105] Both the South Australian and Queensland legislation emphasise 'substituted judgment', while Queensland seeks to maximise the involvement of the represented person in decision making.

SOUTH AUSTRALIA—SUBSTITUTED JUDGMENT AS THE PARAMOUNT CONSIDERATION

17.82 Substituted judgment is an approach that requires the decision maker to attempt, as far possible, to make the decision the represented person would have made if they were able to do so themselves if they did not have impaired capacity.

17.83 In South Australia's *Guardianship and Administration Act 1993* (SA), substituted judgment is the 'paramount' decision-making principle:

> *consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion.*[106]

17.84 Guardians and administrators in South Australia are directed to determine what they believe the wishes of the person would have been if they did not have a mental incapacity. However, the application of this principle is limited by the requirement that such an approach can only be adopted to the extent that there is 'reasonably ascertainable evidence' upon which to base the decision.

17.85 In addition to adopting a 'substituted judgment' approach, guardians and administrators are directed to consider the 'present wishes' of the person, 'unless it is not possible or reasonably practicable to do so'.[107]

17.86 Guardians and administrators must also make decisions that are 'the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection'.[108]

17.87 This reference to 'proper care and protection' is probably the closest the South Australian principles come to a more protective, best interests approach to decision making.

17.88 The South Australian Public Advocate, John Brayley, has argued that substituted judgment is a preferable approach to best interests decision making.[109] Similarly, Jeremy Moore, President of the South Australian Guardianship Board, provided the Commission with a submission arguing that Victoria should move away from best interests and towards considering the person's past wishes as the paramount principle for substitute decision making.[110] He argued that the South Australian paramount principle 'ensures the greatest respect is given to the autonomy of the represented person', and allows the person to 'live the life they would have lived, but for the incapacity'.[111] He also highlighted some of the difficulties in applying the current G&A Act principles, particularly the tension that can arise between a person's 'best interests' and the 'least restrictive' alternative.[112]

95 Ibid ss 23(1)(b), 47(1)(c)(ii).

96 For a general discussion of fiduciary relationships and their obligations, see *Hospital Products Ltd v United States Surgical Corporation* (1984) 165 CLR 41. In relation to the fiduciary nature of administration in Victoria, see *State Trustees Limited v Hayden* [2002] VSC 98 (10 April 2002) [49]; HH (Guardianship) [2008] VCAT 2344 (12 November 2008) [103].

97 *Guardianship and Administration Act 1986* (Vic) s 4(2)(a).

98 Submission IP 28a (People with Disability Australia) 42.

99 *Guardianship and Administration Act 1986* (Vic) ss 22(5), 46(4).

100 Email from State Trustees to Victorian Law Reform Commission, 4 November 2010, 1.

101 *Guardianship and Administration Act 1986* (Vic) s 61.

102 Ibid s 61(3).

103 Ibid ss 30, 55, 56.

104 Submission IP 28a (People with Disability Australia) 49.

105 In South Australia, best interests still guides the conduct of agents appointed under a medical power of attorney: see *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(8). In Queensland, the health care principle includes consideration of whether treatment 'is in all the circumstances, in the adult's best interests': *Guardianship and Administration Act 2000* (Qld) sch 1, pt 2, cl 12(1)(b)(ii).

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

107 Ibid s 5(b).

108 Ibid s 5(d).

109 John Brayley, Office of the Public Advocate (South Australia), *Supported Decision Making in Australia: Presentation Notes* (2009), 4 <http://www.opa.sa.gov.au/documents/08_News_&_Articles/Supported%20Decision%20Making.pdf>

110 Submission IP 60 (Guardianship Board of South Australia).

111 Ibid 9.

112 Ibid.

17.89 In circumstances where adopting this approach proves impossible, however, the South Australian Public Trustee, Mark Bodycoat, has suggested that the principle of best interests is the best alternative.[113] He suggests that both substituted judgment and best interests are principles that remain prone to decision makers imposing their own values on the person.[114] Mr Bodycoat has also highlighted that administrators also have legal responsibilities as trustees, and these can come into tension with the decision-making principles in the *Guardianship and Administration Act 1993* (SA).[115]

QUEENSLAND

Maximum participation, minimal limitations and substituted judgment

17.90 Queensland has probably the most comprehensive set of principles underpinning its guardianship laws. In Chapter 5 we discuss these 'General Principles'[116] as they relate to Queensland guardianship laws as a whole.

17.91 While guardians and administrators are required to apply all the General Principles,[117] clause 7 of the Principles, entitled 'Maximum participation, minimal limitations and substituted judgment', outlines the core decision-making guidelines for guardians and administrators:

> *(1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.*
>
> *(2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.*
>
> *(3) So, for example—*
>
> *(a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and*
>
> *(b) to the greatest extent practicable, for exercising power or a matter for the adult, the adult's views and wishes are to be sought and taken into account; and*
>
> *(c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.*
>
> *(4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.*
>
> *(5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.*
>
> *(6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.*

17.92 These principles emphasise the role of guardians and administrators in ensuring the adult is supported to make their own decisions where possible, and participate in the decision-making process to the greatest possible extent. Alongside this, guardians and administrators are directed to use 'substituted judgment' where appropriate.

17.93 Like South Australia, the Queensland principles do not rely on the notion of 'best interests' (except in the context of medical decisions),[118] but require decisions that are 'consistent with the adult's proper care and protection'.[119] However, unlike South Australia, substituted judgment is not the paramount consideration in the Queensland principles, which place greater emphasis on the participation of the person in the decision-making process.

MENTAL CAPACITY ACT 2005 (UK)—BEST INTERESTS WITH CLEARER GUIDANCE

17.94 Like the G&A Act, acting in the best interests of a person lacking capacity remains a core principle of the *Mental Capacity Act 2005* (UK) (Mental Capacity Act), which applies in England and Wales.[120] However, the Mental Capacity Act provides more extensive guidance than the Victorian legislation for deciding what is in a person's best interests.[121] The Mental Capacity Act's best interests guidance includes:

- not making superficial assumptions based on the person's age, appearance, a condition they may have or an aspect of their behaviour
- consideration of the likelihood the person will regain capacity
- acting to encourage the person to participate in decision making
- considering the person's past and presently expressed wishes, beliefs and values, and factors that the person would have been likely to consider if they were able to
- consulting with relevant people in the person's life, including those nominated by the person.[122]

17.95 This approach to best interests was commended in a number of submissions and consultations.[123]

PROBLEMS WITH CURRENT LAW AND PRACTICE

BEST INTERESTS

17.96 The Commission sees merit in the Public Advocate's suggestion that it is time to move away from best interests as the core consideration in substitute decision making.

17.97 The term 'best interests' is inherently subjective. It is an elusive concept that many people consider undesirably paternalistic. It invites the decision maker to consider what they believe to be in the person's best interests, rather than start from the position of asking what the person themselves would want to happen in the circumstances.

17.98 While guardians and administrators are directed by the legislation that they 'must act in the best interests of the represented person',[124] there appears to be some tension between these provisions and the section of the G&A Act that contains its overarching objects. Section 4(2) directs decision makers to promote the best interests of the represented person and to give effect to the wishes of the person whenever possible. The Act contains no guidance about the priority of these overarching objects or the means of resolving conflict when a guardian or administrator believes that giving effect to the wishes of a person would not be in their best interests. The Public Advocate has suggested that, in practice, the term best interests 'has come to constitute somewhat of a euphemism for overriding free will'.[125]

17.99 Best interests is also a term strongly associated with decision making for children,[126] which might be seen as reinforcing paternalistic attitudes to adults with impaired decision-making capacity.

113 Mark Bodycoat, Public Trustee (South Australia), 'I Walk the Line: Some of the challenges of good trusteeship' (Paper presented at Rights Responsibilities and Rhetoric conference, Adelaide, 8–9 October 2009) <http://www.publictrustee.sa.gov.au/uploads/Mental_Health_Conference/BODYCOAT%20paper.pdf>.

114 Ibid.

115 Ibid. Section 39(1)(b) of the *Guardianship and Administration Act 1993* (SA) deems administrators to be trustees.

116 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1.

117 Ibid s 34.

118 See ibid sch 1 pt 2 cl 12(b)(ii).

119 Ibid sch 1 cl 7(5).

120 *Mental Capacity Act 2005* (UK) c 9.

121 Ibid s 4.

122 Ibid ss 4(1), (3), (4), (6), (7).

123 See, eg, consultation with people with disabilities, carers and advocates in Morwell (29 March 2010); Submissions IP 58 (Mental Health Legal Centre) 20 and IP 47 (Law Institute of Victoria) 22.

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

125 Submission IP 8 (Office of the Public Advocate) 17. See also Barbara Carter, Office of the Public Advocate (Victoria), *Principles and Values in Victorian Guardianship Legislation* (2009) 14.

126 See, eg, *Family Law Act 1975* (Cth) pt VII, *Children, Youth and Families Act 2005* (Vic) s 10; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 3(1), 9, 18, 20, 21 37(c).

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WISHES

17.100 Our consultations revealed a widely held view that where a person is unable to make a decision, they will still have wishes and preferences that should inform any decision made on their behalf. These wishes include both those that are expressed at the time a decision is to be made, and those that can be ascertained by considering the history of the person, including past actions and their known views, beliefs, values, likes and dislikes.

17.101 The G&A Act does not expressly require consideration of the history of the person, or their views, beliefs and values. It also does not clarify whether current wishes are to be given more or less weight in decision making than previous wishes.

Question 87 Does the law need to provide more guidance about the relationship between the wishes a person expresses at the time a decision is made, and any past wishes, views, beliefs and values the person has expressed?

'RISKY' AND 'BAD' DECISION MAKING

17.102 Like other members of our society, a person with impaired capacity may have preferences and desires that others consider risky, unwise or immoral. Guardians and administrators sometimes face the difficult task of choosing between preserving the autonomy of the person and protecting the person from potential harm. Examples of difficult decisions for guardians can include:

- whether a person with advanced dementia should continue to live at home, even where it appears impractical for them to do so, if this is clearly what the person wants now, and has always wanted
- whether a person with chronic alcoholism and alcohol-related brain injuries should continue to drink when this is damaging to their health, but also appears to be the only thing that gets them through the day.

17.103 For an administrator, challenging decisions can include:

- whether to give the represented person cash knowing or believing that the person will use it to purchase illegal drugs
- whether a person should be allowed to gamble with money that the administrator believes they will need to preserve their wellbeing in the future.

17.104 Some participants in our consultations talked about the 'dignity of risk' for people with disabilities, and the importance of ensuring that people are not protected to such an extent that they cannot realise their goals and preferences in life. Others emphasised that substitute decision makers should not impose their own moral standards and values onto the person they are assisting. Former Public Advocate Julian Gardner argued that substitute decision makers should take steps to ensure that in some circumstances risk is properly managed rather than completely avoided.[127]

17.105 While recognising that people with disabilities should have the same rights as others to take risks, make bad decisions, and engage in 'immoral' behaviour, people also have the right to be protected from harm, including abuse, neglect and exploitation. This tension between freedom of decision and action and protection from harm is a core feature of guardianship laws. The Commission is interested in exploring whether current laws strike the right balance and whether more guidance is necessary.

Question 88 Does the law currently strike the right balance between following the wishes of the person, including those that involve risk or danger, and other important considerations such as the right of a person to be protected from harm?

AN ALTERNATVE APPROACH—SUBSTITUTED JUDGMENT

17.106 Substituted judgment—making decisions the person would have made if they were able to—is an alternative to the notion of best interests. The focus of substituted judgment is always on the actual or assumed wishes of the represented person, rather than the protective best interests approach. As discussed earlier in this chapter, this principle is the paramount consideration in South Australian guardianship laws, and an important consideration in Queensland. It is also a principle that the Victorian Public Advocate uses to assist decision making in some contexts.[128]

17.107 Substituted judgment is a particularly useful concept where a person has made decisions for themselves for most of their life and it is only later in life, perhaps as a result of a brain injury or dementia, that the person needs a substitute decision maker. In these situations, determining the decision the person would have made themselves may be relatively straightforward because there is a clear history of decision making to draw upon. The decision maker could refer to written statements of the person, their history of decision making, and to views, beliefs and values the person is known to hold.

17.108 Substituted judgment allows the decision maker to consider the expressed wishes of the person, but also place these wishes in a context or in circumstances that the person may not be aware of or fully understand. For example, an adult with a significant intellectual disability may strongly object to being given daily insulin injections to treat diabetes, but a substitute decision maker might determine that if the person were capable of understanding the life-threatening consequences of not having the injections, they would agree to have them.

17.109 However, despite the 'contextual' nature of substituted judgment, the principle can become difficult or impossible to apply in situations where a person has significantly impaired capacity as a result of a developmental disability, and has always required support in decision making. In these circumstances, where there is not a long history of independent decision making to draw upon, working out the decision the person would have made can easily collapse into a more subjective judgment about the decision the person 'should' make. The President of the Guardianship Board of South Australia has argued that the principle of substituted judgment remains relevant to a person who has never had capacity, and that in these circumstances it is necessary to consider the preferences the person expresses, and the things that the person values.[129]

17.110 The Victorian Public Advocate has considered whether substitute decision making should be different if the person once had capacity.[130] The Public Advocate has suggested that the same principles should apply to substitute decision making, regardless of whether the person has previously had capacity for those decisions, arguing that:

> *to suggest that a distinctly different approach should be adopted for people who have previously had capacity cannot be supported by looking at the complexity and reality of people's lives.*[131]

127 Consultation with Julian Gardner (26 March 2010).

128 Office of the Public Advocate (Victoria), *Adult Guardianship in Victoria* (2006), 2 <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG00_Adult_Guardianship_in_Victoria_09.pdf>.

129 Submission IP 60 (Guardianship Board of South Australia) 5.

130 Office of the Public Advocate (Victoria), 'Decision-making by a guardian: Should it be different if the Represented Person once had capacity?' (2010). Available at <http://www.publicadvocate.vic.gov.au/research/132/>.

131 Ibid 7.

17.111 The Public Advocate supports the inclusion of substituted judgment alongside other decision-making principles and has argued that this principle may still be used where the person has always had a decision-making impairment.[132] However, the Public Advocate has also urged caution in relying too heavily on past decisions and actions as a determinant for future decision making.[133]

17.112 Substituted judgment is also more difficult in situations where the appointed substitute decision maker does not know a great deal about the person's history of decisions, views, beliefs and values. This might occur in situations where the Public Advocate or State Trustees is appointed for a person who has few family, friends or other important people in their life, and the decision maker has to make a decision within a short space of time.

17.113 There has also been some criticism that the principle of substituted judgment can collapse into 'legal fiction' and hide other motives for substitute decision makers.[134] It has been argued that to avoid pressure for substitute decision makers to 'invent' preferences for represented persons, a more workable approach might be the United Kingdom's Mental Capacity Act approach to best interests, which recognises past preferences, and contains a strong element of substituted judgment.[135]

17.114 Though the principle of substituted judgment allows the decision maker to place the person's wishes in context, there may still be circumstances where the decision the person would have made would result in unacceptable harm to that person. An example of this might be a situation where a person has always been adamant that, no matter what the circumstances, they wish to remain in their own home for the rest of their life. Even in circumstances of advanced dementia, it might be clear that the person would have wanted to remain at home despite the risks to their safety and wellbeing, but a substitute decision maker might determine that this would involve unacceptable risk.

17.115 Laws in South Australia and Queensland acknowledge that there may be limits to the principles of substituted judgment by requiring that decisions be consistent with 'the proper care and protection' of the person.[136] The Commission similarly believes that even if a substituted judgment approach were adopted it would be necessary to give a substitute decision maker a power to prevent the person being placed in a situation of serious harm.

17.116 The Commission is also interested in considering the role of the principle of substituted judgment in relation to supported decision-making arrangements. In that context, substituted judgment becomes primarily a matter of supporting a person to make the decision that they would have made if they did not need the support.

CHANGE IN TERMINOLOGY—'PROMOTION OF PERSONAL AND SOCIAL WELLBEING'

17.117 The Public Advocate's suggestion that the terminology of 'best interests' be replaced with 'promotion of the personal and social wellbeing' is also a proposal that merits consideration

17.118 The Public Advocate has argued that this phrase would overcome some of the negative connotations that have become associated with best interests, and the concept of 'wellbeing' places more emphasis on the person, and the outcomes sought for that person.[137] The Victorian Parliament Law Reform Committee's *Inquiry into Powers of Attorney* recently endorsed this more 'modern' terminology as an alternative to best interests, and recommended that promotion of the personal and social wellbeing of the person should form part of the decision-making principles for powers of attorney.[138]

17.119 The Public Advocate has proposed further principled guidance as to how guardians might promote the personal and social wellbeing of the person. Their proposal is that the legislation should state that guardians promote the personal and social wellbeing if they act as far as possible:

> *a) as an advocate for the represented person*
>
> *b) to foster the represented person's dignity*
>
> *c) to make the judgments and decisions that the person would have made after due consideration if able to do so, to the extent that this would not cause him or her undue harm*
>
> *d) in consultation with the represented person, taking into account as far as possible his or her wishes*
>
> *e) in consultation with important people in the life of the represented person*
>
> *f) in a way that fosters the person's positive relationships, friendships and connections with others*
>
> *g) to preserve and foster the person's capacity for self-determination*
>
> *h) so that the person lives in safety and security and is protected from abuse, exploitation and neglect*
>
> *i) so that the person is able to participate in and contribute to the community to the extent that s/he is able and wishes to do so*
>
> *j) with respect for the person's cultural and/or ethnic values and circumstances.*[139]

17.120 The reference to making 'the judgments and decision that the person would have made after due consideration if able to do so' places substituted judgment as one of the considerations for guardians, but not necessarily the paramount consideration.

POSSIBLE OPTIONS FOR REFORM

REFORM OF DECISION-MAKING PRINCIPLES

17.121 There is widespread support for legislation that provides clearer, principled guidance about how guardians and administrators should make decisions.

17.122 The Commission has developed three options for decision-making principles.

17.123 Option A is a continuation of the status quo that guardians and administrators must act in the 'best interests' of the represented person.

17.124 Option B adopts the promotion of the 'personal and social wellbeing of the person' as the overriding consideration for decision makers. It also provides guidance about how a person's wishes should be ascertained and fulfilled, and other considerations decision makers should balance, one of which is the principle of substituted judgment.

17.125 Option C provides that 'substituted judgment' is the starting point for substitute decision making, with other considerations becoming relevant only if it is impossible to apply the principle of substituted judgment, or if doing so would cause the person serious harm.

17.126 Although recognising that financial, personal and medical decisions sometimes require different skills, the Commission suggests that one general set of decision-making principles could apply for all types of decisions. There could be additional principles that guide particular areas of decision making, such as when an administrator makes financial decisions.

132 Ibid 6.

133 Ibid 7.

134 See Louise Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' (1990) 100 *Yale Law Review* 1.

135 Mary Donnelly, 'Best Interests, Patient Participation and the Mental Capacity Act 2005' (2009) 17(1) *Medical Law Review* 1, 16.

136 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(5); *Guardianship and Administration Act 1993* (SA) s 5(d).

137 Barbara Carter, Office of the Public Advocate (Victoria), *Principles and Values in Victorian Guardianship Legislation* (2009) 9, 14.

138 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 173–4.

139 Carter, above n 137, 16.

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Option A: Retain 'best interests'

17.127 At present, guardians and administrators must act in the best interests of the represented person.[140] The G&A Act contains some guidance about how to act in a person's best interests.

17.128 Guardians act in a person's best interests if they act, as far as possible:

- as an advocate for the represented person
- in such a way as to encourage the represented person to participate as far as possible in the life of the community
- in such a way as to encourage and assist the represented person to become capable of caring for herself or himself and of making reasonable judgments in respect of matters relating to her or his person
- in such a way as to protect the represented person from neglect, abuse or exploitation
- in consultation with the represented person, taking into account, as far as possible, their wishes.[141]

17.129 Administrators act in a person's best interests if they act, as far as possible:

- in such a way as to encourage and assist the represented person to become capable of administering the estate
- in consultation with the represented person, taking into account, as far as possible, their wishes.[142]

Option B: Promotion of the personal and social wellbeing of the person

17.130 This option replaces the notion of best interests with a legislative direction that substitute decision makers must act in a way that promotes the personal and social wellbeing of the person.

17.131 Decision makers promote the personal and social wellbeing of the person if they:

- act to protect and promote the rights and dignity of the person
- consult with the person, providing the support necessary for the person to participate in the decision making to the greatest possible extent
- take into account the wishes of the person, which includes consideration of:
  - the wishes and preferences the person expresses at the time a decision needs to be made
  - any wishes or preferences the person has previously expressed orally and in writing
  - the history of the person, including their views, beliefs, values and goals in life
- make the decision that the person would have made after due consideration if able to do so
- act in consultation with family and other important people in the life of the person where appropriate
- preserve and foster the person's positive relationships, friendships and connections with others
- respect and value the person's cultural environment
- consider the likelihood that the person will at some point regain the capacity to make the decision themselves

- encourage the person to realise their full potential, and be as independent and self-reliant as possible
- encourage the person to participate in the life of the community as much as possible
- communicate and explain to the person as far as possible decisions made with or on their behalf
- protect the person from abuse, neglect and exploitation.

Option C: 'Substituted judgment' as the paramount consideration (preferred)

17.132 This option replaces the notion of best interests with a legislative direction that substitute decision makers must, as far as possible, make the decision the person would have made, after due consideration, if they were able to do so themselves. This is the Commission's preferred option.

17.133 This includes consideration of:

- the wishes and preferences the person expresses at the time a decision needs to be made
- any wishes the person has previously expressed in writing, or by any other means
- any circumstances the person was unaware of or failed to take into consideration when expressing their wishes
- the history of the person, including their views, beliefs, values and goals in life.

17.134 In determining the decision the person would have made if they had the ability to do so, decision makers should:

- consult with the person, providing the support necessary for the person to understand their options and express their wishes and preferences
- consult with important people in the life of the person where appropriate
- take any other steps that are reasonable and necessary to determine the decision the person would have made if they had capacity to do so.

17.135 If the decision maker is unable to determine the decision the person would have made, or the decision would cause serious harm to the person, the decision maker must act to protect the personal and social wellbeing of the person, by making decisions that:

- take into account the wishes of the person, which includes consideration of:
  - the wishes and preferences the person expresses at the time a decision needs to be made; and
  - any wishes and preferences the person has previously expressed in writing or by any other means; and
  - the history of the person, including their views, beliefs, values and goals in life
- are made in consultation with family and other important people in the life of the person where appropriate
- protect the rights and dignity of the person
- consider the likelihood that the person will at some point regain the capacity to make the decision themselves
- encourage the person to realise their full potential, and be as independent and self-reliant as possible

140 *Guardianship and Administration Act 1986* (Vic) s 28(1).

141 Ibid s 28(2).

142 Ibid s 49(2).

- encourage the person to participate in the life of the community as much as possible
- preserve and foster the person's positive relationships, friendships and connections with others
- respect and value the person's cultural environment
- protect the person from abuse, neglect and exploitation.

17.136 Where a decision is made on behalf of the person, decision makers must, as far as possible, explain the decision to the person, including the reason the decision was made, and the effect the decision will have on their life.

Question 89 Do you think there should be a general set of decision-making principles that should apply to all types of substituted and supported decisions?

Question 90 Do you agree with the Commission's proposal (Option C) that substituted judgment should be the paramount consideration for decision makers? Or, do you think that substituted judgment should be just one guiding principle to consider?

Question 91 Is substituted judgment relevant to supported decision making?

OTHER RELEVANT CONSIDERATIONS

17.137 In addition to applying the decision-making principles, there are other relevant considerations that substitute decision makers should be mindful of in exercising their authority.

Conflicts of interest and a duty of good faith

17.138 Concerns about conflicts of interest held by substitute decision makers were raised at a number of our consultations. The Convention requires that support provided in the exercise of legal capacity be 'free of conflict of interest or undue influence'.[143]

17.139 The G&A Act requires VCAT to ensure that a guardian or administrator is not in a position where their interests conflict or may conflict with those of the person.[144] However, the Act does not directly require guardians and administrators to avoid placing themselves in situations where their interests conflict with those of the represented person.

17.140 The obligation to avoid conflicts of interest may be inferred from the requirement that guardians and administrators act in the best interests of the represented person. It also clearly forms part of their general law duties as fiduciaries.[145] To underline the importance of this duty, and promote awareness, the Commission proposes that new laws include an explicit duty for substitute decision makers to:

- act honestly, diligently and in good faith
- identify and respond to situations where the decision maker's interests conflict with those of the represented person, ensure that the represented person's interests are always the paramount consideration, and seek external advice where necessary.

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

Privacy and confidentiality

17.141 Respect for privacy is an important right protected in the Convention[146] and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[147] It is also one of the principles set out in the Australian Guardianship and Administration Council's national guardianship standards[148] and the Victoria Public Advocate's guardianship standards.[149]

17.142 We discuss privacy and confidentiality in more detail in the next chapter.

Courtesy and respect

17.143 Some people with experience of administration reported that they did not feel they had been treated with respect by administrators, and found this demeaning.[150] The Commission also heard concerns from some carers about their dealing with public guardians and administrators.[151]

17.144 The role of guardian and administrator is a challenging one, and may involve making difficult decisions with which others disagree. While acting with courtesy and respect would seem to be an implied requirement for guardians and administrators, the Commission believes there is value in including a requirement that guardians and administrators at all times treat the represented person and important people in their life with courtesy and respect.

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

FINANCIAL DECISION MAKING

17.145 As we discussed in Chapter 12, the distinction between 'personal' and 'financial' decisions is often blurred in practice. This has been acknowledged by South Australian Public Trustee Mark Bodycoat:

> *Practice and practical reality also show us that a rigid distinction between financial and non-financial responsibilities can't be maintained in anything but theory. What happens, for example, when there is disagreement with the providers of the person's accommodation, or there is medical opinion that says a holiday would be good for the person and it has to be funded? What about the circumstances in which [the] Public Trustee is trying to reduce a person's prior indebtedness, but there is a case for a larger personal allowance than is being paid at the time, and that case is based on the well-being of the client?*[152]

17.146 Administrators are sometimes caught between conflicting obligations of ensuring prudent financial management and following the wishes of the person as far as possible.

143 *Convention on the Rights of Persons with Disabilities* art 12(4).

144 *Guardianship and Administration Act 1986* (Vic) ss 23(1)(b), 47(1)(c)(ii).

145 For a general discussion of fiduciary relationships and their obligations, see *Hospital Products Ltd v United States Surgical Corporation* (1984) 165 CLR 41, and more specifically in relation to the fiduciary nature of the relationship of guardianship see *Clay v Clay* (2001) 202 CLR 410, 428-430, where the fiduciary nature of guardianship of children is considered. In relation to the fiduciary nature of administration in Victoria, see *State Trustees Limited v Hayden* [2002] VSC 98 (10 April 2002) [49]; HH (Guardianship) [2008] VCAT 2344 (12 November 2008) [103].

146 *Convention on the Rights of Persons with Disabilities* art 22.

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

148 *National Standards of Public Guardianship,* above n 6.

149 *Guardianship Standards*, above n 7.

150 Consultations with people with disabilities, carers and advocates in Morwell (29 March 2010), mental health consumers (7 April 2010) and State Trustees client (7 May 2010).

151 Consultations with carers in Hastings (8 April 2010).

152 Bodycoat, above n 113.

Chapter 17 Responsibilities

17.147 The Commission's preferred approach to substitute decision making—the principle of substituted judgment—would require financial decision makers to attempt, as far as possible, to make the decision they believe the person themselves would have made if they had the capacity to do so. However, there may be some limitations to this in a financial context. For example, there may be situations where it is clear the decision the person would have made would have been financially ruinous. Many people—regardless of their capacity—make poor financial decisions. If a person made 'poor' investment decisions while they had capacity, it is questionable whether a substitute decision maker should continue to make similarly poor investment decisions, particularly when this could affect other aspects of their wellbeing.

17.148 At present, the *Trustee Act 1958* (Vic) provides guidance on how a trustee should exercise their power of investment, and requires trustees to exercise the care, skill and diligence that a prudent person would exercise.[153] How well these 'objective' standards sit alongside the administrator's obligations to act upon the wishes of the person, or make the decision the person would have made, is a matter for further consideration.

ADDITIONAL DUTIES

17.149 We have suggested that guardianship legislation should clearly describe the duties of substitute decision makers as well as the principles they should apply when making decisions for a represented person.

17.150 The proposed legislative duties of all substitute decision makers are to:

- act honestly, diligently and in good faith
- identify and avoid conflicts of interest
- respect the privacy and confidentiality of the person
- treat the person and important people in their life with courtesy and respect at all times.

17.151 The proposed additional duties for financial substitute decision makers are to:

- keep accurate records or accounts of dealings, transactions and investments[154]
- keep the person's property separate from that of the decision maker, except where the property is jointly owned.

17.152 The requirement to maintain accurate records is already part of the undertaking made by an attorney,[155] and is in effect a duty of administrators as part of their obligation to lodge accounts with VCAT.[156]

17.153 The requirement to separate property is an explicit obligation of administrators and attorneys in Queensland, and penalties apply for failure to do so.[157]

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

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

MEDICAL DECISION MAKING

17.154 Although guardians, administrators and the person responsible must all act in the person's best interests, the G&A Act provides separate guidance about what this means when making decisions about medical treatment.[158] The additional considerations—such as the wishes of other family members, the purpose of the treatment, the availability and comparative risks of alternative treatment, and the consequences of not carrying out the treatment—provide more detailed guidance to medical decision makers than that provided to other decision makers.

17.155 The principles governing refusal of treatment under the *Medical Treatment Act 1988* (Vic) by a medical agent are similar to a substituted judgment approach. Treatment may only be refused on behalf of a person where:

- the medical treatment would cause unreasonable distress to the patient, or
- there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to their health and wellbeing, would consider the medical treatment unwarranted.[159]

17.156 Specific guidance in relation to medical decision making exists in most Australian jurisdictions. Queensland and the ACT have distinct health care principles.[160] New South Wales guardianship laws also provide specific objects and guidance in relation to medical decision making.[161] Tasmanian medical decision-making principles are almost identical to those in Victoria,[162] while Western Australia and the Northern Territory also adopt a best interests approach.[163] In South Australia, agents appointed under medical powers of attorney are directed to act in the person's best interests,[164] whereas other medical decision makers are directed by the principles of the *Guardianship and Administration Act 1993* (SA), in which substituted judgment is the paramount consideration.[165]

17.157 As outlined earlier, the Commission is of the initial view that a universal set of principles should apply to personal, financial and medical decision making. One of the advantages of having principles that apply across all types of decision making is that it creates a core set of agreed values, and a clear philosophical approach to substitute decision making. It also recognises that although the context and specific considerations of personal, financial and medical decisions may be quite different, these decision-making areas tend to overlap, and all ultimately bear upon the rights and wellbeing of the person affected. A unified set of principles recognises that regardless of the type of decision, the decision-making process and outcome should seek to uphold the rights, dignity and autonomy of the person, and promote their wellbeing.

17.158 The main disadvantage of a singular approach to decision making is that some of the specific guidance to decision makers can be lost. Options A and B of our reform proposals[166] pitch decision-making principles at a relatively high level of generality, and this may prove challenging to ordinary members of the community who try to apply them to the specific context of medical decisions.

17.159 It might also be argued that medical decision making is a discrete and specific domain, with its own set of challenges and implications, and that the principles and values that underpin medical decisions are simply not the same as those that may apply to other decisions—for example, financial decisions.

Question 96 Should there be separate and distinct principles for medical decision making? If so, what should these principles be?

You may want to refer to your answers to the questions in Chapter 16 here.

153 *Trustee Act 1958* (Vic) s 6.

154 This was proposed by State Trustees. See Submission IP 59 (State Trustees Limited) 5.

155 *Instruments Act 1958* (Vic) s 125D.

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

157 *Guardianship and Administration Act 2000* (Qld) s 50; *Powers of Attorney Act 1998* (Qld) s 86.

158 *Guardianship and Administration Act 1986* (Vic) s 38.

159 *Medical Treatment Act 1988* (Vic) s 5B(2).

160 *Guardianship and Administration Act 2000* (Qld) sch 1, pt 2; *Powers of Attorney Act 1998* (Qld) sch 1 pt 2; *Powers of Attorney Act 2006* (ACT) sch 1 cl 1.11.

161 *Guardianship Act 1987* (NSW) ss 32, 40(3), 44(2).

162 *Guardianship and Administration Act 1995* (Tas) s 43(2).

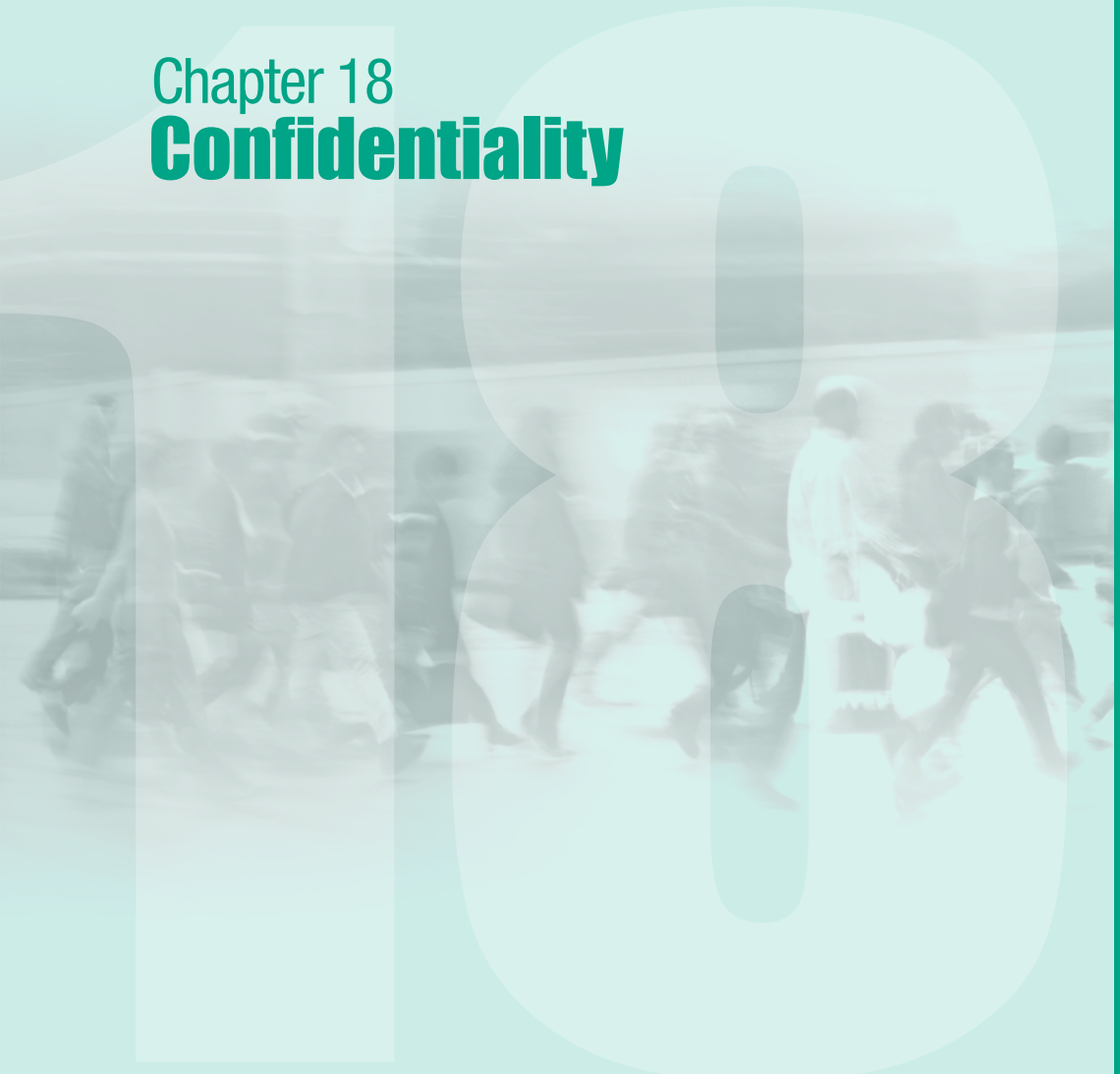
163 *Guardianship and Administration Act 1990* (WA) s 110ZD(8); *Adult Guardianship Act* (NT) s 21(8).

164 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(8). However, the requirement to act in the person's best interests is subject to the requirement of the agent to act in accordance with any lawful conditions and directions contained in the medical power of attorney, and any anticipatory direction the person has made.

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

166 See discussion at [17.127]–[17.131].

Chapter 18
Confidentiality



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Chapter 18 Confidentiality

INTRODUCTION

18.1 The Commission has been asked to consider whether the confidentiality provisions in the *Guardianship and Administration Act 1986* (Vic) (G&A Act) adequately balance the need to ensure that private information is not unnecessarily disclosed with the principle of transparent decision making.[1]

18.2 Issues of confidentiality arise in two main ways under Victoria's guardianship laws:

- the rights of guardians and administrators, or other people who provide decision-making support, to access private information about the person they are representing or assisting
- the responsibilities of guardians and administrators, and other people who provide decision-making support, to keep information private concerning the person they are representing or assisting.

There are no provisions in the G&A Act that deal specifically with these issues.

18.3 In addition, the Victorian Civil and Administrative Tribunal (VCAT) is at times required to balance issues of confidentiality and procedural fairness when considering guardianship and administration applications, because it is sometimes asked to consider information without disclosing it to all interested parties. These matters are discussed in Chapter 21.

CURRENT LAW

CONFIDENTIALITY AND PRIVACY

18.4 While 'confidentiality' and 'privacy' are often used interchangeably in ordinary conversation, there are important distinctions between these terms when used legally.

18.5 'Confidentiality' generally refers to information that is passed from one person to another within a protected relationship and with the expectation that it will not be disclosed to other people without permission. Examples are the information conveyed by a patient to a doctor, or by a client to a legal practitioner. Unless there are exceptional circumstances, the person who receives the information is legally obliged to keep it confidential. Protecting relationships built upon trust and confidence is the primary reason for having laws about confidentiality.

18.6 'Privacy' is a broader concept that refers to information about a person that the person may not wish anyone, or only selected people, to know and that may not have been communicated to anyone. Examples are how a person chooses to vote, their sexual preferences, and information about their health. While information that is 'private' might also be confidential, much private information is never conveyed to another person within a confidential relationship. Protecting and promoting human dignity is the primary reason for having privacy laws.[2]

18.7 This chapter deals primarily with issues of confidentiality. The first issue is the extent to which a guardian or administrator should be entitled to have access to information that the represented person has given another person within a confidential relationship. The second issue is the extent to which the relationship between a guardian or administrator and a represented person should be seen as one to which the notion of confidentiality applies.

THE RIGHTS OF GUARDIANS AND ADMINISTRATORS TO ACCESS INFORMATION ABOUT THE PERSON THEY ARE REPRESENTING

18.8 The G&A Act says nothing specific about the right of a guardian to access information—confidential or otherwise—about the person they are representing. Although section 24(4) of the Act provides that the decisions of a guardian have the same status as if made by the represented person,[3] this provision does not give a guardian any clear authority to access confidential information and nor does it authorise the holder of that information to provide it to the guardian. Section 24(4) deals with the legal effect of a guardian's decision after it is made rather than with a guardian's power to gather information prior to making a decision.

18.9 While the G&A Act also says nothing specific about the right of an administrator to access information about the person they are representing, administrators are usually given a range of powers that imply a right of access to information concerning the financial affairs of a represented person. In most cases, an administrator will be entitled to exercise all of the specific powers in section 58B of the Act, which amplify the administrator's general authority to care for and manage the estate of the represented person.[4] The combined general and specific powers in section 58B appear to give an administrator the right to access information generally regarded as confidential, such as the amount of money the represented person has in a bank account.

THE RESPONSIBILITIES OF GUARDIANS AND ADMINISTRATORS TO KEEP INFORMATION CONFIDENTIAL

18.10 The G&A Act does not place any explicit obligations on guardians or administrators to maintain the confidentiality of any information about the represented person that they obtain by virtue of that relationship. Victoria's legislation is out of step with that of some other Australian jurisdictions on this issue. For example, the New South Wales legislation prohibits disclosure of information obtained by a guardian or financial manager[5] other than in compliance with one of the exceptions set out in the Act.[6]

PRIVACY LEGISLATION

18.11 Commonwealth and Victorian information privacy laws[7] regulate the handling of 'personal information'[8] by government agencies and some private organisations. The legislation deals with the collection, accuracy, security, use and disclosure of personal information. It gives people the right to access personal information about themselves held by a government agency or relevant private organisation in order to check its accuracy.

18.12 There are three pieces of legislation concerning information privacy:

- The *Privacy Act 1988* (Cth) regulates the collection and use of private information by Commonwealth government agencies and some private businesses.[9]
- The *Information Privacy Act 2000* (Vic) regulates the collection and use of private information by Victorian government agencies.
- The *Health Records Act 2001* (Vic) regulates the handling of private health information in both the public and the private sectors.

18.13 The rights granted to people by information privacy laws are not diminished because the person has a guardian or administrator.

1 Victorian Law Reform Commission, *Guardianship Review Terms of Reference* (May 2009) 3(k).

2 Danuta Mendelson and Anne Rees, 'Confidentiality, Privacy and Access to Health Records' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Lawbook, 2010) 301–40.

3 *Guardianship and Administration Act 1986* (Vic) ss 24(4). This provision describes the effect of a decision made by a plenary guardian. Section 25(3) is a similarly worded provision that describes the effect of a decision made by a limited guardian.

4 *Guardianship and Administration Act 1986* (Vic) s 58B(1)(a).

5 'Financial manager' is the term used in New South Wales law to describe an 'administrator'.

6 *Guardianship Act 1987* (NSW) s 101.

7 *Privacy Act 1988* (Cth); *Information Privacy Act 2000* (Vic); *Health Records Act 2001* (Vic).

8 Personal information is defined as being information or an opinion (including information or an opinion forming part of a database), recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion: see *Privacy Act 1988* (Cth) s 6 (read in conjunction with s 16B); *Information Privacy Act 2000* (Vic) s 3.

9 In broad terms, these private businesses are private health service providers, credit providers and credit reporting agencies, and everyone who handles tax file numbers.

Chapter 18 Confidentiality

18.14 Both of the Victorian statutes give a guardian or administrator the same rights to access and correct information as the person they are representing.[10] The Commonwealth Act does not directly deal with this issue.

CONFIDENTIALITY FOR AUTOMATIC APPOINTMENTS

18.15 As discussed in Chapter 14, the G&A Act authorises the person responsible—often a close family member—to consent to many medical and dental procedures[11] and medical research procedures[12] for a person with impaired decision-making capacity. As with guardians and administrators, the Act does not deal with the right of the person responsible to have access to information that may be confidential before deciding whether to exercise the statutory powers, and nor does it deal with that person's responsibility to maintain the confidentiality of any information received when performing that role.

OBLIGATIONS OF CONFIDENTIALITY

18.16 The law often requires people who receive personal information within a relationship of confidence not to give that information to other people without the consent of the person concerned, except in response to a lawful requirement, such as a summons.

18.17 The duty of confidence can arise under contract, pursuant to legislation, or from a branch of the general law known as equity. Equity, which is based on broad notions of fairness, recognises that there are some relationships where one person sometimes provides private information to another in order to receive valuable assistance. As mentioned earlier, the relationship between a patient and a doctor is one in which there is an 'equitable duty of confidence'.[13]

18.18 The person entitled to the benefit of the equitable duty of confidence—such as a patient—can take legal action if confidential information is given to someone else without that person's consent or without lawful authority. A person may have a range of legal remedies available to them if the holder of confidential information passes it on unlawfully. Those remedies include:

- seeking damages for breach of contract
- pursuing a remedy under information privacy legislation for breach of privacy principles and standards[14]
- seeking an injunction and/or damages in court for breach of the equitable duty of confidence
- lodging a complaint with the relevant professional board.

18.19 In some cases, all or most of these remedies might be available. If, for example, a medical practitioner disclosed confidential information about a patient to another person without consent or lawful authority, the patient might be able to seek an injunction and damages for breach of the equitable duty of confidence, as well as a remedy under the *Privacy Act 1988* (Cth) for breach of the National Privacy Principles. The patient could also make a notification to the Medical Board of Australia, which might result in professional disciplinary action against the medical practitioner.

COMMUNITY RESPONSES

THE AUTHORITY OF GUARDIANS AND ADMINISTRATORS TO ACCESS PRIVATE INFORMATION ABOUT THE PERSON THEY ARE REPRESENTING

18.20 The extent to which guardians and administrators have a right to access information about the person they are representing was raised a number of times during our consultations. For some people, the difficulty in obtaining access to information without a guardianship order in place is a major and unreasonable obstacle:

> *[P]eople with limited capacity need transparency, not privacy, to expand their quality of life. There is far too much emphasis on privacy for people who have little to be private about. They need to be 'public' to expand their quality of life.*[15]

18.21 A VCAT appointment might not overcome this difficulty, however, because it was also suggested that guardians and administrators sometimes experience difficulties gaining access to relevant information. The Mental Illness Fellowship of Victoria, for example, noted that individuals appointed as administrators (and possibly guardians) are unable to access information about the represented person's medical condition, which 'limits [their] ability to respond appropriately given that different medical conditions can sometimes require different styles of interaction'.[16]

18.22 People with disabilities felt that maintaining privacy is important, even if someone else is helping them to make decisions.[17] Two consultation participants supported the introduction of a system of nominated carers under which a named individual would have access to information on a person's behalf and participate in reviews concerning the person.[18] It was argued that it would be beneficial to have many people as nominated carers, particularly in the context of other cultures that utilise a whole-of-family approach to decision making.[19] It was also noted that under the New South Wales *Mental Health Act 2007* (NSW), if a person is actively providing care, then withholding information necessary to that care is considered a breach the individual's right to have the best possible care.[20]

THE RESPONSIBILITIES OF GUARDIANS AND ADMINISTRATORS TO KEEP INFORMATION CONFIDENTIAL

18.23 While the extent of the responsibility of guardians and administrators to maintain the confidentiality of the information they gather about the represented person was rarely raised during our consultations, Disability Advocacy Resource Unit suggested that some guardians and administrators misuse privacy laws in order to deny family members access to information.[21]

18.24 FTL Judge and Papaleo explained that when it is asked to provide information about their clients' estates to people, it 'makes judgments in relation to whether people are deemed to be trustworthy and well intentioned'.[22] It noted that while it might be advantageous for the client to disclose information to their relatives, the sharing of such information is 'done judiciously'.[23]

PROBLEMS WITH CURRENT LAW AND PRACTICE

18.25 The Commission believes that two matters concerning information that is imparted in confidence, or is of a private nature, require examination because they are not dealt with by current guardianship laws. Those matters are the extent to which a guardian or administrator is:

- entitled to receive information from others about the represented person that was disclosed in the course of a confidential relationship or is private information
- obliged not to disclose information of a private nature about the represented person acquired in the course of acting as a guardian or administrator.

18.26 These issues are addressed in the proposals for reform discussed below.

10 See *Information Privacy Act 2000* (Vic) s 64; *Health Records Act* (Vic) s 65.

11 *Guardianship and Administration Act 1986* (Vic) s 42H(1).

12 Ibid s 42S(2).

13 See, eg, *Breen v Williams* (1996) 186 CLR 71, 92; see also R P Meagher, W M C Gummow and J R F Lehane, 'Confidential Information' in *Equity: Doctrines and Remedies* (Butterworths, 3rd ed, 1992) 4109–11.

14 See *Privacy Act 1988* (Cth) pt III div 3; *Privacy Act 1988* (Cth) sch 3 [the National Privacy Principles]; *Information Privacy Act 2000* (Vic) s 14; *Information Privacy Act 2000* (Vic) sch 1 [the Information Privacy Principles].

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

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

17 Consultation with VALID Northern Regional Client Network (3 March 2010).

18 New South Wales mental health legislation allows for the appointment of a nominated primary carer who is able to request information concerning the person detained in a mental health facility: *Mental Health Act 2007* (NSW) ss 71–9.

19 Consultation with Ruth Vine—Chief Psychiatrist (9 April 2010).

20 Consultation with Julian Gardner (26 March 2010).

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

22 Consultation with FTL Judge and Papaleo (13 April 2010).

23 Ibid.

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OTHER JURISDICTIONS

SUBSTITUTE DECISION MAKERS' ACCESS TO INFORMATION ABOUT A REPRESENTED PERSON

18.27 The New South Wales *Mental Health Act 2007* (NSW) allows a patient's primary carer to access information on their behalf.[24] The primary carer is defined through a hierarchical list in the Act,[25] or can be appointed by the patient themselves.[26]

18.28 Provisions for patients to nominate a person to access information on their behalf have been included in the Exposure Draft of a new Victorian Mental Health Bill.[27] The Bill establishes a 'nominated person's scheme', which enables patients to choose a person to receive information about their treatment and care. The patient must be able to understand the effect of the appointment at the time it is made.[28] The role of the nominated person 'is to help the person who has nominated them by ensuring that the interests of that person are respected if they become a [compulsory] patient'[29] by:

- receiving information
- being consulted about treatment, care and recovery planning
- exercising rights conferred for the benefit of the patient who has nominated them.[30]

18.29 This proposed scheme is an example of a mechanism that gives one person access to sensitive and possibly confidential information about another person.

18.30 These issues have been addressed in the guardianship legislation of the Canadian province of Alberta. The *Adult Guardianship and Trusteeship Act 2008* provides for the disclosure of an adult's 'personal information'[31] by a public body, or health professional to a person where:

- the person to whom the information is to be disclosed intends to make an application for a guardianship order in respect of the adult
- the information is relevant to and necessary for the application.[32]

18.31 The person to whom the personal information is disclosed may use the information only for the purpose of making an application and 'must take reasonable care to ensure the information is secure from unauthorized access, use or disclosure'.[33]

18.32 The Albertan guardianship legislation also deals with:

- a guardian's right to access personal information about a represented adult
- the authority of the holder of that information to disclose it to the guardian.

A guardian is entitled to access, collect or obtain personal information from a range of organisations and people about the represented adult 'that is relevant to the exercise of the guardian's authority and the carrying out of the guardian's duties and responsibilities'.[34] The holders of the information are entitled to disclose any information that falls within this very broad description to the guardian.[35]

18.33 Once information of this nature is obtained, the guardian may only use it 'for the purpose of exercising the authority and carrying out the duties and responsibilities of the guardian'.[36] The guardian must 'take reasonable care to ensure the information is kept secure from unauthorized access, use or disclosure'.[37] A guardian is specifically obliged not to gather personal information about the represented person beyond that specifically authorised by the Act.[38]

18.34 There are similar provisions in the Albertan legislation concerning the powers of a trustee and a specific decision maker—the equivalents of an administrator and a person responsible—to gather personal information about a represented person and the authority of the holder of the information to disclose it to the trustee or the specific decision maker.[39]

THE RESPONSIBILITIES OF SUBSTITUTE DECISION MAKERS TO MAINTAIN CONFIDENTIALITY

18.35 Other Australian jurisdictions place obligations on guardians and administrators to maintain the confidentiality of information they acquire in the course of their role. In New South Wales, for example, no one who acquires information as a result of the administration of the Act can disclose that information to another person unless it is with the consent of the person from whom the information was obtained, or unless other nominated criteria, such as for the purpose of administering the Act, are met.[40] Similar, although slightly expanded, provisions are in the Queensland legislation.[41]

POSSIBLE OPTIONS FOR REFORM

18.36 The Commission has identified a number of possible options for reforming the law to deal with the issues concerning access to information and confidentiality raised in this chapter. Options for reform concerning access to information used in VCAT applications for guardianship or administration are discussed in Chapter 21.

ACCESS TO CONFIDENTIAL INFORMATION BY GUARDIANS, ADMINISTRATORS, PERSONS RESPONSIBLE AND PERSONAL APPOINTEES

18.37 These options address the two key issues identified at the start of the chapter:

- the right of substitute decision makers to access confidential and private information about the person they represent, and the authority of the holder of that information to release it to the substitute decision maker
- the obligations of substitute decision makers to maintain the confidentiality of information they receive about a represented person.

18.38 The Commission believes that these reforms should extend to all substitute decision makers appointed under guardianship laws—guardians and administrators appointed by VCAT, enduring guardians, holders of enduring powers of attorney and persons responsible for medical treatment decisions appointed under the G&A Act.

Option A: Detail a substitute decision maker's authority to access confidential and private information in VCAT orders and personal appointments

18.39 Under this option, the authority of a substitute decision maker to access confidential and private information would be determined by VCAT on a case-by-case basis, or by a person when making an enduring appointment of a guardian or an attorney. New guardianship legislation could specifically deal with the fact that a power to access information could be included in a VCAT order or in an instrument of appointment. The legislation could also provide that the act of granting a power of access to the information also authorises the holder of the confidential information to disclose that information to the substitute decision maker.

24 *Mental Health Act 2007* (NSW) ss 73–9.
25 Ibid s 71.
26 Ibid s 72.
27 See Department of Health (Victoria), Review of the *Mental Health Act 1986* (10 January 2011) <http://www.health.vic.gov.au/mentalhealth/mhactreview/index.htm> for information about the current status of Victoria's Mental Health Act review.
28 Mental Health Bill 2010 (Exposure Draft) cl 156.
29 Ibid cl 157(1).
30 Ibid cl 157(2).
31 'Personal information' is defined to mean 'information, including health information and financial information, about an identifiable individual': *Adult Guardianship and Trusteeship Act*, RSA 2008, c A-4.2, s 1.
32 *Adult Guardianship and Trusteeship Act*, RSA 2008, c A-4.2, s 41(1).
33 Ibid s 41(2).
34 Ibid s 41(4).
35 Ibid s 41(5).
36 Ibid s 41(6).
37 Ibid.
38 Ibid s 41(7).
39 Ibid ss 72, 99.
40 *Guardianship Act 1987* (NSW) s 101.
41 *Guardianship and Administration Act 2000* (Qld) ss 249–249A.

18.40 An advantage of this option is that it would permit each case to be dealt with on its merits and that it would enable both VCAT and private individuals to 'purpose build' rights of access to confidential information. Disadvantages are that rights of access might be overlooked in individual cases. Holders of confidential information might also find it difficult to identify those circumstances in which they are obliged to pass confidential information to a substitute decision maker and are therefore protected from any legal liability for doing so.

Option B: Detail a substitute decision maker's authority to access confidential and private information in the legislation (preferred)

18.41 Under this option, the right of a substitute decision maker to access confidential information and the authority of holders of that information to release it would be dealt with in general terms in legislation. The responsibility of a substitute decision maker to respect the confidentiality of information obtained about a represented person would also be dealt with in general terms in legislation.

18.42 The Commission believes that Victorian guardianship legislation would benefit from the inclusion of provisions similar to those in the Alberta Act. Those provisions clearly describe the right of substitute decision makers to gather information about a represented person, the authority of the holder of that information to disclose it to the substitute decision maker, and the responsibilities of the substitute decision maker to respect the confidential nature of that information.

18.43 In broad terms, the Alberta legislation gives substitute decision makers a right of access to information on a 'need to know basis'. This appears to be the most practical means of protecting confidential information from unnecessary disclosure, while also ensuring that a substitute decision maker is aware of important information that may affect a decision they are asked to make for a represented person.

Q **Question 97** Do you agree with the Commission's proposal that new guardianship legislation should authorise all substitute decision makers, including automatic appointees, to have access to confidential and private information about the represented person on a 'need to know' basis?

DISCLOSURE OF CONFIDENTIAL INFORMATION

18.44 The Commission believes that substitute decision makers should be required to respect the confidentiality of information they obtain about a represented person unless it is reasonably necessary to disclose that information to a third person in order to perform the functions of a substitute decision maker, or disclosure is otherwise required or permitted by law.

18.45 There is a useful precedent in New South Wales legislation. Section 101 of the *Guardianship Act 1988* (NSW) provides:

> *A person shall not disclose any information obtained in connection with the administration or execution of this Act unless the disclosure is made:*
>
> *(a) with the consent of the person from whom the information was obtained,*
>
> *(b) in connection with the administration or execution of this Act,*

(c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings,

(d) in accordance with a requirement imposed under the Ombudsman Act 1974 (NSW), or

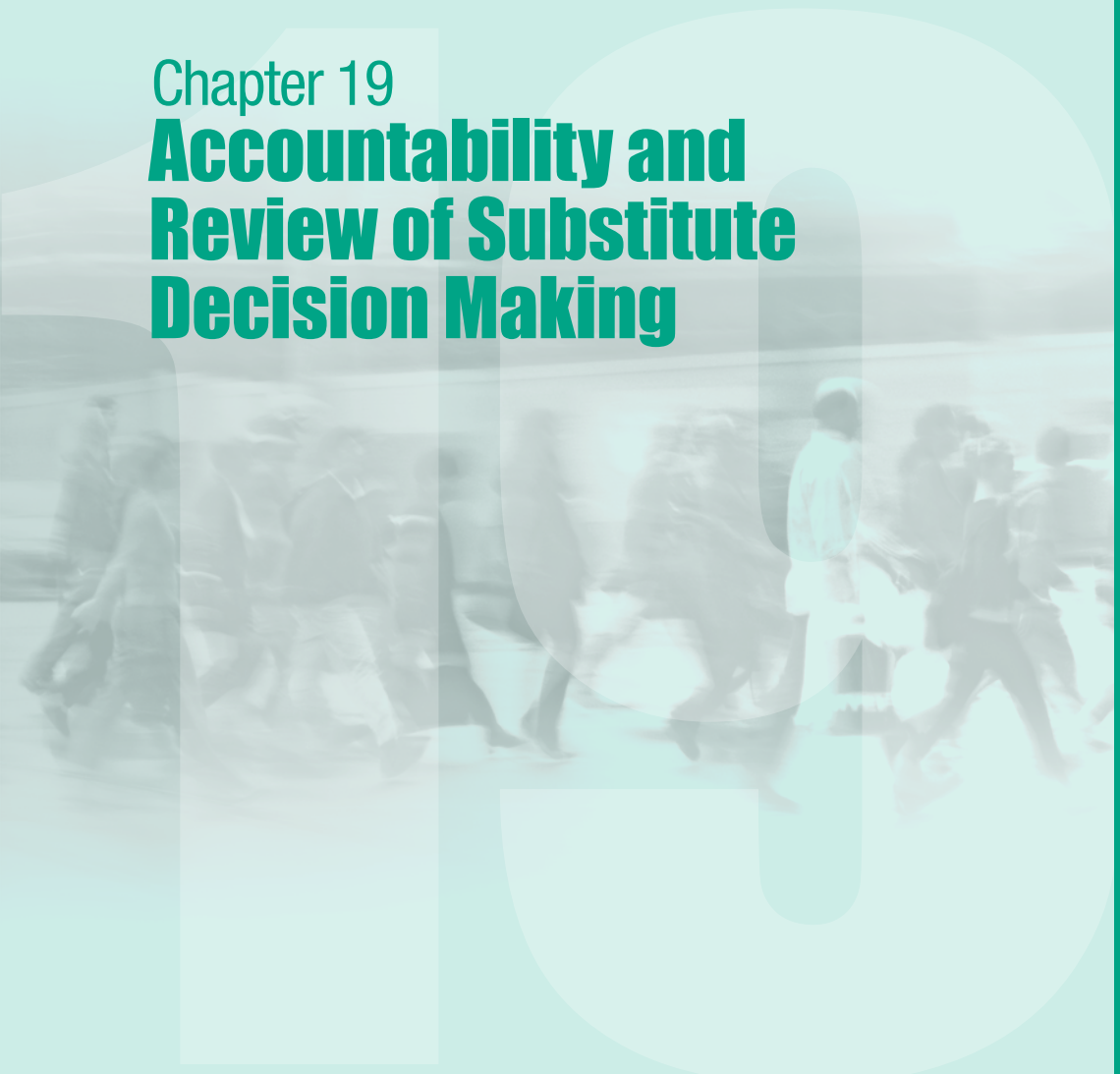
(e) with other lawful excuse.

18.46 It is an offence punishable by a fine of 10 penalty units or imprisonment for 12 months, or both, to contravene this provision. The Commission proposes that a similar provision be included in new Victorian guardianship legislation that would apply to all substitute decision makers.

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

Chapter 19

Accountability and Review of Substitute Decision Making



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Chapter 19

Accountability and Review of Substitute Decision Making

INTRODUCTION

19.1 Guardianship laws contain a range of accountability mechanisms that seek to ensure substitute decision makers exercise their powers appropriately. In this chapter, we look at ways to improve the accountability of decision makers and, in particular, whether individual decisions of guardians and administrators should be reviewable.

CURRENT LAW AND PRACTICE

19.2 At present, the Victorian Civil and Administrative Tribunal (VCAT) has primary responsibility for overseeing the activities of substitute decision makers. It makes and reviews guardianship and administration orders and hears applications in cases of suspected misuse of powers of attorney. The Public Advocate assists VCAT to perform this role by conducting investigations and providing VCAT with reports. We discuss these activities of the Public Advocate in more detail in Chapter 20.

GUARDIANS AND ADMINISTRATORS

19.3 Guardians and administrators are subject to regular reassessments of their appointment by VCAT. For guardians, this usually happens at least once a year, and for administrators reassessments are conducted at least every three years.[1]

19.4 Following appointment by VCAT, administrators are usually required to lodge a financial statement and plan, detailing how the represented person's estate will be managed.[2]

19.5 Administrators are also generally required to lodge an annual statement of accounts—known as an 'Account by Administrator'[3]—with VCAT, which is examined by State Trustees.[4] Where unacceptable spending is identified, VCAT may require the administrator to repay the estate if it is satisfied that the administrator has failed to exercise their powers in good faith and with reasonable care.[5]

19.6 The *Guardianship and Administration Act 1986* (Vic) (G&A Act) provides that the state of Victoria is not liable to compensate any person for the actions of guardians and administrators,[6] but guardians and administrators may otherwise be held liable for the consequences of their conduct. The G&A Act also includes criminal penalties for breaches of the Act, which may be up to 20 penalty units ($2389).[7] Proceedings for a breach of the G&A Act must be taken in the Magistrates' Court. No organisation, other than Victoria Police, is responsible for investigating and prosecuting possible breaches of the Act.

PERSON RESPONSIBLE

19.7 The person responsible for medical decision making is only subject to a formal external assessment if an application is made to VCAT. However, the person responsible is generally considered to be subject to a higher level of scrutiny in practice than other appointments, because the role is limited to situations where treatment is offered by medical professionals, who are themselves subject to ethical standards.

19.8 In addition to the general offence of contravening the Act, the G&A Act contains a specific offence for a person who either consents, or claims to have authority to consent, to a medical procedure when they know that no such authority exists or they lack reasonable grounds for believing they have this authority.[8] There are heavy penalties for medical practitioners who perform special procedures or medical research procedures without proper authorisation.[9]

ENDURING GUARDIANS, ATTORNEYS AND AGENTS

19.9 Substitute decision makers appointed under one of the three enduring power of attorney instruments in Victoria are not subject to any regular external reassessment. These arrangements generally operate privately, unless an application to VCAT causes it to review the operation of the enduring power.

19.10 Although financial attorneys are required to keep adequate records,[10] unlike administrators there is no general requirement that attorneys submit accounts to any external body for review. VCAT may, however, require that accounts are audited or lodged if concerns about the manner in which the financial attorney is acting are drawn to its attention.[11]

19.11 While enduring guardians may be subject to the same criminal penalty as guardians for contravening the G&A Act, there is no specific offence in the *Instruments Act 1958* (Vic) for misconduct by attorneys appointed under that Act. In the case of an agent, the general penalty under the G&A Act would only apply for breaches that occur if they are acting under the person responsible provisions of the G&A Act (part 4A). There are no provisions in the *Medical Treatment Act 1988* (Vic) that deal with contraventions of that Act by a medical agent.

EDUCATION AND SUPPORT FOR SUBSTITUTE DECISION MAKERS

19.12 The Public Advocate works with VCAT to provide optional training sessions to newly appointed guardians and administrators, and publishes guides for guardians and enduring guardians, administrators, financial powers of attorney, medical agents and other medical decision makers.[12] The Public Advocate also has a private guardian support program, and a general telephone advice service.

COMMUNITY RESPONSES

OVERSIGHT AND ACCOUNTABILITY OF GUARDIANS

19.13 A number of our consultations revealed dissatisfaction with current levels of oversight and accountability of guardians.[13] Some people with disabilities felt that guardians should provide more information about what they do and what is expected of them, and allow more opportunities for the represented person to provide them with feedback.[14]

19.14 The Public Advocate expressed concern about the current practices and levels of knowledge of some private guardians. While noting its role in providing information and support, the Public Advocate also emphasised that this support relies on the guardian actively seeking out information. They suggested that private guardians should be required to submit periodic reports to VCAT, and that further resources should be dedicated to educating private guardians about their responsibilities.[15]

19.15 PILCH Homeless Persons' Legal Clinic argued that, given the significant and complex role of guardians and administrators, attending the (currently optional) information sessions that are provided should be a condition of assuming the role of guardian or administrator.[16]

PARTICULAR CONCERNS AROUND PRIVATE ADMINISTRATORS

19.16 Concern was expressed that some private administrators do not have the skills and training to perform their role.[17] Others emphasised that there is a need for more ongoing training and support for private administrators.[18]

1 *Guardianship and Administration Act 1986* (Vic) s 61(1). See also Anstat, *Victorian Civil and Administrative Tribunal: Guardianship and Administration* (pt 6-6 at September 2008) [61.01]. The Act requires that initial orders be reassessed within 12 months, and thereafter at least once every three years. However, VCAT has the discretion to order otherwise.

2 Office of the Public Advocate (Victoria), *Administration Guide: A guide for people appointed as administrators under the Guardianship and Administration Act 1986* (2009) 4 <http://www.publicadvocate.vic.gov.au/file/file/Administration/Administration%20Guidev2%20for%20web5.pdf>.

3 *Guardianship and Administration Act 1986* (Vic) s 58(2).

4 The examiner must provide a report to VCAT indicating whether it is able to conclude that the administrator is acting in the person's best interests, and if it is unable to conclude that the person is acting in the person's best interests, it must provide reasons: see Victorian Civil and Administrative Tribunal, *Statement for Examiners appointed by VCAT under the Guardianship and Administration Act 1986* (11 November 2005) <http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/$file/statement_for_examiners.pdf>. In 2008–09, State Trustees performed 5421 examinations, and reported 959 cases of anomalies and concerns arising from these examinations to VCAT: email from State Trustees to Victorian Law Reform Commission, 4 November 2010, 7. State Trustees charge $165 per hour for examinations, with a minimum charge of $165 for each examination: 'State Trustees Fees and Charges' in Victoria, *Victorian Government Gazette*, G25, 24 June 2010, 1334.

5 *Guardianship and Administration Act 1986* (Vic) s 58(3) and (4).

6 Ibid s 70(2).

7 Ibid s 80.

8 Ibid s 42.

9 Ibid ss 42G(1), 42Y(1).

10 *Instruments Act 1958* (Vic) s 125D.

11 Ibid s 125ZB.

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

13 Consultation with Royal District Nursing Service (10 May 2010); Submissions IP 8 (Office of the Public Advocate) 11, IP 21 (BENETAS) 2.

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

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

16 Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 36.

17 Consultation with Royal District Nursing Service (10 May 2010); Submission IP 21 (BENETAS) 2.

18 Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 36.

Chapter 19

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19.17 Some groups felt it was important that there is more scrutiny of people appointed as administrators, and greater oversight of the conduct of administrators.[19] However, some carers who had experience acting as administrators argued that the current annual financial reporting requirements were overly complicated and burdensome on families and carers, particularly in situations where the person's only source of income was a disability support pension.[20]

REVIEW OF DECISIONS OF GUARDIANS AND ADMINISTRATORS

19.18 Questions 16 and 17 of the Commission's information paper asked whether decisions of guardians and administrators should be subject to review by VCAT. These questions reflected our terms of reference, which asked us to consider:

> *The feasibility of introducing additional mechanisms for review of decisions made by guardians and administrators under the Act, including the scope of these review powers and the meaning of 'decision' for this purpose and whether there should be a mechanism to address unconscionable conduct of a guardian or administrator.*[21]

19.19 Many people supported the principle that decisions of guardians and administrators should be subject to review.[22] The Public Advocate believes that her decisions should be reviewable.[23]

19.20 A number of issues arise when considering whether decisions of guardians and administrators should be reviewable:

- Who should be able to seek review?
- What would constitute a 'decision' that could be reviewed?
- Should there be limits on review for 'trivial' matters or 'vexatious' litigants?
- What criteria would a tribunal apply when deciding whether the decision should be upheld or set aside?

19.21 Some submissions suggested that the scope of the ability to seek review should be limited to ensure it is practically workable.[24]

19.22 State Trustees expressed strong concerns about merits review of administrators' decisions, arguing that it may render the system unworkable. State Trustees' main concerns were that:

- frequent applications for review would cause great expense, delay and inconvenience to the administrator
- a power of review and overturning of decisions may adversely affect third parties who have acted in good faith in dealing with an administrator
- the potential threat of reversal could hinder an administrator's ability to effectively negotiate with third parties, impacting the ability of the administrator to realise assets or raise funds for the represented person.[25]

19.23 State Trustees argued that the G&A Act already has sufficient avenues for raising concerns about an administrator's actions,[26] including allowing:

- VCAT to provide direction or advice to an administrator on any matter[27]
- interested persons to make an application to VCAT in relation to any matter arising out of the administration[28]
- any person to seek reassessment of the administration order.[29]

19.24 FTL Judge and Papaleo, the other major provider of administration services in Victoria, argued that the G&A Act already permits sufficient oversight of administrators through the capacity for any person to seek a reassessment of the order.[30] Another submission indicated strong concern about the prospect of VCAT interfering with the decision making of private guardians and administrators.[31]

MISUSE AND ABUSE OF POWERS

19.25 There was widespread support for VCAT being able to revoke the authority of substitute decision makers who abuse their power, but there was disagreement as to whether VCAT needed further powers to penalise people who abuse their powers, or to compensate victims of abuse.

19.26 Some groups argued that VCAT should have the ability to impose penalties for abuse,[32] but others considered this role inappropriate for VCAT, and an issue better dealt with by the police and courts.[33] There was general support for it being an offence for substitute decision makers to abuse their power.[34]

19.27 Some submissions observed that financial abuse of elderly and vulnerable people is a real problem in our community, and it is often very difficult for victims to recover lost funds. A number of factors appear to contribute to this growing problem. They include:

- the fact that financial abuse occurs largely in the private sphere and is often uncovered far too late, if at all
- the difficulty and cost of pursuing legal action to recover misappropriated funds
- the likelihood that few if any funds will still exist even where legal action is successful.

19.28 A number of submissions argued that VCAT should have the power to require substitute decision makers to repay misappropriated funds to the represented person.[35] It was argued that this would be easier, faster and more cost effective than the current process of appointing a new substitute decision maker to pursue the funds in other proceedings.

OTHER JURISDICTIONS

QUEENSLAND—LARGER AND MORE SPECIFIC PENALTIES

19.29 The Queensland legislation contains a comprehensive statement of the responsibilities of guardians and administrators. Guardians and administrators in Queensland are required to:

- apply the principles of the Act[36]
- act honestly and with reasonable diligence[37]
- act as required by the guardianship or administration order[38]
- consult with other appointed substitute decision makers.[39]

19.30 In addition, administrators are required to:

- avoid transactions involving a conflict of interest, except where the transaction involves jointly held property[40]
- keep the administrator's property separate from the represented person's, except for jointly owned property[41]
- keep records that are reasonable in the circumstances.[42]

19 Consultation with Royal District Nursing Service (10 May 2010); Submission IP 54 (PILCH Homeless Persons' Legal Clinic) 37.

20 Consultations with carers in Hastings (8 April 2010), metropolitan carers (6 May 2010); Submission IP 10 (Gippsland Carers Association Inc) 12.

21 Victorian Law Reform Commission, *Guardianship Review Terms of Reference* (May 2009) 3(h).

22 See, eg, consultation with Julian Gardner (26 March 2010); Submission IP 30 (Victorian Aboriginal Legal Service) 9.

23 Submission IP 8 (Office of the Public Advocate) 25.

24 Consultation with Mental Illness Fellowship Victoria (13 April 2010); Submissions IP 16 (Mark Feigan) 13, IP 47 (Law Institute of Victoria) 27.

25 Submission IP 59 (State Trustees Limited) 8.

26 Ibid.

27 *Guardianship and Administration Act 1986* (Vic) s 55(4A).

28 Ibid s 56.

29 Ibid s 61.

30 Consultation with FTL Judge and Papaleo (13 April 2010).

31 Submission IP 7 (Stephanie Mortimer) 3.

32 Submissions IP 5 (Southwest Advocacy Association) 6, IP 9 (Royal District Nursing Service) 10, IP 50 (Action for Community Living) 8–9.

33 Submissions IP 7 (Stephanie Mortimer) 4, IP 16 (Mark Feigan) 13–14, IP 42 (Health Services Commissioner) 7.

34 See, eg, Submissions IP 8 (Office of the Public Advocate) 27, IP 40 (Australian & New Zealand Society for Geriatric Medicine) 5, IP 49b (Seniors Rights Victoria) 7.

35 Submissions IP 8 (Office of the Public Advocate) 10, IP 47 (Law Institute of Victoria) 29, IP 43 (Victoria Legal Aid) 7–8, IP 49a (Council on the Ageing) 2.

36 *Guardianship and Administration Act 2000* (Qld) s 34.

37 Ibid s 35.

38 Ibid s 36.

39 Ibid s 40.

40 Ibid s 37.

41 Ibid s 50.

42 Ibid s 49.

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19.31 Guardians and administrators may be prosecuted in the Magistrates Court for failing to act honestly and with reasonable diligence, or for acting outside the authority of their order of appointment. Fines of up to $20 000 apply.[43] For administrators, a failure to keep records can lead to penalties of up to $10 000,[44] while a failure to keep property separate can lead to penalties of up to $30 000.[45] There is a defence of having acted honestly and reasonably.[46]

19.32 Compensation can also be sought in the courts or the Queensland Civil and Administrative Tribunal from guardians and administrators for losses arising out of their failure to comply with obligations.[47]

NEW SOUTH WALES—REVIEW OF DECISIONS

19.33 New South Wales is the only Australian jurisdiction that allows merits review of individual decisions of guardians and administrators. Since 2003, the New South Wales Administrative Decisions Tribunal (ADT) has been able to review guardianship decisions made by the New South Wales Public Guardian (similar to the Victorian Public Advocate), and financial management decisions made by the New South Wales Trustee and Guardian (which has a broadly similar role to State Trustees in relation to administration).[48] However, the ADT is unable to review decisions of private guardians and financial managers. The ADT is separate to the New South Wales Guardianship Tribunal (which is the New South Wales equivalent of VCAT's Guardianship List), and has a specialised 'Guardianship and Protected Estates List'.

19.34 All decisions made by the Public Guardian 'in connection with the exercise of the Public Guardian's functions' are reviewable.[49] Review of a Public Guardian's decision may be sought by the person to whom the decision relates, their spouse, their carer, or any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.[50]

19.35 In relation to financial management (the New South Wales equivalent of administration), review may be sought for all decisions made by the New South Wales Trustee and Guardian about the management of a represented person's estate.[51]

19.36 Review of financial management decisions may be sought by either the represented person about whose estate the decision was made, their spouse or any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.[52]

19.37 ADT review may only be sought after internal review with the New South Wales Public Guardian or the New South Wales Trustee and Guardian has been sought and finalised.[53] The ADT is required 'to decide what the correct and preferable decision is having regard to the material then before it'.[54] The ADT has the power to:

- affirm the decision
- vary the decision completely or in part
- substitute a new decision for the original decision, or
- order the Public Guardian or the New South Wales Trustee and Guardian to reconsider the decision with directions or recommendations.[55]

19.38 In 2008–09, there were eight review applications lodged in relation to decisions of the Public Guardian, and nine review applications lodged in relation to decisions of the Office of the Protective Commissioner (as the New South Wales Trustee and Guardian was then known).[56] In 2009–10 there were only 10 review applications in total.[57]

19.39 An equivalent avenue for merits review of decisions of the Public Advocate and State Trustees is currently unavailable in Victoria.

19.40 The Queensland Law Reform Commission recently recommended that decisions of the Adult Guardian (which has a similar role to the Victorian Public Advocate) and the Public Trustee of Queensland (which has a broadly similar role to State Trustees) should be reviewable by the Queensland Civil and Administrative Tribunal as part of its merits review jurisdiction.[58]

POSSIBLE OPTIONS FOR REFORM

NEW ACCOUNTABILITY MECHANISMS FOR SUBSTITUTE DECISION MAKERS

19.41 Administrators are usually required to lodge a financial statement and plan with VCAT soon after being appointed, and provide an annual Account by Administrator to VCAT, which is then examined by State Trustees.

19.42 There are currently no similar reporting requirements for guardians, enduring guardians, and attorneys appointed under an enduring power of attorney (financial), although guardianship orders made by VCAT are subject to regular reassessment.

19.43 Some people who attended our consultations expressed concern about the lack of oversight of private guardians and attorneys.

19.44 The options that appear below are not mutually exclusive. Any or all of them could be included in new laws.

Option A: No change—keep current reporting requirements for administrators

19.45 This option would keep the current reporting requirements for administrators, but not extend reporting requirements to guardians and financial attorneys.

19.46 The current approach appears to reflect a need for someone to oversee the financial affairs of a person who has an administrator, but also an unwillingness to interfere with privately made powers of attorney.

19.47 The G&A Act provides some accountability mechanisms for guardianship, although these appointments tend to be more limited than administration—in terms of both duration and the extent of powers granted under the order—and subject to more regular reassessment by VCAT.

19.48 Even if the current reporting arrangements remain unchanged, it may be appropriate to remove the fee VCAT charges to represented people for examination of the annual Account by Administrator. A number of carers complained about this fee during consultations.[59] VCAT has the discretion to waive all or part of this fee,[60] usually on financial hardship grounds.

Option B: Introduce reporting requirements for private guardians and attorneys

19.49 This option responds to the Public Advocate's concern about a lack of oversight of the conduct of private guardians, and treats administrators and attorneys consistently by requiring private guardians and attorneys to lodge periodic reports about their activities.

19.50 State Trustees could examine financial accounts prepared by attorneys in the same way as administrators' accounts and the Public Advocate could consider reports of private guardians.

19.51 The main advantage of this option is that it would provide added protection against abuse and mismanagement of a represented person's affairs by increasing the level of external scrutiny of their conduct. Ideally, it would also mean that private guardians and attorneys would become more mindful of their responsibilities.

43 Ibid ss 35, 36.
44 Ibid s 49.
45 Ibid s 50.
46 Ibid s 58.
47 Ibid s 59.
48 *Guardianship and Protected Estates Legislation Amendment Act 2002* (NSW).
49 *Guardianship Act 1987* (NSW) s 80A(1); *Guardianship Regulations 2010* (NSW) s 17.
50 *Guardianship Act 1987* (NSW) s 80A(2).
51 *NSW Trustee and Guardian Act 2009* (NSW) s 62(1); *NSW Trustee and Guardian Regulations 2008* (NSW) s 43. The powers of the New South Wales Trustee and Guardian in relation to the estates of managed people committed to its management are outlined in ss 56–61 of the *NSW Trustee and Guardian Act 2009* (NSW).
52 *NSW Trustee and Guardian Act 2009* (NSW) s 62(3).
53 *Administrative Decisions Tribunal Act 1997* (NSW) s 55(1)(b).
54 Ibid s 63(1).
55 Ibid s 63(3).
56 Administrative Decisions Tribunal, *Annual Report 2008/2009* (2009) 17.
57 Administrative Decisions Tribunal, *Annual Report 2009/2010* (2010) 18.
58 See Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) 191–226, 272–98.
59 Consultations with carers in Hastings (8 April 2010); Submission IP 10 (Gippsland Carers Association Inc) 11.
60 *Guardianship and Administration Act 1986* (Vic) s 58(6). State Trustees charges $165 per hour for examinations, with a minimum charge of $165 for each examination: *Victorian Government Gazette*, above n 4.

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19.52 However, during our consultations a number of private administrators, who were also carers, argued that the current reporting requirements were already too onerous.

19.53 State Trustees advised that they have limited resources with which to analyse these accounts, and it is beyond the scope of these examinations to make in-depth qualitative assessments about whether the administrator is acting in the best interests of the person. Qualitative assessment of reports by private guardians may be even more difficult than examining administrator accounts, and place additional strain on the Public Advocate's limited resources.

19.54 As the number of enduring guardians and enduring financial attorneys who currently exercise their powers is unknown, monitoring compliance with any reporting requirements would be an impossible task in the absence of a registration scheme.

Q **Question 99** Do you think that private guardians and attorneys should be required to lodge periodic reports about their activities with a public official?

Option C: Introduce annual declarations of compliance with responsibilities

19.55 This option would require guardians and administrators to lodge annual declarations that they had met their responsibilities under the G&A Act. They could also identify any areas where they would benefit from assistance.

19.56 These declarations could be lodged with and examined by either VCAT or the Public Advocate.

19.57 Although accounts provided by administrators are currently lodged with VCAT, State Trustees examines them. The Public Advocate may be better placed to undertake these responsibilities.

19.58 The requirement to lodge a declaration could apply to both guardians and administrators—and perhaps to enduring guardians and enduring attorneys. It might be appropriate to require guardians to lodge declarations at shorter intervals than administrators and enduring attorneys because of the different nature of their responsibilities. There could be a penalty for lodging a false declaration or for failing to submit one.

19.59 Declarations would introduce a degree of self-regulation by requiring guardians, administrators and attorneys to reflect regularly upon their responsibilities. Declarations would be less onerous than reports of activities, as they would not require detailed scrutiny by a regulator.

19.60 However, as declarations rely largely on the honesty of the appointee, they might not reveal many instances of abuse, neglect or exploitation. There is also a danger that they might become a matter of form rather than substance.

Q **Question 100** Should people exercising substitute decision-making powers be required to provide periodic declarations of compliance with their responsibilities?

Question 101 Who should receive and monitor the declarations?

Option D: Introduce a requirement that guardians and administrators make an oath or declaration upon undertaking responsibilities

19.61 This option would require guardians and administrators to declare on oath or affirm at the time of their appointment by VCAT that they will comply with their responsibilities.

19.62 Enduring attorneys and enduring guardians might be required to sign a statement agreeing to comply with their responsibilities at the same time as they accept the role. A brief statement of this kind is already required for financial attorneys[61] *and* enduring guardians,[62] but not for agents appointed under the *Medical Treatment Act 1988* (Vic). This obligation to make a written declaration could also be imposed at the time any enduring power is activated if the registration proposals outlined in Chapter 8 are adopted.

19.63 The purpose of the declaration would be to encourage substitute decision makers to reflect upon the gravity and key responsibilities of the role.

19.64 The major disadvantage of this option is the time and possible expense that it would entail.

Question 102 Do you think that substitute decision makers should declare an oath or sign a statement agreeing to comply with their responsibilities before they undertake their roles?

Option E: Introduce random investigation and auditing of guardians, administrators and attorneys

19.65 This option, which might complement Options C and D, would involve random audits of the conduct of guardians, administrators and attorneys. The Public Advocate could audit the conduct of guardians, while State Trustees might conduct financial audits.

19.66 Random auditing of administrators and attorneys might involve an examination of the accounts operated by that person on behalf of the represented person. Random auditing of private guardians might involve a meeting with the Public Advocate and the represented person to discuss the manner in which the guardian's powers have been exercised.

19.67 The primary advantage of random auditing is that it provides a means of reviewing the activities of private guardians, administrators and attorneys without requiring a large number of reports to be prepared and examined. It is likely to encourage these people to perform their difficult tasks responsibly because they will be aware of the possibility of an audit.

19.68 A significant concern with random auditing is that it could be an unpleasant and upsetting intrusion into the life of those investigated, and perhaps create unnecessary anxiety for private guardians, administrators and attorneys.

Question 103 Should there be random audits of the way substitute decision makers perform their responsibilities?

Question 104 Who should carry out these random audits?

61 *Instruments Act 1958* (Vic) s 125B(5).

62 *Guardianship and Administration Act 1986* (Vic) s 35A(2)(b), sch 4.

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Option F: Give VCAT the power to order administrators or attorneys to repay funds that have been misused

19.69 This option would give VCAT the power to order that an administrator or financial attorney repay funds that have been misused to the estate of a represented person. The Victorian Parliament Law Reform Committee's *Inquiry into Powers of Attorney* recommended that VCAT have this power in relation to financial attorneys.[63]

19.70 At present, legal action to recover funds misused by administrators and financial attorneys must be taken in the courts. While recovery action in VCAT is likely to be much cheaper than court proceedings, it could be argued that tribunal proceedings might not provide sufficient protection to an administrator or financial attorney who could be at risk of having to pay substantial sums of money to the estate of a represented person.

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

Option G: Introduce increased and more specific penalties for all substitute decision makers who misuse or abuse their powers

19.71 Option G would introduce increased and more specific penalties for substitute decision makers who fail to meet their responsibilities or who abuse their powers. These penalties would apply consistently across all different substitute decision-making appointments—whether they are personally appointed agents, attorneys or enduring guardians, or state appointed guardians and administrators.

19.72 Guardianship laws in Queensland have more detailed penalty provisions. They include penalties for guardians and administrators who fail to act with reasonable diligence and within the terms of the order,[64] and penalties for administrators who enter into transactions involving a conflict of interest, fail to keep proper records, and do not keep their property separate from the represented person's.[65]

19.73 The potential advantages of increased and more specific penalties is that they could improve protections for represented people, increase substitute decision makers' compliance with their responsibilities, and provide justice for victims of abuse. Having consistent penalties apply across all different substitute decision-making appointments would also emphasise consistency in the responsibilities and expectations of substitute decision makers, regardless of their manner of appointment.

19.74 It would be necessary to consider carefully the degree of culpability required before a penalty could be imposed upon a substitute decision maker. Some people might have acted inappropriately out of ignorance, or because of a very different understanding of the represented person's interests.

19.75 One possible means of improving enforcement would be to introduce civil penalties enforceable at VCAT, instead of or as well as the current criminal penalties that are enforceable in the Magistrates' Court. Civil penalties differ from criminal penalties in two main ways: they have a lower standard of proof than criminal penalties, and there is no finding of criminal culpability.

19.76 Civil penalties have greater procedural flexibility, making them easier to enforce than criminal sanctions.[66] They also may be appropriate for use in cases where a substitute decision maker has committed a wrong, but the behaviour does not warrant a criminal conviction. Conversely, there may be situations where the conduct of a substitute decision maker is so unacceptable that a finding of criminal culpability is the only appropriate outcome.

19.77 Either the police or the Office of Public Prosecutions may take proceedings for criminal penalties. Regulators usually take civil penalty proceedings. The Public Advocate could be empowered to bring proceedings to enforce civil penalties. While this step would ensure that the role rested with an expert regulator, it might adversely affect public attitudes to the Public Advocate were it to become a law enforcement agency as well as an advocate for people with a disability. There might also be the potential for conflict, as the Public Advocate is the guardian of last resort. We discuss this role for the Public Advocate further in Chapter 20.

Question 106 Is there a need for more specific penalties for substitute decision makers who misuse or abuse their powers?

Question 107 If yes, what types of conduct should warrant a specific penalty?

Question 108 Should penalties for substitute decision makers who misuse or abuse their powers be increased?

Question 109 Should penalties be the same, regardless of whether the substitute decision makers have been personally appointed or appointed by VCAT?

Question 110 Should civil penalties be introduced for substitute decision makers who misuse or abuse their powers?

MERITS REVIEW OF DECISIONS OF GUARDIANS AND ADMINISTRATORS

19.78 The G&A Act does not allow for merits review of individual decisions of guardians and administrators. In other words, it is not possible for a represented person, or any other interested person, to challenge the merits of an individual decision by a guardian or an administrator at VCAT if they do not believe it to be the correct or preferable decision in the circumstances.

19.79 It is possible to mount an indirect challenge to the merits of an individual decision. Guardianship and administration orders may be reassessed on VCAT's own initiative or 'upon the application of any person'.[67] Guardians and administrators may seek advice from VCAT about the exercise of their powers.[68] In addition, VCAT may on its own initiative direct or give an advisory opinion to an administrator concerning any matter.[69] Certain interested people may also apply to VCAT in relation to any matter arising out of the administration, and VCAT has the power to make 'such order in relation to the application as the circumstances of the case may require'.[70]

19.80 The Commission has identified three options for consideration in relation to merits review of individual decisions by guardians and administrators.

63 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 212–14 [Rec 62].

64 *Guardianship and Administration Act 2000* (Qld) ss 35, 36.

65 Ibid ss 37, 49, 50.

66 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia,* Report No 95 (2002) 8182.

67 *Guardianship and Administration Act* (Vic) s 61(3).

68 Ibid ss 30, 55(1)–(4). The person responsible may also seek advice from VCAT: ss 42I, 42W.

69 Ibid s 55(4A).

70 Ibid s 56. People who can seek application are 'any person interested as a creditor, beneficiary, next of kin, guardian, nearest relative, primary carer or the Public Advocate or otherwise in any estate or otherwise'.

Accountability and Review of Substitute Decision Making

Option A: No change—no merits review

19.81 The option would continue the current inability to review individual decisions of guardians and administrators.

19.82 The main advantage of this approach is that it preserves the distinction between VCAT's role in deciding whether a substitute decision maker is necessary, and making appointments, and the role of the Public Advocate, State Trustees and other private appointments in making decisions for people with impaired decision-making capacity. Some people have also expressed concerns about the potential difficulty and cost in hearing applications for review of decisions.

19.83 However, many people who responded to our information paper considered merits review of the decisions of guardians and administrators to be a desirable reform. Merits review would be an important means of dealing with disputes about guardianship and administration, which are currently dealt with by indirect means. It would also be consistent with Australia's obligation under the *Convention on the Rights of Persons with Disabilities* to ensure that support measures 'are subject to regular review by a competent, independent and impartial authority or judicial body'.[71]

Option B: Allow review of decisions of the Public Advocate and State Trustees (preferred)

19.84 This option would adopt the New South Wales approach, which limits review to decisions made by public guardians and public administrators. Review would only be available after the internal complaints mechanisms of the Public Advocate and State Trustees had been exhausted.

19.85 Allowing merits review of decisions by the Public Advocate and State Trustees only would strike a balance between increased accountability for the public bodies, without intruding too far into decisions made by private guardians, enduring guardians, private administrators and attorneys. While the Public Advocate and State Trustees have internal complaints mechanisms and processes in place to prepare for and assist with these proposed merits reviews, they may prove too expensive and burdensome for private substitute decision makers.

19.86 It could be argued that it is unfair that a represented person not have an avenue for merits review merely because their guardian or administrator is not the Public Advocate or State Trustees. Whether private companies that accept appointment as an administrator, such as FTL Judge and Papaleo, should be subjected to the same system of review as State Trustees is also a matter for consideration. One way of dealing with this issue might be to give VCAT a discretionary power to order that the individual decisions of private guardians and administrators can be reviewed.

Option C: Allow review of decisions of both public and private appointments

19.87 This option would allow merits review of individual decisions of all substitute decision makers, whether appointed personally or by VCAT.

19.88 It could be argued that this is the most equitable approach to the issue. The focus would be on the right to review an exercise of substitute decision-making power, regardless of whether that power is held by a public entity, or a private individual.

19.89 Alternatively, it might be argued that the Public Advocate and State Trustees are public bodies and substitute decision makers of last resort, so it is appropriate that there is an avenue for review of their decisions, but this does not necessarily extend into the private sphere. Reassessments would still be available in relation to private guardians and private administrators, and alternative appointments (including public appointments) could still be made

19.90 Any capacity to review decisions of privately appointed enduring guardians and attorneys, particularly at the request of anyone other than the represented person, might be seen as inappropriate interference with the right of a person with capacity to choose their own substitute decision maker.

Question 111 Do you agree with the Commission's proposal (Option B) that new guardianship laws should permit merits review of decisions made by the Public Advocate as a guardian and by State Trustees as an administrator?

FURTHER ISSUES FOR CONSIDERATION

Standing to seek review

19.91 'Standing' is the term used to refer to a person who is permitted to commence legal proceedings. In New South Wales, many people have standing to apply for review of individual decisions of the Public Guardian and the New South Wales Trustee and Guardian. The represented person, their spouse, carers (Public Guardian decisions only), and anyone else whose interests are adversely affected by the decision has standing to apply for review of these decisions.[72]

19.92 In Victoria, a person's ability to make an application under the G&A Act varies depending on the type of application:

- 'Any person' may make an application for a guardianship or administration order[73] or reassessment of an order.[74]
- A 'party' or a 'person entitled to notice' for a hearing may make an application for a rehearing of a matter.[75]
- '[A]ny person who, in the opinion of the Tribunal, has a special interest in the affairs of the patient' may make applications in relation to medical decisions.[76]
- '[A]ny person interested as a creditor, beneficiary, next of kin, guardian, nearest relative, primary carer or the Public Advocate or otherwise' may apply to the tribunal upon any matter arising out of the administrator's administration of the estate.[77]

19.93 The Commission's initial view is that applications for merits review of decisions should be limited to the represented person and people with a special interest in the affairs of the represented person.

19.94 VCAT would then have the discretion to decide whether the applicant had a 'special interest' in the affairs of the represented person.

Question 112 Who should be entitled to apply for merits review of a guardian's or administrator's decision?

71 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(4).

72 *Guardianship Act 1987* (NSW) s 80A(2); *NSW Trustee and Guardian Act 2009* (NSW) s 62(3).

73 *Guardianship and Administration Act 1986* (Vic) ss 19(1), 32(1), 43(1), 59(1).

74 Ibid s 61(3)(b).

75 Ibid s 60A(1).

76 Ibid ss 42B(1), 42N(2), 42V(2)(b).

77 Ibid s 56(1).

Chapter 19

Accountability and Review of Substitute Decision Making

Part 7 Responsibility and Accountability under the Law

What is a reviewable decision?

19.95 A number of submissions expressed concern about what might be considered a 'reviewable decision' if merits review is introduced.

19.96 Section 4 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) states that a person makes a decision if the person:

> *(a) makes, suspends, revokes or refuses to make a decision, order, determination or assessment (including a decision not to make a decision, order, determination or assessment);*
>
> *(b) gives, suspends, revokes or refuses to give a certificate, direction, approval, consent or permission;*
>
> *(c) issues, suspends, revokes or refuses to issue a licence, authority or other instrument;*
>
> *(d) imposes a condition or restriction;*
>
> *(e) amends or varies any of the things referred to in paragraph (a), (b), (c) or (d);*
>
> *(f) makes a declaration, demand, direction or requirement;*
>
> *(g) retains or refuses to deliver up an article;*
>
> *(h) does or refuses to do any other act or thing.*[78]

19.97 A similar definition is used in the New South Wales *Administrative Decisions Tribunal Act 1997* (NSW).[79]

19.98 The leading judicial authority on the meaning of a 'decision' for the purposes of administrative review is the judgment of Chief Justice Mason in *Australian Broadcasting Tribunal v Bond*.[80] In this case, Chief Justice Mason described a reviewable decision as one that would 'generally, but not always entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration'.[81]

19.99 The position in New South Wales is that decisions made by the New South Wales Public Guardian 'in connection with the exercise of the Public Guardian's functions under the Act' and decisions made by the New South Wales Trustee and Guardian 'in connection with the exercise of the NSW Trustee's functions' as manager of a person's estate are reviewable.[82]

19.100 Guardianship laws in Victoria could adopt a similar approach, allowing for review of decisions made by guardians and administrators in connection with the exercise of their powers under the G&A Act.

Question 113 What should constitute a 'reviewable decision'?

Trivial, vexatious or repeated applications

19.101 Our consultations indicated concern about a possible flood of trivial or vexatious applications for review of guardians' and administrators' decisions.

19.102 In New South Wales, review of decisions of the Public Guardian and the New South Wales Trustee and Guardian is only available after an internal review has been sought with these bodies, and has been finalised.[83] A similar provision seems necessary in Victoria to avoid unnecessary applications to VCAT.

19.103 VCAT also currently has the power to summarily dismiss or strike out proceedings that are frivolous, vexatious, misconceived or lacking in substance, or are otherwise an abuse of process.[84]

19.104 This may provide sufficient discretionary power for VCAT to deal with applications that are trivial, vexatious or lacking in merit.

Question 114 Are there any additional steps that need to be taken to limit trivial, vexatious or repeated applications for merits review of a guardian's or administrator's decision?

Review of financial decisions

19.105 The introduction of merits review of administrators' decisions would give the review body power to:

- affirm the decision under review
- vary the decision under review
- set aside the decision under review and make another decision in substitution for it
- set aside the decision under review and remit the matter for reconsideration by the decision maker in accordance with any directions or recommendations.[85]

19.106 State Trustees has raised concerns about review of administrators' decisions, arguing that it could lead to added expense, delay and inconvenience to the administrator, damage the rights of innocent third parties who have engaged with administrators in good faith, and adversely affect an administrator's ability to deal with third parties on behalf of the represented person.[86]

19.107 The New South Wales experience suggests it is unlikely that there will be an unmanageable number of applications. There were only nine review applications lodged in relation to financial management decisions in 2008–09,[87] and only 10 review applications of guardianship and financial management decisions in 2009–10.[88]

19.108 There is a risk that the certainty and finality of financial transactions could be threatened by review of an administrator's decisions. Both represented people and third parties could be affected. The potential for significant impacts on a represented person's rights and wellbeing therefore needs to be balanced against the importance of having mechanisms of accountability and review in the exercise of substitute decision-making powers.

19.109 The New South Wales Trustee and Guardian has argued that on balance, it is better to have external merits review of individual decisions because of the enhanced accountability and oversight it provides.[89] In its submission, the New South Wales Guardianship Tribunal has also indicated its support for independent reviews of guardians' and administrators' decisions.[90]

Question 115 Should merits review of decisions by administrators be treated differently to merits review of decisions by guardians?

78 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 4(1).

79 *Administrative Decisions Tribunal Act 1997* (NSW) s 6.

80 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

81 Ibid 336.

82 *Guardianship Act 1987* (NSW) s 80A(1); *Guardianship Regulations 2010* (NSW) s 17; *NSW Trustee and Guardian Act 2009* (NSW) s 62(1), *NSW Trustee and Guardian Regulations 2008* (NSW) s 43.

83 *Administrative Decisions Tribunal Act 1997* (NSW) s 55(1)(b).

84 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 75.

85 See functions of VCAT in exercising its review jurisdiction: ibid s 51(2).

86 Submission IP 59 (State Trustees Limited) 8.

87 Administrative Decisions Tribunal, *Annual Report 2008/2009*, above n 56.

88 Administrative Decisions Tribunal, *Annual Report 2009/2010*, above n 57.

89 Telephone conversation with Imelda Dodds, CEO of NSW Trustee and Guardian (20 August 2010).

90 Submission IP 32 (NSW Guardianship Tribunal) 5.

Chapter 19

Accountability and Review of Substitute Decision Making

Forum for review

19.110 The New South Wales Administrative Decisions Tribunal (ADT) conducts merits review of individual decisions by the Public Guardian and the New South Wales Public Trustee and Guardian. The ADT is a separate body to the New South Wales Guardianship Tribunal, which is responsible for appointing guardians and administrators. It is also possible to appeal to the ADT about decisions made by the New South Wales Guardianship Tribunal.

19.111 Victoria has one 'super-tribunal'—VCAT. The Guardianship List at VCAT deals with the appointment of guardians and administrators, while the General List usually deals with merits review of public officials' decisions.

19.112 VCAT is therefore the logical forum for merits review of decisions made by guardians and administrators. Within VCAT, review applications could possibly be heard before:

- the Guardianship List of VCAT, before a different or more senior tribunal member
- the General List of VCAT
- a specialist guardianship review list of VCAT.

19.113 The main advantage of the Guardianship List is that the members have expertise in matters concerning the G&A Act. However, it is undesirable that the people who appoint guardians and administrators should also be responsible for reviewing their decisions, particularly because of perceptions about the need for separate decision makers.

19.114 A specialist guardianship and administration review list would draw on the New South Wales ADT approach where the Guardianship and Protected Estates List is a sub-list within the General Division of the ADT. Such a list would have the advantages of both expertise and independence, provided there is sufficient demand to justify the creation of such a list.

Q **Question 116** Who should conduct merits review of decisions of public guardians and administrators?

TRAINING REQUIREMENTS FOR GUARDIANS AND ADMINISTRATORS

19.115 The Commission has identified a number of options concerning the training of guardians and administrators.

Option A: No change—information sessions offered by VCAT and the Public Advocate remain optional

19.116 VCAT and the Public Advocate provides optional information sessions for private guardians and administrators. Private guardians and administrators also receive information booklets upon appointment.[91] Option A would leave these information sessions as optional.

Option B: VCAT can make appointment conditional upon training requirements

19.117 Under this option, VCAT would be given a discretionary power to make an appointment as a private guardian or administrator conditional upon completing nominated training requirements. Online training, together with a simple online test about core responsibilities, would be introduced to reduce the cost and increase the accessibility of the training.

19.118 The goal of the training would be to provide all private appointees with information about their role and encourage them to use external support services such as the Public Advocate's Private Guardian Support Program and Telephone Advice Service.

19.119 The public bodies and professional administrators would continue to provide in-house training for their own staff.

19.120 Some people, particularly family members and carers of a person with a disability who have been acting as 'informal' guardians or administrators for many years, might view compulsory training as unnecessary and offensive. Others might appreciate the opportunity to receive some professional training about how to perform a very difficult role. A discretionary power within VCAT to order training might overcome concerns about whether some people have the expertise to be a guardian or administrator.

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

91 These are: *Administration Guide: A guide for people appointed as administrators under the Guardianship and Administration Act 1986* above n 2; Office of the Public Advocate (Victoria), *Good Guardianship: A guide for people appointed as guardians under the Guardianship and Administration Act 1986* (2008) <http://www.publicadvocate.vic.gov.au/file/file/Guardianship/Good_Guardianship_08.pdf>.